

**Comments of the Hong Kong Bar Association
on Revised Practice Directions :**
3.1 - Bankruptcy and Winding-up Proceedings and
3.2 – Procedure for Filing and Hearing Bankruptcy Petitions by Debtors who are
Legally Represented

1. Save where otherwise indicated, references to paragraph numbers are to those appearing in the Revised Practice Directions.

Part I : Bankruptcy Proceedings

2. §2.6: The steps set out in sub-paragraphs (a) to (i), as they now stand, apply to order for substituted service of a petition as well as a statutory demand. It may be appropriate to amend the first sentence of §2.6 as follows:

“In most cases, evidence of the following steps will suffice to justify an order for substituted service of a statutory demand and a petition.”

Part II : Winding-Up Proceedings and Company Matters

3. §1.1(i)-(j): the addition of these 2 sub-paragraphs may be interpreted by the practitioners as requiring the liquidator to make an application to the court before he can exercise the power under s.199(2)(g) of the Companies Ordinance, despite the opening words of s.199(2) which provides that “Subject to s193(3), the liquidator in a winding up by the court shall have power –”. Indeed, if any creditor or contributory wishes to challenge the exercise by the liquidator of any power under s.199(2) (which can be exercised by the liquidator without sanction of the court), the application should be made under s.199(3) instead of s.199(2). It may be appropriate to delete §1.1(i)-(j) to avoid possible confusion.

4. Further, it is difficult to understand why the appointment of Counsel to take any proceedings would fall within the remit of s.199(2)(g) which provides that the liquidator shall have power “to appoint an agent to do any business which the liquidator is unable to do himself”. There are 2 reasons for this.

5. First, due to the nature of engagement, Counsel is not and cannot be regarded as agent of the liquidator (or, for that matter, the company of which the liquidator is appointed). The nature of Counsel’s engagement was described by Seagrott J in *Cheng Ma Choi v. Tai Fong Textile Finishing Work Ltd*, HCPI 563, 1995, unreported, 1 March 1999, at p.10 in this way:-

“It must be remembered that counsel’s fees are incurred by the solicitors who instruct them and there lies the primary and only responsibility. They must assure themselves that it is necessary and/or reasonable to instruct counsel at any particular stage and that the fees suggested are reasonable ones. Counsel cannot sue for his or her fees but solicitors are honour bound, as a matter of professional duty, to

meet counsel's fees where there is no dispute between them as to the quality of professional service or reasonableness of amount. If the fee is agreed it is, 'ipso facto', reasonable as between counsel and solicitor. In many circumstances fees can be negotiated 'post facto' to achieve or maintain goodwill. It is not for me to question the reasonableness of counsel's fees, and do not do so save in one respect which I will deal with shortly. I have assumed the Plaintiff's solicitors have established this before the commitment is made." (emphasis added)

6. Secondly, Counsel will not and can never be engaged by the liquidator to do any business which the liquidator is unable to do. The Code of Conduct of the Bar does not allow any Counsel to take up an engagement to assist the liquidator to do any business.

7. §1.2: The reference to "counsel" is inappropriate for the same reasons set out in paragraphs 3 to 6 above.

8. §5.4(c): the reference to "the dismissal is not opposed by any creditor or other interested party at the hearing itself" can be interpreted as giving any creditor or any party who claims to be interested in the company the right to oppose the dismissal of the petition. It may be appropriate to narrow the class of person who may oppose the dismissal of the petition in this way:

"the dismissal is not opposed by any creditor or other interested party who has filed a notice of intention to appear in the petition or otherwise has proved to the satisfaction of the court that it is a creditor of or a person interested in the company at the hearing itself"

9. §5.6.2: In fact, the directions for filing particulars of claim, defence and reply are unusual rather than usual for a petition under s.168A. The reference to "which would likely be given except in very simple cases" does not accord with the present practice of the Companies Court.

Hong Kong Bar Association
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