HONG KONG BAR ASSOCIATION

Comments on Review of the Abscondee Regime

under the Bankruptcy Ordinance

1. The Hong Kong Bar Association ("the Bar") has been asked to comment on the two alternative proposals put forward by the Financial Services and The Treasury Bureau (**"FSTB"**) for the abscondee regime under s.30A(10) of the Bankruptcy Ordinance (Cap. 6).Reference is made to the note sent under cover of letter dated 28 April 2014. The abbreviations and nomenclature utilised therein are adopted for the purposes of the discussion below.

2. The Bar has since been informed by FSTB that the members of the Legislative Council Panel on Financial Affairs considered the interview approach to be more reasonable and, consequently, subject to stakeholders' views, the FSTB is inclined to proceed on the basis of the interview approach.

3. The FTSB's proposals aim to address the issues arising out of the judgment in *Official Receiver & Trustee in Bankruptcy of Chan Wing Hing* [2006] 9 HKCFAR 545, which held that the existing abscondee regime under Section 30A(10)(b)(i), is unconstitutional. There is also an ongoing case (*Re Chang Hyun Chi*, HCB 5227/2006, unreported judgment dated 2 May 2013) wherein the constitutionality of Section 30A(10)(a) is being challenged and the Court (Chung J), having considered the principles propounded in *Chan Wing Hing*, held that s.30A(10)(a) is not unconstitutional primarily because the bases upon which the CFA held that the restriction on freedom to travel was more than necessary for the protection of the rights of the creditors do *not* apply to the automatic suspension under s.30A(10)(a). The Bar understands that the appeal will be heard by the Court of Appeal on 11 December 2014.

4. Upon consideration of the two proposals, the Bar has the following observations.

5. It must be borne in mind that the Court of Final Appeal recognised that the restriction as set out in the current Section 30A(10) was and is *"rationally connected"* to the protection of rights of creditors (§§41-42, *ChanWing Hing*) and only declared Section 30A(10)(b)(i) unconstitutional. The Court of

Appeal made it clear that its holding has no application to Section 30A(10)(a), which remains to be considered and determined by the Court (§53, *Chan Wing Hing*).

6. The difficulty which the CFA had with the existing provision was that such restriction was disproportionate and beyond what was necessary for the protection of the rights of creditors (§§44-50, *Chan Wing Hing*).

7. The aim of any legislative proposal put forward should thus be to achieve the proportionate response, more specifically, to remedy the disproportionate effect of s.30A(10)(b), rather than to abolish the abscondee regime altogether.

8. In our view, it is crucial to retain the abscondee regime. As the FSTB points out in §3 of the note, the abscondee regime was introduced upon the recommendation of the LRC to ensure that the bankrupts cannot avoid their obligations by staying away from Hong Kong until the end of the bankruptcy period. The importance of the regime was described by the LRC in §17.49 of its Report on Bankruptcy dated May 1995 in this way:

> "The exception to an extension of bankruptcy to eight years before discharge relates to absconding debtors. We consider that in cases where the bankrupt has, whether before or after the date of bankruptcy, left Hong Kong and has not returned to Hong Kong or where, while the bankrupt was absent from Hong Kong he was requested by the trustee to return to Hong Kong by a particular date or within a particular period but the bankrupt failed to return by that date or within that period, the running of time of the bankruptcy should not begin, or should be suspended where appropriate, until the date on which the bankrupt returns to Hong Kong. This recommendation reflects the provisions under the new Australian provisions. The adoption of these provisions would assist in ensuring that bankrupts could not avoid their obligations under the Bankruptcy Ordinance by staying away from Hong Kong until the end of the bankruptcy period. It is not unusual for bankrupts to leave jurisdiction to avoid the present provisions and we would not like our recommendations to make absconding an alternative proposition for bankrupts."

9. The Bar does not think either approach proposed by the FSTB would achieve the important purposes emphasised by the LRC.

10. Bearing the above in mind, the Bar does not consider that Approach B (interview approach) would be a helpful direction to take:-

(1) It effectively abolishes the abscondee regime altogether, which appears to be an excessive response to the *Chan Wing Hing* case.

(2) Approach B fails to address the mischief which the whole abscondee regime seeks to address, namely to ensure that an absconding bankrupt cannot obtain the benefit of an automatic discharge unless and until he returns to Hong Kong and cooperates with the TIB.

(3) Instead, Approach B remove the automatic suspension under s.30A(10), and puts the onus on the TIB to apply for an order to suspend the running of the relevant period. This in the Bar's view would impose an unnecessary financial burden on the TIB who, more often than not, would not have any or any sufficient funds in the estate for the purpose of carrying out his duties in administering the estate and investigating the bankrupt's affairs including to ascertain and recover the assets of the bankrupt.

(4) Approach B would also overlap with the grounds of objection to discharge under Section 30A(4)(b), (c) and (e), where prejudice to administration of the bankrupt's estate, failure to cooperate in the administration of his estate and the bankrupt's departure from Hong Kong and failure to return following the TIB's request are already grounds which may be relied on by the TIB (or the creditors) for suspending the running of the relevant period for automatic discharge.

(5) As the FSTB recognises in its discussion of the Proposed Reform Approaches, the UK and commonwealth jurisdictions all have some form of abscondee regime which provides that the abscondee will not be discharged from bankruptcy until he has returned to the relevant jurisdiction and/or that a bankrupt's failure to attend an interview or cooperate with the TIB will without more result in his bankruptcy being extended. Indeed, the abscondee regimes in Australia, Singapore and the UK may have the effect of suspending the relevant period from running indefinitely if and for so long as the abscondee does not return

to the relevant jurisdiction. In none of these jurisdiction does the legislation imposes a burden on the TIB to apply to the Court for an order to suspend the running of the relevant period for automatic discharge.

11. In the circumstances, we do not consider Approach B to be the desirable course to take.

12. Compared to Approach B, Approach A is preferable in that:-

(1) It aims to address the criticisms set out in the *Chan Wing Hing* case in a more tempered manner.

(2) It maintains the abscondee regime such that creditors may be protected, a recognised *"rationally connected"* aim in the restriction on the bankrupt's rights.

(3) It endeavours to address the three pointscited by the CFA which render the existing regime too harsh (§§47-49 of *Chan Wing Hing*), by requiring the TIB to apply for suspension with reasons justifying the same (with the bankrupt's prejudicial departure from Hong Kong being an acceptable reason).

13. Nevertheless, the Bar considers that Approach A, as it stands, is not wholly satisfactory in that:-

(1) It still places the burden on the TIB to apply to the Court, which necessarily require the TIB to expend what would likely be limited or non-existent resources of the estate.

(2) It would likely encourage the Bankrupt to try and avoid his obligations to cooperate with the TIB when he knows that the TIB would have difficulties in funding and/or providing evidence for any such application.

(3) As the bankrupt has statutory duties and obligations to cooperate with the TIB under the Bankruptcy Ordinance, all of which require the

bankrupt to "stay within the radar" of the TIB, the Bar considers that it is only right that an abscondee, who has stayed out of the radar of the TIB, be required to apply the Court to lift the automatic suspension under the abscondee regime. This could ensure that the TIB would not be required to expend the funds in the estate before the automatic suspension applies and, at the same time, would provide an incentive to the abscondee to cooperate with the TIB, as the Court would inevitably take into account the view of the TIB in deciding whether or not to lift the automatic suspension under the abscondee regime.

14. The Bar would thus suggest that further alternatives and factors be considered including *inter alia* the following.

15. First, in formulating any proposal, the aim is to address the disproportionality or perceived harshness identified by the CFA, whilst at the same time maintaining the effectiveness of the abscondee regime under Section 30A(10).

16. In order to do so, the issues identified with the sanction of automatic suspension needs to be tempered so as to make it more flexible, with there being room to remedy the harshness or unfairness (if any), taking into account the specific circumstances of each case.

17. Secondly, and on the other hand, from the TIB's perspective, and from the perspective of wishing to maintain the effectiveness of the abscondee regime, any proposal ought not place any unnecessary burden on the TIB (and hence the estate), which would be inconsistent with the statutory purpose of the bankruptcy regime and unduly jeopardise the protection of creditors.

18. Ultimately, the aim is to ensure that there is a mechanism whereby:-

    (1) Reasons for failure to notify can be taken into account (§47, *Chan Wing Hing*);

    (2) The application of the sanction can be tailored to the circumstances of individual cases (§48, *Chan Wing Hing*); and

(3) The Court is vested with discretion to disapply the sanction or mitigate its consequences (§49, *Chan Wing Hing*).

19. Hence, in addressing the above, we would suggest that:-

(1) A provision be formulated such that the Court is given ultimate discretion to consider the reasons for failure to notify the TIB and the particular circumstances of the bankrupt's case, and temper or mitigate the sanction (with retrospective effect, as necessary) accordingly.

(2) It would be preferable that the burden is placed on the bankrupt to demonstrate good reasons why the sanction should be so tempered or mitigated in his favour, rather than requiring the TIB to justify any suspension.

(3) The above could be achieved, either by inserting a new provision within Section 30A(10) which gives the Court the overriding power to adjust or mitigate the sanction retrospectively, or simply by inserting the phrase "Unless the Court otherwise orders" at the beginning of Section 30A(10), or by inserting a new proviso after existing Section 30A(10), to make clear that the Court has the power to override the automatic suspension under Section 30A(10).

20. Yet a further alternative is to remove the existing mechanism of automatic suspension, but provide an accessible and cost-effective means to enable the TIB to initiate suspension without an overly burdensome process – for example, by way of filing a simple notice triggering suspension, which can then be removed upon application by the bankrupt or the TIB himself. This suggestion follows the regime under the Bankruptcy Amendment Act 1991, s. 149D(1), as discussed in §17.32 of the Report on Bankruptcy. The Bar notes that this was also the recommendation of the LRC in its Report on Bankruptcy.

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Hong Kong Bar Association