

**HONG KONG BAR ASSOCIATION’S COMMENTS
ON FSTB’S RESPONSE ON THE
BANKRUPTCY (AMENDMENT) BILL 2015
(RE REPLACEMENT OF THE ABSCONDEE REGIME)**

1. The Bar has submitted its comments on the Bankruptcy (Amendment) Bill 2005 (“the Bill”) in its paper dated 1 September 2015.
2. Recently, the Financial Services and the Treasury Bureau (“FSTB”) provided its response (“FSTB’s response”) to the Bar for comments.
3. The Bar has considered FSTB’s response and now makes the following submissions by following the sequence of the points set out in FSTB’s response.
4. Re Point 1, FSTB acknowledges that a bankrupt’s “physical presence” (as opposed to attendance via video conferencing, etc) at the initial interview is required. However, this has not been clearly addressed in the provisions of the Bill. FSTB’s response fails to explain why a proper definition of the phrase “initial interview” should not be set out in the Bill. The Bar repeats paragraph 7(1) of its paper.
5. Re Point 2, the Bar’s concern is whether a bankrupt’s failure to attend any other interview session (adjourned from the initial interview) will be caught under s.30AB(1)(b). FSTB agrees that “the bankrupt could dispute or be confused whether a subsequent meeting is a continual session of the initial interview or actually a separate meeting”; however, it goes on to say that the new proposal is “a balancing act” without addressing how such a

dispute or confusion (already recognised by FSTB in its response) could be alleviated. The Bar repeats paragraph 7(2) of its paper.

6. Re Point 3, the issue raised by the Bar is that given the serious consequences which may flow from a bankrupt's failure to attend the initial interview, there should be clear provisions setting out how and when the notice of the interview should be served on the bankrupt. FSTB's response is that there is flexibility under the new proposal when it comes to how the initial interview should be fixed. Nonetheless, in the absence of any requirements in the Bill as to how and in what manner the notice should be served, it would be difficult for the Court to assess whether the trustee in bankruptcy ("TIB") has taken proper steps to bring the details of the initial interview to the attention of the bankrupt (given that an abscondee will always say "I got nothing!"). FSTB's response fails to address this issue. The Bar repeats paragraph 8 of its paper.
7. Re Point 4, the Bar notes that under the new regime, the Court would apparently only make non-commencement orders and there is no clear provision empowering the Court to make any suspension orders¹. In a situation where there is an inordinate delay in the TIB's application for a non-commencement order but the Court eventually grants the order sought, there will be substantial prejudice caused to the bankrupt (who did not cause such delay). FSTB's response is that in such a case, the Court may exercise its discretion in refusing to grant the order. However, it is sometimes not easy for the Court to make such a decision, particularly if the delay is not wholly attributable to

¹ See the Bar's comments on s.30AC(2(b)) set out in footnote 3 at p.7 of its paper.

TIB's fault. In the circumstances, if the Court is not merely left with an "all or nothing" choice between granting and not granting a non-commencement order and if it is given the power to specify when the "relevant period" will start to run, this will help minimise the unfairness which may be caused to a bankrupt if the situation mentioned above occurs. The Bar repeats paragraph 9 of its paper.

8. Re Point 5, the Bar queries if the new s.30A(10A) of the Bill is an appropriate transitional arrangement, in view of the likelihood that the present s.30A(10)(a) is held to be unconstitutional by the Court of Final Appeal. The Bar repeats paragraph 10 of its paper.
9. In conclusion, the Bar asks FSTB to reconsider the points raised in its paper dated 1 September 2015 before the Legislative Council Bills Committee resumes its deliberations on the Bill.

Hong Kong Bar Association

Dated: 7 October 2015