



INSOL International

Small Practices and Consumer Debt Issues – Hong Kong

June 2018

Small Practice Issues Technical Series

Small Practices and Consumer Debt Issues – Hong Kong

Contents	i
Acknowledgement	ii
1. Consumer insolvency regime	1
1.1 What are the consumer bankruptcy / restructuring processes available in your country?	1
1.2 Which is the competent court or other authority to apply for consumer insolvency proceedings?	2
1.3 Who is the 'boss' in consumer insolvency proceedings	2
1.4 What legal and actual requirements are there to enter into consumer insolvency proceedings?	3
2. Means testing for insolvent individuals	3
2.1 What is means testing and how is it applied in bankruptcy proceedings?	3
2.2 Exemptions and allowances and the notion of fairness?	3
3. Priority / secured and preferential claims	4
3.1 How are the various claims treated in your country?	4
4. Consumer credit counselling	4
4.1 Is “credit counselling” available in your country and is it provided for in legislation?	4
4.2 How do consumers in debt obtain assistance and relief?	4
4.3 What are the best practices in the field of credit counselling?	4
4.4 What changes and reforms are needed?	4
4.5 Are there viable alternatives to credit counselling and if so, are they compatible with existing programmes or can they be substituted?	5

INSOL International
6-7 Queen Street, London, EC4N 1SP
Tel: +44 (0) 20 7248 3333 Fax: +44 (0) 20 7248 3384

Copyright © No part of this document may be reproduced or transmitted in any form or by any means without the prior permission of INSOL International. The publishers and authors accept no responsibility for any loss occasioned to any person acting or refraining from acting as a result of any view expressed herein.

Copyright © INSOL INTERNATIONAL 2018. All Rights Reserved. Registered in England and Wales, No. 0307353. INSOL, INSOL INTERNATIONAL, INSOL Globe are trademarks of INSOL INTERNATIONAL.

Acknowledgement

INSOL International is pleased to present a study on Hong Kong under its Small Practice Technical Paper Series focusing on “Small Practices and Consumer Debt Issues”. The paper was written by Mat Ng, Board Director INSOL International, FCPA, FCPA (Aust.), SD (Insolvency), CFE, Managing Director; Leonard Chan, CPA, CPA U.S., SQ (Insolvency), Director; and Fiona Fok, CPA, CPA (Aust.), SQ (Insolvency), Senior Manager all of JLA Limited, Hong Kong, PRC

INSOL International sincerely thanks Mat Ng, Leonard Chan and Fiona Fok for providing INSOL members with this very informative paper on Hong Kong.

June 2018

Small Practices and Consumer Debt Issues – Hong Kong

By

Mat Ng*, Board Director INSOL International, FCPA, FCPA (Aust.), SD (Insolvency), CFE, Managing Director; Leonard Chan, CPA, CPA U.S., SQ (Insolvency), Director; and Fiona Fok, CPA, CPA (Aust.), SQ (Insolvency), Senior Manager of JLA Limited, Hong Kong

1. Consumer insolvency regime

1.1 What are the consumer bankruptcy / restructuring processes available in your country?

In Hong Kong, the Bankruptcy Ordinance (Cap 6) provides the legal framework that governs both the formal bankruptcy process and restructuring process for consumer debts. The aim of the bankruptcy law is to collect and realise all assets of the bankrupt and distribute them amongst creditors in a fair and equitable manner.

For debtors in financial difficulties, the bankruptcy regime provides relief by allowing for the discharge of debt obligations and giving a fresh start. However, the law also provides for the punishment of debtors who commit bankruptcy offences. In terms of the duration of a bankruptcy, if no objections are raised by the bankruptcy trustee and / or the bankrupt's creditors, a first-time bankrupt will be discharged after 4 years while a repeat bankrupt will be discharged after 5 years. In cases where there are objections and the court is satisfied that such objections are valid, the bankruptcy period may be extended up to 8 years.

i) Bankruptcy

Under the Bankruptcy Ordinance, a petition for a Bankruptcy Order can be made by the debtor himself / herself (self-petition) or by a creditor of the debtor.

Procedure for self-petition

The debtor must complete a 'Debtor's Bankruptcy Petition' and a 'Statement of Affairs' (SOA); pay a deposit of HK\$8,000 to the Official Receiver; and pay a court fee of HK\$1,045 for the filing of the bankruptcy petition with the court. Once filed, the debtor must submit copies of his / her petition and the SOA to the Official Receiver.

Procedure for creditor's petition

The creditor must complete a 'Creditor's Bankruptcy Petition' after serving a 'Statutory Demand' on the debtor or upon failure of the execution of a judgment debt against the debtor. In some cases, the creditor may be required to prove that it served the Statutory Demand on the debtor and this is usually done by preparing an affidavit of service. The creditor must pay a deposit of HK\$11,250 to the Official Receiver and as with a self-petition, the creditor must also pay a court fee of HK\$1,045 for filing the bankruptcy petition with the court. Once filed, the creditor must serve a copy of the petition on the debtor and the Official Receiver.

When a Bankruptcy Order is granted by the court, the Official Receiver becomes the Provisional Trustee by virtue of the Bankruptcy Ordinance. In a self-petitioned case, where assets are unlikely to exceed HK\$200,000 (referred to as a summary case), the bankruptcy law provides that the Official Receiver may appoint another person (usually an experienced insolvency practitioner) to act in his / her place as the Provisional Trustee. Currently, the Official Receiver outsources these summary bankruptcy cases biennially under a tender scheme.

In bankruptcy cases where the debtor's assets are likely to exceed HK\$200,000, the Provisional Trustee / Official Receiver will convene a creditors' meeting within 12 weeks from the date of the Bankruptcy Order to consider appointing a Bankruptcy Trustee and forming a Creditors' Committee.

* The views expressed in this paper are the views of the authors and not of INSOL International, London.

ii) Individual Voluntary Arrangement (IVA)

IVAs are an alternative route offered by the Bankruptcy Ordinance to a debtor in financial difficulties who does not wish to be made bankrupt. An IVA can also be adopted by an undischarged bankrupt who wishes to restructure and repay his / her debts, and annul his / her Bankruptcy Order.

Procedure for IVA

The first step a debtor needs to take if he / she wishes to enter into an IVA with his / her creditors is to appoint a Nominee. A Nominee is usually an accountant or a solicitor who has the required qualifications and experience in these matters.

According to the Bankruptcy Ordinance, the debtor is also required to prepare and submit an IVA proposal and a SOA (if applicable) to the Nominee. Whilst the debtor completes the IVA proposal and the appointment of a Nominee, an application to the court may be made for an Interim Order that no bankruptcy petition or other legal proceedings may be initiated or continued against him / her. The period of the Interim Order is 14 days but may be extended by the court.

No less than 3 days before the expiration of the Interim Order, the Nominee must submit a report to the court stating whether in his / her opinion a meeting of creditors should be held to consider the proposal, and if so, the date, time and place of the meeting. If the court is satisfied that a meeting of creditors should be held, the court will extend the Interim Order for a further period so that the proposal can be considered by the creditors.

It is strongly recommended that the debtor attends the creditors' meeting as any modifications to the IVA proposal require the debtor's agreement. An IVA proposal is approved if more than 75% by value of the creditors present at the meeting, either in person or by proxy, vote in favour, and not more than 50% by value of creditors, who are non-associates of the debtor, object to the proposal. The chairman of the creditors' meeting is then required to submit a report on the results of the meeting to the court within 7 days of the meeting. Once approved, the IVA proposal is effective on the same day as the meeting of creditors and is binding on all creditors. The Nominee will take control of all assets included in the IVA proposal. A register of IVAs is maintained by the Official Receiver for public inspection.

The debtor, any creditor, the Nominee, the undischarged bankrupt, the Trustee or the Official Receiver may submit an application to the court to challenge the decision made at the creditors' meeting within 28 days after the chairman has submitted his / her report to the court.

The costs for the IVA are mainly the remuneration and expenses of the Nominee which will be subject to the terms of engagement with the proposed Nominee for the IVA proposal. The debtor also has to pay the required court fees for the application for the Interim Order.

It is an offence if the debtor commits any fraud or misrepresentation for the purposes of obtaining the approval of his / her creditors for an IVA proposal.

1.2 Which is the competent court or other authority to apply for consumer insolvency proceedings?

The Court of First Instance of the High Court of Hong Kong is the court which grants the relevant orders and supervises bankruptcy proceedings and IVAs in Hong Kong.

1.3 Who is the 'boss' in consumer insolvency proceedings (judge or administrator)

As mentioned in question 1.1 above, once a Bankruptcy Order is granted, the Official Receiver becomes the Provisional Trustee although an experienced and qualified person other than the Official Receiver can also be appointed as the Provisional Trustee or the Trustee in bankruptcies. The Nominee in the IVA takes control of all assets that are included in the IVA for administration.

Accordingly, the Provisional Trustee or the Trustee is responsible for the administration of a bankruptcy and the Nominee is responsible for the administration of an IVA in Hong Kong.

1.4 What legal and actual requirements are there to enter into consumer insolvency proceedings?

There is no minimum outstanding debt requirement for filing a self-petitioned bankruptcy in Hong Kong. Any debtor who considers that he / she is not able to repay debts when they fall due can file a petition to the court for a Bankruptcy Order. For a creditor-petitioned bankruptcy, the amount of debt outstanding should not be less than HK\$10,000.

The debtor must also be any one of the following:

- a) domiciled in Hong Kong;
- b) personally present in Hong Kong on the day on which the petition is presented; or
- c) at any time in the period of 3 years ending with that day:
 - i) ordinarily resident, or has had a place of residence in Hong Kong; or
 - ii) carried on business in Hong Kong.

2. Means testing for insolvent individuals

2.1 What is means testing and how is it applied in bankruptcy proceedings?

A debtor is required to prepare and swear a SOA which contains, to the best of the debtor's knowledge, the most up-to-date details of his / her assets, liabilities, income and expenditure. The SOA is required to be filed with the court together with the bankruptcy petition in the case of a self-petitioned bankruptcy or filed with the Provisional Trustee or Trustee in the case of a creditor-petitioned bankruptcy. A 'Statement of Means' is contained in the SOA, which lists all items of the debtor's regular monthly income and expenditure and shows the debtor's ability to make any contribution to the bankruptcy estate.

2.2 Exemptions and allowances and the notion of fairness?

Once a debtor is adjudged as bankrupt, he / she loses control of his / her assets and property, i.e. the bankrupt's assets or property vest in the Provisional Trustee or Trustee. The Trustee has the power to continue to administer the assets even after the bankrupt has been discharged from bankruptcy.

However, there are some assets that are exempt from a bankrupt's estate under the Bankruptcy Ordinance such as:

- tools, books, vehicles and other items of equipment necessary to the bankrupt for use personally in his / her employment, business or vocation;
- clothing, bedding, furniture, household equipment and provisions that are necessary for satisfying the basic domestic needs of the bankrupt and his / her family;
- property held by the bankrupt on trust for any other person; or
- retirement scheme contributions as required by law.

Income

A bankrupt's income does not form part of his / her estate but the Trustee will assess the ability of the bankrupt to make any voluntary contribution to the estate. The Trustee may request the bankrupt to make monthly income contributions and, if appropriate, may apply to the court for an 'Income Payments Order' to compel the bankrupt to make monthly contributions. However, the court will not issue the Order if it is of the view that such contributions will reduce the necessary reasonable domestic needs of the bankrupt.

After-acquired property

Any property of the bankrupt acquired after the commencement of the bankruptcy will not automatically be vested in the Trustee. The Trustee is required to serve a written notice to the bankrupt within 42 days from the day on which he / she first received knowledge of the 'after-acquired' property.

Continuing occupation of family home

If a bankrupt resides in a family home that forms part of the estate, the bankrupt shall be entitled to continue to reside for a 6-month period after the Bankruptcy Order. The bankrupt may also make an application to the court before the expiry of the aforementioned 6-month period to extend the period of stay but such extension cannot exceed a further 6 months. In other words, the maximum period of stay is limited to 1 year from the date of the Bankruptcy Order. Once this period has expired, the Trustee can take over the bankrupt's interest in the family home.

3 Priority / secured and preferential claims

3.1 How are the various claims treated in your country?

In Hong Kong, creditors are required to submit a 'Proof of Debt' (POD) which is a statutory form, showing the total amount due to the creditor by the debtor. The POD should include relevant supporting documents to prove the debt and together with a statutory filing fee of HK\$35, it must be filed with the Official Receiver. Secured creditors can only claim the unsecured portion of their debt in a bankruptcy estate unless the creditor surrenders the security and claims the full amount of the debt. A secured creditor may realise the security before proving for any balance due or provide an estimated value of the security and put in a POD for the balance.

If there are surplus assets in the estate after the settlement of the costs of the administration, the Trustee will adjudicate the claims received and consider making a dividend distribution. All creditors of the same ranking will receive an equal distribution from the available assets following the *pari passu* principle.

Preferential debts that are defined under the Bankruptcy Ordinance, are ranked before ordinary creditors. Amongst the preferential debts, employees' entitlements and outstanding Mandatory Provident Fund (retirement scheme contributions) are ranked the highest followed by any statutory debts due to the Government which have become due and payable in the period of 12 months prior to the date of the Bankruptcy Order.

If there is a surplus available after the settlement of preferential debts, ordinary debts and interest incurred on provable debts that is yet to be paid subsequent to the Bankruptcy Order, a distribution can be made to settle any claim of the bankrupt's spouse.

4 Consumer credit counselling

4.1 Is "credit counselling" available in your country and is it provided for in legislation?

There is no formal "credit counselling" available in Hong Kong. However, various charitable organisations in Hong Kong such as Caritas Family Crisis Line & Education Centre (<http://debt.caritas.org.hk/>) and The Tung Wah Group of Hospitals Healthy Budgeting Family Debt Counselling Centre (<http://fdcc.tungwahcsd.org/tungwah.php?nid=2&tblid=2>) offer counselling services and emotional support to debtors to assist them in managing their financial problems.

4.2 How do consumers in debt obtain assistance and relief?

Consumer debtors may seek relief and assistance from the Official Receiver's office or insolvency practitioners who are professional accountants or lawyers can assist the debtor in bankruptcy proceedings. Those debtors who wish to restructure their debts to avoid bankruptcy, may also seek professional advice on the viability of an IVA.

4.3 What are the best practices in the field of credit counselling?

The Restructuring and Insolvency Faculty of the Hong Kong Institute of Certified Public Accountants, a member association of INSOL International, provides regular training and professional courses for insolvency practitioners and members of the industry.

4.4 What changes and reforms are needed?

There is yet to be any regulatory reform in the field of credit counselling. However, if reforms are made, it is suggested that the regulatory authority implements guidance or standard courses

through the relevant professional bodies such as the Law Society or HKICPA for credit counsellors to standardise their procedures in relation to advising consumer debtors in distress.

4.5 Are there viable alternatives to credit counselling and if so, are they compatible with existing programmes or can they be substituted?

Besides formal bankruptcy or the IVA regime in Hong Kong, there is an informal debt relief plan which is an informal repayment agreement or arrangement entered into between the debtor and individual creditor which offers an out of court alternative to consumer debtors.



INSOL International

GROUP THIRTY-SIX

AlixPartners LLP
Allen & Overy LLP
Alvarez & Marsal
Baker McKenzie
BDO
Brown Rudnick LLP
BTG Global Advisory
Clayton Utz
Cleary Gottlieb Steen & Hamilton LLP
Clifford Chance
Conyers Dill & Pearman
Davis Polk & Wardwell LLP
De Brauw Blackstone Westbroek
Deloitte
Dentons
DLA Piper
EY
Ferrier Hodgson
Freshfields Bruckhaus Deringer LLP
FTI Consulting
Goodmans LLP
Grant Thornton
Greenberg Traurig LLP
Hogan Lovells
Huron Consulting Group
Jones Day
King & Wood Mallesons
Kirkland & Ellis LLP
KPMG LLP
Linklaters LLP
Morgan, Lewis & Bockius LLP
Norton Rose Fulbright
Pepper Hamilton LLP
Pinheiro Neto Advogados
PPB Advisory
PwC
Rajah & Tann Asia
RBS
RSM
Shearman & Sterling LLP
Skadden, Arps, Slate, Meagher & Flom LLP
South Square
Weil, Gotshal & Manges LLP
White & Case LLP