

# A Guide to Personal Insolvency in Hong Kong



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## What is Bankruptcy?

Bankruptcy is a process to realise an insolvent individual's assets and distribute the proceeds amongst his creditors. It starts when the Court makes a bankruptcy order against an individual, the debtor, who is unable to pay his debts as and when they become due. The purpose of the bankruptcy order is to appoint the Official Receiver as the provisional trustee of the debtor to protect his assets

## Who Can Present a Petition?

A creditor can present a petition to the Court for a bankruptcy order against the debtor. Personal service of the petition on the debtor is required. A debtor himself can also present a petition to make himself bankrupt on the grounds that he is unable to pay his debts. This is becoming more and more common in Hong Kong.

After the presentation of the petition, a creditor may feel it is necessary to take some action for the protection of the estate of the debtor, in which case the creditor can apply to the Court for an order to appoint an interim trustee. The interim trustee can take immediate possession of the debtor's assets and protect them between the appointment date and the date of the bankruptcy order.

## Who Deals With the Affairs of the Debtor?

Once a bankruptcy order is made, the Official Receiver becomes the provisional trustee. The Official Receiver is a civil servant and an officer of the Court. The provisional trustee must decide within 12 weeks from the date of the bankruptcy order whether to call a meeting of creditors to appoint a private sector insolvency practitioner to act as trustee.

This guide assumes that an insolvency practitioner other than the Official Receiver is appointed as trustee.

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The purpose of this guide is to provide a brief, plain English introduction to the compulsory liquidation procedure in Hong Kong. It is not exhaustive and is not meant to be an alternative to legal or professional advice on specific issues. However, if you are in doubt regarding any of the matters dealt with in the guide, please do not hesitate to contact us.



## What Are the Effects of the Bankruptcy Order?

Bankruptcy commences when the Court makes a bankruptcy order. Following this, all the assets of the bankrupt, both within and outside Hong Kong, are vested in the provisional trustee/trustee. This includes the accounting books and records in the case of a trading bankrupt.

Once vested, the assets will not be returned to the bankrupt, even after he is discharged from bankruptcy. For the period of his bankruptcy, the debtor is subject to a number of restrictions:

- He cannot engage in certain professions; he cannot practice as a solicitor or an accountant. Other professional bodies also have prohibitions in respect of persons who are undischarged bankrupts.
- If he continues to engage in a trade or business, he is required to disclose the name under which he was adjudged bankrupt.
- He cannot obtain credit above HK\$100 without disclosing that he is an undischarged bankrupt.
- There are no travel restrictions on the bankrupt as long as the travel expenses are not being paid out of his assets or income, but he should keep the trustee advised of his whereabouts in the event that he leaves Hong Kong.

Following the making of a bankruptcy order, legal proceedings against the bankrupt cannot be commenced or continued except with the consent of the Court.

## What are the Powers of the Trustee?

The trustee has extensive powers to sell the bankrupt's assets, to bring and defend legal proceedings and to pay dividends to creditors. Some of the trustees' powers can only be exercised with the agreement of the creditors' committee. The trustees are also equipped with inquisitive powers to investigate the bankrupt's affairs and the reasons for his insolvency, so as to uncover all his assets and to assess the validity of the creditors' claims.

## What Assets of the Bankrupt Form Part of the Bankruptcy Estate?

All property belonging to the bankrupt as at the date of bankruptcy order forms part of the bankrupt's estate. This includes money, goods, rights of legal actions, land, whether present or future, and whether in Hong Kong or elsewhere.

## Family Home

The family home is part of the estate. However, the bankrupt can continue to reside in the family home for six months from the date of bankruptcy order. After the expiry of the six month period the trustee can apply for possession of the property and the Court will, in most cases, consider the interests of the creditors ahead of any others and allow the trustee to sell the property. If the bankrupt moves out of the property but his spouse or dependent children continue to reside there, the six month protection does not apply and the trustee can seek immediate possession of the property.

## Tools of Trade

Tools, books and other equipment necessary for the bankrupt's personal use in his employment or business do not form part of the estate. Similarly, clothing, furniture, other household equipment and provisions for the basic domestic needs of the bankrupt and his family (for example, expenses for accommodation, food, transportation, education, expenses for medicine, income tax, MPF contributions as required by law, etc), are not required to be handed over to the trustee.

## Income

The bankrupt's income does not form part of his estate. However, the trustee can apply to the Court for an income payments order under which the bankrupt is required to pay a part of his income over to the bankruptcy estate. Such an application will depend upon the level of the bankrupt's income.

## After Acquired Property

Property acquired by the bankrupt or vested in him after the bankruptcy order (known as after-acquired property) does not form part of the bankrupt's estate. However, the trustee can claim the after-acquired property by serving a written notice on the bankrupt.

For the avoidance of doubt the bankruptcy relates to the bankrupt only and not to his family or family members. If the bankrupt owns a property jointly with his spouse, the bankrupt's share of the house may be realised, but not his spouse's share.

If the bankrupt holds a joint account with his family members, only the bankrupt's portion of the total amount, (which will vary according to the circumstances), is available for the benefit of his creditors.

## Does The Trustee Pay Unsecured Creditors The Money Owed To Them?

Secured and preferential creditors are paid before unsecured creditors. Secured creditors are those that have some form of security over a bankrupt's property (for instance a bank with a charge over the residential property). Secured creditors are entitled to be repaid their debt out of the proceeds of sale of the secured assets in priority to other creditors.

Preferential creditors are a special category of creditor. They include certain debts due to employees, the Inland Revenue Department or other government departments and are paid in priority to unsecured creditors. The trustee will pay a dividend to unsecured creditors if there are sufficient funds after paying preferential creditors and the costs associated with the bankruptcy.

When all claims have been adjudicated or provided for, the trustee will declare a dividend. The dividend will be a percentage (cents on the dollar) of each creditor's total admitted claim, based on the cash available for distribution to the creditors and the total of all creditors' claims. All unsecured creditors are treated equally.

## **How Can A Creditor Make A Claim In The Bankruptcy?**

Creditors must complete a Proof of Debt form for any debt contracted by the bankrupt and submit it to the trustee together with any supporting documentary evidence and a non-refundable filing fee of HK\$35. The filing fee is waived in the case of claims for wages or claims for debts not exceeding HK\$250. The trustee will advise the creditors when the claims have been adjudicated. Any costs incurred by creditors in submitting their claims are not reimbursable.

A creditor may claim interest on the outstanding debt up to the date of bankruptcy order if he is contractually entitled to it, or if the creditor has previously demanded repayment in writing with notice that he would claim interest. Creditors will not get interest on their claim accruing after bankruptcy, unless all creditors are paid in full.

If a creditor believes that he owns something which is in the bankrupt's possession, he should contact the trustee as soon as possible with full proof of ownership and be prepared to identify what he is claiming. The trustee will examine the claim carefully before deciding whether to release the goods in question, pay the creditor for them, or otherwise.

It should be noted that advances made by the spouse of the bankrupt are subordinated to all unsecured creditors in the context of the priority of payment. That is they only get paid if all the other unsecured creditors have been paid in full.

## **As a Creditor What Are My Rights?**

Following the making of a bankruptcy order, any creditor of the bankrupt can request the provisional trustee to summon a general meeting of the bankrupt's creditors for the purpose of appointing a trustee. Creditors are also entitled to obtain a copy of the Statement of Affairs on payment of a prescribed fee.

Creditors, with the concurrence of not less than one fourth in value of the bankrupt's creditors, may request the trustee to apply to the Court for a public examination of the bankrupt in open Court. A Public Examination may be attended by any creditor who has proved his debt. However, it must be remembered that gaming or gambling debts are generally void in the context of bankruptcy and so a creditor for these amounts would not be able to claim in the bankruptcy or attend a Public Examination.

## How Are The Trustee's Fees Determined?

The creditors' committee (if there is one), or the creditors agree the trustee's fees, failing which they are determined by the Court. If one-fourth in number or value of the creditors apply to the Official Receiver, or the Official Receiver is of the opinion that the trustee's fees should be reviewed, the Official Receiver may apply to the Court to confirm, increase, or reduce the trustee's fees.

## When is a Bankrupt Discharged?

If he has not previously been made bankrupt, he will normally be discharged four years after the date of the bankruptcy order, providing that there is no valid objection from creditors. If he has been previously made bankrupt, he will be discharged five years after the date of the bankruptcy order.

Creditors can raise objections against the discharge of the bankrupt on grounds such as the bankrupt's unsatisfactory conduct or his failure to fully disclose the assets or earnings. The bankruptcy order can be extended for a maximum period of four years for a first-time bankrupt and for three years for a repeat bankrupt.

However, if the bankrupt has failed to attend the initial interview of the provisional trustee/trustee or has attended the initial interview but failed to provide the provisional trustee/trustee with all the information concerning the bankrupt's affairs, the provisional trustee/trustee can apply for a non-commencement order to the effect that the relevant period (i.e. four years for a first time bankruptcy and five years for a second and subsequent bankruptcy) will not start to run until the bankrupt's compliance with the terms of the non-commencement order.

When a bankrupt is discharged, he is released from all provable debts, including any debts or liabilities that were proved in the bankruptcy proceedings. However, he remains liable for certain debts regardless of the discharge of the bankruptcy order. These debts include those incurred by fraud, fines imposed for criminal or other offences, or damages in respect of personal injuries to other persons, etc.

## Is There An Alternative to Bankruptcy?

A debtor can opt for an Individual Voluntary Arrangement (IVA) in which he makes a repayment proposal to the Court and his creditors. If it is approved by 75 percent in value of his creditors, it will be legally binding on all his creditors and the debtor will not be subject to the legal restrictions that apply to a bankrupt.

While the debtor is preparing the repayment proposal, he can apply to the Court for an Interim Order. This has the effect that no bankruptcy petition can be presented against him and no other legal proceedings may be commenced or continued against him whilst the order is in effect.

An independent nominee, usually an experienced Insolvency Practitioner, will be appointed to, among other things, review the repayment proposal, to report to the Court on the feasibility and viability of the proposal, and to implement and supervise the repayment proposal if it is approved by creditors. The nominee, however, does not have the powers of investigation that are available to a trustee in bankruptcy.

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