



**DEVELOPING A REGULATORY FRAMEWORK FOR
OUTSOURCING OF INSOLVENCY WORK IN HONG KONG,
CHINA**

by Xianchu Zhang

**Meeting held on
27-28 April 2006**

This document reproduces a report by Mr. Xianchu Zhang written after the Fifth Forum for Asian Insolvency Reform (FAIR) which was held on 27-28 April 2006 in Beijing, China. It will form part of the forthcoming publication “Legal & Institutional Reforms of Asian Insolvency Systems”.

CORPORATE AFFAIRS DIVISION, DIRECTORATE FOR FINANCIAL AND ENTERPRISE
AFFAIRS
ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT
2 RUE ANDRÉ-PASCAL, PARIS 75116, FRANCE
[HTTP://WWW.OECD.ORG/DAF/CORPORATE-AFFAIRS/](http://www.oecd.org/daf/corporate-affairs/)

DEVELOPING A REGULATORY FRAMEWORK FOR OUTSOURCING OF INSOLVENCY WORK IN HONG KONG, CHINA

*by Xianchu Zhang**

In the course of the modernisation of the insolvency system in many jurisdictions, efficiency and effectiveness have been generally accepted as two basic principles. These principles are reflected in the recent World Bank Principles and Guidelines¹ and the Model Law on Cross-Border Insolvency.² The successful development of an insolvency regime depends crucially upon the competence and integrity of the appointed insolvency administrators.³

Against this background, a modern regulatory framework has been proposed to include requirements on qualifications/experience, professional/ethics standards, competence, independence, integrity, diligence and periodic training.⁴ When considering the different legal, economic and political systems of different countries, it becomes apparent that the power to oversee such a regulatory framework may be given to either a government department or the judiciary.

A further choice may have to be made between a license-based model or a professional membership-based model.⁵ For example, in Australia a reform has moved a court controlled regime of insolvency administration to one where it rests within a government agency.⁶ This article highlights contracting-out practices and recent efforts to develop a regulatory framework in Hong Kong, China. For convenience, the outsourcing of corporate insolvency work under the Companies Ordinance of Hong Kong, China and personal bankruptcy work under the Bankruptcy Ordinance of

* Faculty of Law, the University of Hong Kong. The author would like to thank his former colleague, Professor Charlie Booth of Hawaii University School of Law for his valuable comments on the draft of this article.

Hong Kong, China may be referred to in this document as the contracting-out of insolvency cases or insolvency practice.

1) Contracting-out practices in Hong Kong, China

In Hong Kong, China the Official Receiver's Office (ORO) has traditionally been responsible for administering most of the case work in respect of winding-up and bankruptcies under court orders, and engaging special managers in a limited number of larger cases demanding substantial resources. However, the substantial increase of the caseload led the ORO in consultation with the Hong Kong Society of Accounts (HKSA)⁷ in 1996 to establish the Administrative Panel of Insolvency Practitioners for Court Winding-up (known as Panel A) to outsource some court-ordered compulsory insolvency case management with estimated realisation assets of more than HKD 200 000 (Hong Kong dollars).

As a result, non-summary insolvency liquidations were contracted out to private insolvency practitioners (PIPs). Panel A has worked on a roster system under which the ORO is required to convene a meeting of creditors to appoint the name of the next person on the roster as the liquidator, subject to the approval of the court, if the creditors have not nominated a liquidator of their own.⁸ Only insolvency practitioners and professional firms that meet certain criteria may participate in the work of Panel A. One of the most important requirements is that a participating firm must have at least two PIPs who should be qualified members of the HKSA (and later, the Hong Kong Institute of Certified Public Accountants (HKICPA)) with experience equivalent to a minimum of 600 chargeable hours of insolvency work in the last three years, or 750 chargeable hours in the past five years.⁹

In 1998, the second scheme (known as Panel B), was set up with lower qualification requirements to allow PIPs to deal with smaller cases with estimated realisation assets of no more than HKD 200 000 in value (summary cases), as the agent of the ORO on a roster basis. However, the operation of Panel B did not last long after the court expressed concern about the wholesale contracting out by the ORO of its duties and responsibilities as the provisional liquidator under the law.¹⁰

In 2001, the original roster scheme of Panel A was changed into a tender system (commonly known as Panel T).¹¹ Under this scheme, PIPs are appointed by the ORO as provisional liquidators and their remuneration is subsidised by government funds up to the limits submitted in their tender.¹² The ORO sets out the terms and conditions of the work and invites PIPs to take up contracting-out appointments by making available a set of application forms and background materials on its website or in its office.¹³

In 2003, under the pressure of continuing personal bankruptcies, the ORO started to expand its outsourcing practice to self-petitioned bankruptcy cases. As an agent of the ORO, an appointee firm may conduct interviews with the bankrupt and complete and submit various documents to the ORO. In terms of qualifications, the ORO requires the firm concerned to have, among other things: a minimum of two “recognised professionals” (RPs), one of whom must be a certified accountant, a solicitor lawyer or a member of the Hong Kong Institute of Companies Secretaries; at least three years of post-qualification experience; and a minimum of 200 professional hours in the last three years relating to insolvency and bankruptcy work.¹⁴

According to the statistics of the ORO, in recent years, most of the court related winding-up work has been contracted out and performed by private practitioners. The winding-up orders made by the courts in each calendar year from 2001-2005 were: 1 066 (2001), 1 292 (2002), 1 248 (2003), 1 147 (2004) and 849 (2005);¹⁵ whereas the cases allocated under the ORO’s tender exercise in the period were: 809 (2001-2002), 1 231 (2002-2003), 1 116 (2003-2004), 1 009 (2004-2005) and 557 (first 8 months of 2005-2006).¹⁶

With the expansion of outsourcing practices, the ORO has broadened the qualification criteria for tender applicants. According to the contract conditions of the work under the Companies Ordinance, which stipulates the ORO’s function of winding up companies under court order,¹⁷ in order to qualify for the appointed work, a firm should, among other things, have: at least two “recognised professionals”, one of whom must be a member of the HKICPA or the Hong Kong Institute of Companies Secretaries, or a member of the Hong Kong Law Society. The recognised professionals further need to have at least three years of post-qualification experience and have a minimum of 300 chargeable hours over the past three years.¹⁸ However, despite the existence of the different requirements for the experience of insolvency work for summary and preliminary examination of personal bankrupts on the one hand, and the practice under the Panel A scheme on the other, no formal registration or certification system for insolvency practitioners has been established so far.

2) **Legislative amendments and consultation**

Contracting out practices soon raised concerns with the regulatory framework. In 1999, the Law Reform Commission (LRC) published its Report on the Winding-Up Provisions of the Companies Ordinance, which recommended a license regime for contracting out insolvency work to private practitioners with the two panels at that time. The report held that “the winding up of companies and insolvency related appointments require

high standards of liquidators and other insolvency practitioners as it is they who are charged with realising, managing or re-organising assets and with distributing assets to those entitled to them.”¹⁹ It also found that:

*...there has been anecdotal evidence of abuse where assets in winding-up have been diverted by unscrupulous liquidators, usually by selling the assets at low prices to persons connected with the directors. In addition, there is also some evidence over the last several years of receivers and liquidators being appointed who have had only a vague idea of their functions and obligations.*²⁰

Thus, the Law Reform Commission recommended, as the ultimate aim, to introduce a professional insolvency practitioner qualification based on an examination that would be established by the ORO and other related professional bodies at a later time.²¹ It believed that to turn the current qualification (based on work experience) to a system of licensing would have the effect of enhancing the power of insolvency practitioners and reducing the potential for abuse.²²

In designing the regulatory framework, the commission proposed a licensing system with two tiers, where the most difficult insolvency work should be performed by those best qualified to do it, namely licensed practitioners. This system aimed at separating less complex from more complex forms of insolvency, and ensuring that licensed practitioners carry out the most difficult work.²³

However, before the recommendation was implemented, the Asian financial crisis created a dramatic increase in the workload of the ORO, which forced it to contract out more insolvency cases. In 2001 alone, 13 000 corporate liquidation and personal bankruptcy cases were recorded, representing a ten-fold increase over 1998. The situation even triggered the suspicion of abuse of the legal institution, and the ORO was criticised for its ineffective inspection and supervision of insolvency and bankruptcy cases.²⁴ According to Mr. E.T. O’Connell, the Official Receiver of Hong Kong, the number of court receiving/bankruptcy orders jumped from 1 179 in 1998-99 to 30 239 in 2002-03 and court-ordered windings-ups increased from 763 to 1 289.²⁵

Against this background, the Companies Ordinance was amended in 2000 by inserting a new §194 (1A). The new rule provides that where the ORO is the provisional liquidator by virtue of the law, and is of the opinion that the property of the company concerned is not likely to exceed HKD 200 000 in value, it may, at any time, appoint one or more persons as provisional liquidators in its place.

Although the amendment enables the ORO to continue its contracting out practice in summary liquidations, the private practitioners under the new law will be appointed as provisional liquidators in place of the ORO, rather than its agent as under the old law. Consequently, in case of winding-up with assets of less than HKD 200 000 under a summary order, the insolvency practitioner may automatically become the liquidator.²⁶

Given the increase of contracting-out cases, the different schemes created and different qualifying requirements, the landscape has changed significantly over the past years as regards the nature of the work being undertaken by PIPs in Hong Kong, China. The situation is still changing.²⁷

3) The consultation paper of 2002

Facing this challenging situation, the Financial Service Bureau of Hong Kong appointed Arthur Andersen to carry out a study of ORO's role in handling liquidation and bankruptcy cases. The government (though it had no pre-determined position), had expressed its concern with the efficient functioning of the insolvency regime in Hong Kong, China as an international financial centre.²⁸ The consultation paper was published in June 2002.²⁹

The consultation paper first affirmed the need to outsource insolvency work due to a major increase in the ORO caseload. It further noted that the trend towards a service-based economy (where tangible assets are often worth less than intangible assets) raised the risk that assets would be insufficient to meet the costs of administration. As a result, a more efficient insolvency regime should be developed.³⁰

Having studied the role of the insolvency authority of other benchmark jurisdictions, the consultation paper identified the major functions that should be performed by the ORO: 1) administration of cases as the last resort where the assets in the case are insufficient to meet the administrative cost;³¹ 2) enquiry and enforcement to deal with breach of the law and abuse of powers for the public interest; and 3) regulation and supervision, in particular of private insolvency practitioners.

In this regard the study found that although the ORO's responsibilities in regulation and supervision were not as wide as some other jurisdictions, it did "have some loosely defined responsibilities under the Companies Ordinance for PIPs conducting compulsory liquidation. The ORO's supervision of the Panel A and tender scheme, combined with the high proportion of court based insolvency, also gave the ORO extra-statutory authority and influence on the private practitioners."³² Given that the private sector has been playing a greater role in insolvency proceeding, it should be

a guiding principle to put stronger emphasis on the regulatory and supervisory functions of the ORO.³³

According to government policy, the ORO would contract out work wherever appropriate so as to enable the ORO to concentrate on other services and responsibilities, including regulating and monitoring PIPs in outsourced cases. As a result, it proposed that certain new check and balance schemes be introduced and, conceivably, that all case administration and responsibility could eventually be contracted out through the panel schemes.³⁴

The consultation paper recognised that there was no formal licensing and regulatory framework of private practitioners in contracting-out cases in Hong Kong, China. Currently, the ORO can only exercise its control on taking tenders, authorising panel participants, and allocating cases. Although this may have some significant impact on private practitioners, neither the ORO nor the court has any authority over the right of the PIPs to carry out voluntary liquidation or other insolvency proceedings.³⁵ Moreover, the lack of a license system as an access control may be a potential risk to the credibility of the insolvency system.³⁶

However, the study disagreed with the Law Reform Commission on the two tier regulatory framework and the immediate introduction of a licensing system on three grounds. First, the cost-benefit consideration: unlike the UK where a large base of insolvency professionals and a greater number of insolvency cases may spread the fixed costs of regulation and supervision, Hong Kong, China has a considerably smaller number of these practitioners. According to a study, all bankruptcy, administration, receivership, and liquidation work in the UK in 1998 was carried out by over 1 800 insolvency practitioners belonging to accountancy and law firms,³⁷ but in Hong Kong, China there were only 84 PIPs including 52 appointment tenders and 32 additional registered practitioners as of September 2001.³⁸ Thus, the high cost and threshold of a formal regulatory regime would discourage the entry of firms of practitioners into the market.³⁹

Second, the track record of public confidence: in the UK there is a history of abuses by PIPS and “in contrast there is no record of abuse of the system by PIPs in Hong Kong, and the degree of public concern over the issue is therefore questionable.”⁴⁰ For example, in the UK a series of high profile incidents resulted in the creation of a working party led by Mr. Justice Ferris on excessive remuneration.⁴¹ In Hong Kong, China the court has been the arbiter in deciding fees and the ORO has taken some supervisory responsibility over compulsory liquidation. As a result the ORO’s further involvement in fee supervision would render the regime redundant.

Third, a simple system based on authorisation as a policy consideration: given the two aforesaid grounds, the size of the market in Hong Kong may not justify the additional complexity and supervisory efforts based on a formal examination/license approach.⁴² As such, the consultation paper recommended a single tier and a less formal scheme on the basis of authorisation where PIPs should be required to show satisfactory experience and staff resources to handle contracting-out insolvency work as a statutory condition. But, the legislation would be silent on the details of the mechanism, including the granting authority, formal audit and the supervision process.⁴³ This recommendation is clearly different from the suggestion of the Legal Reform Commission, which proposes formal licensing and regulation.

Both the report of the Legal Reform Commission and the ORO commissioned consultation paper focus on the cost-efficiency analysis and the needs to establish a regulatory framework on contracting-out insolvency work and PIPs in order to prevent potential abuse of powers or breach of duties. Both express different views. The differences may be interpreted in different ways. For one, the two studies hold different reviews on some basic facts. For instance, the report of the Legal Reform Commission concluded that the danger existing in practice demanded further regulation⁴⁴ whereas the consultation paper did not believe the current situation justified the introduction of a formal regulatory scheme.⁴⁵

The issue has attracted judicial attention. One example is in *Re Peregrine Investments Holding Ltd. & Ors*,⁴⁶ where the parties disputed the fees and reimbursements for 63 days work sought by the private provisional liquidators between the commencement of the provisional supervision and the issuing of the winding-up order of HKD 76 million. According to the factors listed by the court to determine whether the fees could be justified, some firms and PIPs have reviewed their internal billing and record keeping practices. Thus, the extent to which new rules need to be developed to deal with potential abuse should be studied further in order to accurately determine market conditions and identify the major concerns that should be addressed by possible regulation.

Moreover, the cost-justified basis, although agreed on by both studies, should be further clarified. For example, given the current market size and the number of participating PIPs, a careful assessment is needed to take all of the relevant factors into account. Otherwise, it would be difficult to develop an effective framework on a rational basis. Further, the different positions of the Law Reform Commission and Arthur Andersen as a professional firm may be viewed from another angle. The report of the Law Reform Commission takes a top-down approach with more emphasis on public policy and the integrity of outsourcing practices, whereas the

consultation paper takes a bottom-up approach to reflect more practical issues and practitioners' concerns. In this context, a sound balance needs to be found between the public and private interests with updated information, and further study and consultation.

4) Recent developments

Since the publication of the consultation paper in 2002, the government of Hong Kong, China and the ORO have not taken any further reform measures, though new developments have again raised concerns regarding the current system.

It is reported that the increase of bankruptcy cases has attracted firms that were not qualified through the panel practice, and individuals who are not professionals to the insolvency business. In the peak time of bankruptcy in 2002, some individuals were even seen outside the ORO to solicit clients or to provide "services". Such unfair competition also drove fees to an unreasonably low level that could not sustain the quality of professional work.⁴⁷

The bankruptcy contracting-out practice was further addressed in the Bankruptcy (Amendment) Ordinance 2005, which enables the ORO to appoint PIPs, without a creditors' meeting, to act as trustees in personal bankruptcy cases. The legislation confines the appointment to cases where individuals have filed for their own bankruptcy and where the anticipated value of the estate does not exceed HKD 200 000. However, the detailed qualification criteria for such contracting-out have not been set yet. The ORO is expected to submit its subsidiary legislative proposal in 2006.⁴⁸

Although the Asia financial crisis is over, budget cuts and resource constraints have continued to challenge the effective function of the insolvency regime in Hong Kong, China. The most recent budgetary information of the ORO shows that its staff number would be reduced from 254 in 2002 to 227 in 2006, and further down to an estimated 223 in 2007, with its annual budget to be lowered from HKD 129 million in the 2003-2004 financial year to HKD 122 million in 2005-2006.⁴⁹ In a recent case, the ORO was openly criticised by the Office of the Ombudsman of the Hong Kong, China government for its negligence and inappropriate handling of a creditor's petition in 2002, and repeated complaints since then against a bankrupt for fraudulent borrowing during the uncharged bankruptcy period in 2004.⁵⁰ Although these may be isolated cases, they do show real apprehension with respect to ORO's efficiency.

A more recent development in this regard is the launch of Insolvency Guidance Notes (IGNs) by the HKICPA. In September 2005, it produced

the first set of co-ordinated guidelines to provide its members with best practice standards for liquidation under the Companies Ordinance. The guidance became effective for insolvency appointments made on or after 1 October 2005. According to Paul Chan, Vice President of the HKICPA, the IGNs represent a more regulated approach given that (unlike most other major jurisdictions) insolvency practice has been largely unregulated in Hong Kong, China.⁵¹

Despite the IGNs being expected to be observed under normal circumstances as “best practice”, Mr. Alan Tang, Chairman of the Insolvency Practitioners Committee of the HKICPA, has further reminded people that the orderly administration of companies in financial difficulties and their winding up “is part of the rule of commercial law in Hong Kong. ...we need to build up a body of high quality local insolvency practitioners and to strengthen the expertise and standards of the members of the Institute who want to specialise in this area.”⁵²

The IGNs are adapted from the UK Statements of Insolvency Practice (SIPs) issued by the UK Recognised Professional Bodies (RPB) and follows their broad thrust. The initial batch of IGNs covers three major fields: 1) the scope of the liquidator’s investigation into the affairs of an insolvent company; 2) preparation of insolvency office holder’s receipts and payments accounts; and 3) making statutory reports to the ORO on the conduct and disqualification of the directors of the bankrupt.⁵³ In these areas the duties and responsibilities of the liquidators are specifically outlined.

In terms of binding force, in the UK, departure from the standards set out in the SIPs is a matter that will be considered by the regulatory authority for the purposes of possible disciplinary or regulatory action,⁵⁴ whereas in Hong Kong, China the IGNs are issued for the purpose of guidance only and are not mandatory in nature. The HKICPA, however, reminds its members that failure to follow the IGNs may put a member at risk of having to justify their actions in answer to a complaint, and to explain and justify significant departures from the norms of the notes.⁵⁵

Despite its similarities with the UK SIPs, the Hong Kong, China version of best practice is adopted by the HKICPA with the awareness of the differences between the regimes.⁵⁶ For example, some statutory rules have been set out in the Companies Ordinances in Hong Kong, China governing PIP remuneration. Where a PIP is appointed as the liquidator, their remuneration shall be determined either by the agreement between the liquidator and the committee of inspection, or by the court if there is no committee of inspection or the agreement cannot be reached.⁵⁷ The ORO may also apply to the court for an order confirming the remuneration of the PIP if it is of the opinion that the remuneration should be reviewed.⁵⁸ Under

the Panel A scheme, the PIPs standard hourly rates had been approved by the ORO in consultation with the HKSA.⁵⁹

Institutionally, the SIPs of the UK are issued under procedures agreed by the insolvency regulatory authorities acting through the Joint Insolvency Committee (JIC). Although they are produced by the Association of Business Recovery Professionals (R3) as the leading professional organisation for insolvency, business recovery and turnaround specialists in the UK, the subsequent approval by the JIC, and adoption by the RPBs (including the Association of Chartered Certified Accountants, the Law Society and the Insolvency Practitioners Association) render the SIPs applicable to PIPs of all professions.⁶⁰

In contrast, the IGNs are guidelines adopted only by the HKICPA and may have limited applicability to accountants. Moreover, as compared with the SIPs, which cover at least 15 different aspects of insolvency work, the IGNs are much less sophisticated and comprehensive. It is envisaged that further guidelines will be issued in the future.

Currently, the HKICPA, with 25 000 members and nearly 10 000 registered students, is the only body authorised by law to register and grant certificates to qualified accountants in Hong Kong, China. As such, the IGNs will have important implications in insolvency practice. In addition to streamlining private practice, the promulgation may be taken as an indication of the future moves of the HKICPA. As Mr. Paul Chan stated, his institute, while having no fixed timetable, would not rule out the possibility of establishing a system to certify insolvency practitioners.⁶¹

As part of its efforts to develop an institutional framework for PIPs, the HKICPA has established an Insolvency Interest Group which is open to accountants, lawyers and other insolvency PIPs. In addition, the institute developed three training courses since 2001. The Diploma Course in Insolvency is recognised by the ORO as the equivalent of 50 hours towards the 600-hour requirement under the Panel A scheme.⁶²

5) Future perspectives

Despite unsettled issues, the ORO has made it clear that it will continue its outsourcing practices. Mr. E.T. O'Connell predicted that in the period of 2004-2006 the ORO would contract out 1 140 cases,⁶³ including summary and non-remunerative liquidation with estimated realisable assets of less than HKD 200 000, the panel scheme for non-summary liquidation with estimated realisable assets of more than HKD 200 000, and preliminary examination of bankruptcy cases.

Against this background it seems increasingly necessary to develop a uniform and co-ordinated regulatory framework. Currently, contracting-out practices have involved public accountants, solicitors and company secretaries, who are subject to different professional institutes with different disciplinary standards and procedures. Moreover, the ORO's requirements as set out above, may involve senior and junior practitioners with unequal backgrounds and experience. Without a licensing or registration system and a scheme with different tiers, the current experience-based qualification may not adequately ensure the quality of work. As such, certain minimum thresholds on knowledge, ethics, and training requirements should be established. Further, given the different nature of outsourced work, uniform guidelines with general application need to be developed by the ORO or a joint committee of professionals (like the JIC in the UK), rather than individual institutes. Currently, it is not clear to what extent the IGNs adopted by the HKICPA would be recognised and observed by lawyers and company secretaries while performing their duties as PIPs.

In this regard, some measures are being taken by the ORO. It has committed "in the light of the consultation study to seek legislative amendments to the Bankruptcy Ordinance to provide a legal mechanism for outsourcing summary bankruptcy cases, and to consider the way forward for other recommendations of the study."⁶⁴ This is in addition to monitoring the administrative panel scheme. Mr. Frederick Ma, the Secretary for Financial Services and the Treasury of Hong Kong, China recently stated that the ORO should develop a more flexible approach to dealing with insolvency cases so that it would further strengthen its supervisory and regulatory functions. As such, he promised to adopt more measures to deal with the complaints against PIPs by the court and the ORO (including contract provisions, investigation, and legal liabilities), and carry out a review after 24 months of the implementation of the Bankruptcy (Amendment) Ordinance 2005 for further legislative deliberation.⁶⁵

Despite this positive attitude, the timetable of the government seems to indicate that there is no urgency in establishing a uniform and formal regulatory framework in Hong Kong, China over PIPs and contracting-out cases. Indeed, the quality of the rule of law and the professionalism in Hong Kong, China have been well recognised worldwide. However, the environment itself may not necessarily prevent and deter all abuses and violations. A report by the US Securities and Exchanges Commission found that over two years, partners of PricewaterhouseCoopers violated the profession's ethical rules more than 8 000 times,⁶⁶ and certain practices in the UK were found by Mr. Justice Ferris to be "profoundly shocking" and "shameful".⁶⁷ In this context, a study by three professors of the US and the UK held that:

Evidence of conflict of interest and arbitrary abuse of power in UK bankruptcy practice belie the myth of “disinterested professionalism” and point to the danger of privatised governance.⁶⁸ ...due to the autonomy and discretion exercised by professionals there are considerable differences between the insolvency “law on the book” and the insolvency “law in practice”.⁶⁹

Another related issue is the regulatory model. In the UK the RPBs increasingly operate a so-called “private system of law” as a quasi-court or tribunal. But, their performance has been criticised for lack of duty of care to stakeholders and inefficient handling of complaints.⁷⁰ Here it is interesting to note that according to UK experience, the vast majority of insolvency practitioners themselves believed that most parties involved in insolvency would be far better served by one regulator.⁷¹ But officials of professional organisations are keen to hang on to their powers and perks. They oppose the single regulation system on the ground of costs and disciplinary problems.⁷² In designing the regulatory framework, the experience of the UK should be carefully studied.

Beyond the ethics and legal standards, other concerns may also be relevant. For example, a recent examination of all 170 active private insolvency trustees in their contracted-out work in over 700 administrations conducted by the Insolvency and Trustee Service Australia (ITSA) in 2003, found that in Australia, (a jurisdiction similar to Hong Kong, China in terms of its bankruptcy rate and rule of law environment), some 21% contained one or more material errors. ITSA followed up to ensure that remedial measures were taken.⁷³ Apparently, the real challenge in Hong Kong, China (as in Australia) may not be the abuse of power or breach of duties, but practical issues such as correct understanding, adequate knowledge, and sufficient experience of PIPs. For this reason, the simple absence of abuse under the current contracting-out system may not be sufficient to justify not introducing a regulatory framework with examination and licensing requirements.

With regard to the cost of developing a regulatory framework for outsourcing insolvency and bankruptcy cases, the experience of other jurisdictions should be taken as a reference. Using Australia as an example again, the ITSA licenses some 200 private administrators in relation to personal insolvency at a cost of AUD 50 000 (Australian dollars), which is fully recovered from application and re-registration fees paid by the administrators. The service also monitors the practitioners’ handling of their cases through a programme of audits, investigation of complaints and decision reviews at a total cost of AUD 750 000, fully recovered from a percentage levied on asset realisation.⁷⁴ On the basis of comparative merits,

the cost does not seem unreasonably high though, at the outset, some financial support from the government may be necessary.

6) Conclusion

In a highly competitive world, institutions have to develop and innovate constantly and proactively. Reputation alone may not guarantee future success. In line with the trend of other jurisdictions, Hong Kong, China has put great efforts into developing its outsourcing practices in both corporate insolvency and personal bankruptcy cases. However, the establishment of a uniform regulatory regime seems to be lagging. Despite the study commissioned by the HKICPA and other initiatives, some fundamental issues concerning the model to be used and the details of the rules that are needed remain unsettled. Although the government is endeavouring to adopt a timetable for the creation of a framework, budget pressures, the increase of contracting-out cases, and the lack of clear and uniform standards and rules will continue to challenge the current system in the near future.

¹ The World Bank (2001), *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems*.

² The *UNCITRAL Model Law on Cross-Border Insolvency*, 1997.

³ Although different jurisdictions may use different titles for these insolvency appointments, the concept of insolvency administrator in general includes trustee, assignee, supervisor, liquidator, receiver, administrator, curator, official or judicial manager, commissioner, etc. Joyce, Peter (2003), “The Regulatory Gap: The Cost of Capacity Building”, conference paper presented at The World Bank Global Forum on Insolvency Risk Management: Standards and Strategies, 28-29 January 2003, Washington DC, available at www.insolvencyreg.org.

⁴ The Principles and Guidelines of the World Bank, pp. 227-231.

⁵ Joyce, *supra* note 3.

⁶ Gallagher, Terry (2004), “The Role of Regulators in Insolvency Regimes”, conference paper presented at the Colombo Conclave on Balancing Recovery, Restructuring and Liquidation—the Emerging Challenges in Asia, 13-15 February 2004, on file with the author.

⁷ The HKSA was established in 1973. Its name was changed to the Hong Kong Institute of Certified Public Accountants (HKICPA).

⁸ Smart, Philip, Charles Booth and Stephen Briscoe (2002), *Hong Kong Corporate Insolvency Manual*, Hong Kong Society of Accountants, Hong Kong, p. 61.

⁹ The Law Reform Commission of Hong Kong (Sub-Committee on Insolvency) (1998), “The Winding-up Provisions of the Companies Ordinance Consultation Paper”, §26.7.

¹⁰ Philip, Booth, and Briscoe, *supra* note 8, p. 62.

¹¹ *Ibid.*

¹² The Yearbook of the Hong Kong Government 2002 (Chapter 4), available at <http://www.info.gov.hk/yearbook/2002/ehhtml/e04-09.htm>.

¹³ Official Receiver's Office of the Hong Kong SAR, "Tender for Taking up of Appointment as Provisional Liquidator under Section 194 (1A) of the Companies Ordinance", available at <http://www.oro.gov.hk/eng/tender/doc/annex1.pdf>, modified on 16 December 2005.

¹⁴ See the website of the Hong Kong Institute of Certified Public Accountants at www.hkicpa.org.hk.

¹⁵ See the Statistics on Compulsory Winding-up and Bankruptcy Statistics Search, available at <http://www.oro.gov.hk>.

¹⁶ Official Receiver's Office, note *supra* 13, Terms of Tender, §12. The numbers are provided here on the basis of the financial year of Hong Kong, which runs from April 1 to March 31 of the following year.

¹⁷ §194 of the Companies Ordinance of Hong Kong.

¹⁸ Official Receiver's Office, note *supra* 13, Part II, Qualification Criteria.

¹⁹ The Law Reform Commission of Hong Kong (1999), "Report on the Winding-up Provisions of the Companies Ordinance", §3.11, available at www.hkreform.gov.hk/reports/rwind-e.pdf.

²⁰ *Ibid.*, §3.12

²¹ *Ibid.*, §3.16.

²² *Ibid.*, §3.13.

²³ *Ibid.*, §3.17.

²⁴ See the reports of China Xinhua News Agency dated 3 August 2001 and 7 January 2002, available at: www.xaonline.com/news/gnxw/20010803/20022.htm; and <http://news.xaonline.com/gnxw/20020107/119579.htm>, respectively.

²⁵ The reply of Mr. E.T. O'Connell as the Official Receiver to the question of Mr. Tsang Yok-Sing in the Finance Committee of the Legislative Council of Hong Kong on the meeting to review the expenditure budget of 2004-2005 (Question number 1313) dated 26 March 2004.

²⁶ Philip, Booth and Briscoe, note *supra* 8, at 62.

²⁷ Letter of the HKICPA dated 30 September 2004 inviting comments on its "Exposure Draft of Insolvency Notes", p. 3 (Background).

²⁸ The news release of the Hong Kong Government dated 28 June 2002.

²⁹ Arthur Anderson (2002), "Review of the Role of the Official Receiver's Office—Consultation Paper", Hong Kong.

³⁰ *Ibid.*, paragraph. 3.

³¹ The consultation paper found that in Australia and the US, private insolvency practitioners were extensively used to provide the last resort service, whereas in Hong Kong and the UK, the ORO body typically carried out such a function. *Ibid.*, paragraph. 1.8.

³² *Ibid.*, paragraphs 1.5 and 1.6.

- ³³ *Ibid.*, paragraph 1.9 (b).
- ³⁴ *Ibid.*, paragraph 2.4.
- ³⁵ *Ibid.*, paragraph 4.1.
- ³⁶ *Ibid.*, paragraph 4.2.
- ³⁷ Cousins, Jim, Austin Mitchell, Prem Sikka, Christine Cooper, and Patricia Arnold (2000), *Insolvency Abuse: Regulating the Insolvency Industry*, Association for Accountancy and Business Affairs (AABA), London, p. 5.
- ³⁸ Arthur Andersen, *supra* note 29, paragraph 4.12.
- ³⁹ *Ibid.*, paragraph 4.13.
- ⁴⁰ *Ibid.*, paragraphs 4.2 and 4.18.
- ⁴¹ The report of Mr. Justice Ferris' Working Party on the Remuneration of Office-holders and Certain Related Matters (1998) is available at <http://www.dca.gov.uk/civil/ferrisfr.htm>. For a discussion of some of these cases, see Arnold Patricia, Christine Cooper, and Prem Sikka (2001), "Insolvency, Market Professionalism and the Commodification of Professional Expertise", working paper available at: http://www.essex.ac.uk/AFM/research/working_papers/wp03-01.pdf.
- ⁴² Arthur Andersen, *supra* note 29 paragraph 4.20.
- ⁴³ *Ibid.*, paragraphs 4.16 and 4. 21.
- ⁴⁴ *Supra* note 19.
- ⁴⁵ *Supra* note 29, chapter 4.
- ⁴⁶ [1998] 3 HKC 1.
- ⁴⁷ See the report of the Peopledaily Network dated 21 March 2002, available at www.china.com.cn/chinese/TCC/121818.htm (in Chinese).
- ⁴⁸ *Ibid.*
- ⁴⁹ The budget of ORO of 2005-06 and 2006-2007 (estimate) is available at <http://www.budget.gov.hk>.
- ⁵⁰ See the report of the Sing Pao Daily News dated 21 January 2005, p. A15 (in Chinese).
- ⁵¹ HKICPA (2005), "Hong Kong Institute of CPAs Issues Guidance for Insolvency Practitioners", News release of the HKICPA, 14 September 2005, <http://www.hkicpa.org.hk>.
- ⁵² *Ibid.*
- ⁵³ Insolvency Guidance Note (1), (2), (3) and (4) respectively.
- ⁵⁴ Explanatory Foreword of the Statements of Insolvency Practice of the UK.
- ⁵⁵ The News Release, *supra* note 51.
- ⁵⁶ According to Mr. Darach Haughey, member of the Insolvency Committee of the HKICPA, the legal differences between two jurisdictions have been taken into account in formulating the IGNs of Hong Kong. Soo, Vanson (2005), "New Liquidation Guidelines Take Effect Next Month", *The Standard*, 20 September 2005.
- ⁵⁷ §196 of the Companies Ordinance of Hong Kong.
- ⁵⁸ *Ibid.*, §196 (2A).

- ⁵⁹ Booth and McBain (2004), “Insolvency Systems and Risk Management in Asia”, conference paper presented at the Forum on Asian Insolvency Reform, New Delhi, India, 3-5 November 2004, <http://www.oecd.org/dataoecd/1/56/33929417.pdf>.
- ⁶⁰ Explanatory Foreword, *supra* note 54.
- ⁶¹ See the website of the HKICPA, *supra* note 14 and the report of Wenwei Po (Hong Kong) of 15 September 2005, www.wenweipo.com/GB/?www.wenweipo.com/news_print.phtml?news_id=F10509150023.
- ⁶² Booth and McBain, *supra* note 59.
- ⁶³ The reply of Mr. E.T. O’Connell to the question of Mr. Eric K.C. Li in the Finance Committee of the Legislative Council of Hong Kong on the meeting to review the budget 2004-2005 (Question number 0767) dated 25 March 2004.
- ⁶⁴ See the 2005-2006 Government Budget, www.budget.gov.hk/2005/eng/head116.pdf.
- ⁶⁵ See the report dated 7 July 2005, www.hbzq.com.cn/detail.asp?id=438453&db=TB0039.
- ⁶⁶ Securities and Exchange Commission of the US (2000), “Report of the Internal Investigation of Independence Issues at PricewaterhouseCoopers LLP”.
- ⁶⁷ Mirror Group Newspapers plc. v. Maxwell and Others [1998] BCC 324.
- ⁶⁸ Arnold, Cooper, and Sikka, *supra* note 41, p. 29.
- ⁶⁹ *Ibid*, p. 17.
- ⁷⁰ Cousins, Mitchell, Sikka, Cooper and Arnold, note *supra* 37, p. 16.
- ⁷¹ Insolvency Practitioners Association (IPA) of the UK (1997), IPA News, November 1997, p. 2.
- ⁷² Cousins, Mitchell, Sikka, Cooper and Arnold, *supra* note 37, p. 53.
- ⁷³ Gallagher, *supra* note 6.
- ⁷⁴ Joyce, *supra* note 3.