

PRACTICE DIRECTION 3.1

BANKRUPTCY AND WINDING-UP PROCEEDINGS

Part I: Bankruptcy Proceedings

1. Rule 49(9) of the Bankruptcy Rules

- 1.1 Rule 49(9) of the Bankruptcy Rules provides that the Court may decline to file the petition if it is not satisfied that the creditor has discharged his obligation in respect of the service of statutory demand imposed by Rule 46(2). To give effect to this rule, a petitioning creditor shall observe the following practice directions relating to the service of statutory demands and the filing of bankruptcy petitions.
- 1.2 A bankruptcy petition based on the failure to comply with a statutory demand shall first be lodged with the High Court Registry together with the affidavit(s) proving service of the statutory demand. The papers will then be passed to the master in charge of the Bankruptcy and Winding-up List to consider whether service of the statutory demand has fully complied with Rules 46(2) and 49. After perusing the papers, the master may either allow or reject the filing of the petition concerned. In appropriate cases, the master may specify the steps that need to be taken before allowing filing.
- 1.3 The solicitors lodging the petition shall return to the High Court Registry not earlier than 3 working days after the lodging of the petition to ascertain whether the petition is allowed to be filed or not.
- 1.4 Where the statutory demand has been served personally on the debtor, the petition may be filed upon presentation without the necessity of referring the papers to the master for consideration, provided that the petition when filed is accompanied by a certificate signed by the handling solicitor stating that the statutory demand has been served personally on the debtor. Practitioners are reminded that the filing of such certificate does not relieve the petitioning creditor of the

obligation to file an affidavit of service by the person who effected that service, pursuant to Rule 49(3) of the Bankruptcy Rules.

1.5 For a petition which is not based on failure to comply with a statutory demand, the petitioning creditor does not need to observe the matters in paras 1.2-1.3 above. Hence to avoid unnecessary confusion and delay, practitioners should endorse in the header of all petitions the grounds upon which the petitions are based.

1.6 Urgent application for leave to file a petition may be made to the master in charge of the Bankruptcy and Winding-up List. Applications that cannot wait until the said master is available should be made to the practice master.

2. Service of statutory demand and petition

2.1 The creditor is under an obligation to do all that is reasonable to bring the statutory demand to the debtor's attention and, if practicable, to cause personal service to be effected. If the debtor is represented by a solicitor, an attempt should be made to arrange an appointment for personal service through such solicitor. Rule 49(4) of the Bankruptcy Rules enables a solicitor to accept service of a statutory demand on behalf of his client.

2.2 Practitioners are reminded that a statutory demand is not a document issued by the Court. Leave to serve out of jurisdiction and leave to effect service by way of substituted service are not, therefore required. A creditor wishing to serve a statutory demand outside the jurisdiction in a foreign country may adopt the procedure prescribed by the Rules of the High Court in Order 11 Rule 6.

2.3 When a statutory demand is to be served outside the jurisdiction, the time limits of 21 and 18 days respectively referred to in the demand must be amended by adding 21 days to each of these time limits wherever they appear.

- 2.4 Advertisement can only be used as a means of substituted service of a statutory demand without first attempting personal service where the demand is based on a judgment or order of any Court and the requirements of Rule 46(3) (a) and (b) are met. The advertisement shall be made in a language which the debtor is expected to understand. As there is no statutory form of advertisement, the Court will normally accept an advertisement in the following form:

STATUTORY DEMAND

To (block letters)
of

TAKE NOTICE that a Statutory Demand has been issued by
(name of creditor) of (address of creditor)

The creditor demands payment of \$ _____ the amount now due (on a Judgment/Order/Award of the _____ Court/Tribunal dated the _____ day of _____). (Give the date when the debt was incurred and a description of the debt. If the creditor holds any security, the amount of the debt should be the sum the creditor is prepared to regard as unsecured for the purposes of the demand, giving brief details of the total debt, the nature of the security and the value put upon it by the creditor as at the date of the demand.)

The Statutory Demand is an important document and it is deemed to have been served on you on the date of the first appearance of this advertisement. You must deal with this demand within 21 days of the service upon you by paying the debt or reaching a settlement with the creditor or you could be made bankrupt and your property and goods taken away from you. If you consider you have grounds to set aside the statutory demand, you should apply to Court within 18 days of the service

upon you. If you are in any doubt as to your position, you should seek advice immediately from a solicitor.

The Statutory Demand can be obtained or is available for inspection and collection from:

Name

Address

(Solicitor for) the creditor

Tel No. Reference

You have only 21 days from the date of the first appearance of this advertisement before the creditor may present a Bankruptcy Petition. You have only 18 days from that date within which to apply to the Court to set aside the demand.

(A corresponding Chinese translation should be given)

- 2.5 For the guidance of practitioners, the steps set out in the paragraph below are considered reasonable steps that should normally be taken by a creditor to discharge his obligation under Rule 46(2) in respect of the service of a statutory demand. These steps are similar to all the reasonable steps that should be complied with by a creditor in order to satisfy the Court that an order for substituted service of a petition should be made. Appropriate alterations should be made to the affidavit proving service of the statutory demand where the requirements of the supporting affidavit for substituted service of a petition are inapplicable.
- 2.6 In most cases, evidence of the following steps will suffice to justify an order for substituted service of a petition:

- (a) at least 2 personal calls should be made to all the debtor's addresses known to the petitioning creditor;
- (b) the calls should be made on weekdays and at reasonable hours. If the service is attempted at the residential address, it should be at such time of the day when the debtor is expected to be found there (usually before or after normal working hours). If the service is attempted at the business address, it should be at such time of the day when the debtor is expected to be found there (during normal working hours);
- (c) each call should be made on a separate day. The calls should not be made in close succession and an appropriate interval should be allowed between them;
- (d) the second (or subsequent) call(s) should be made by appointment by letter ("the appointment letter") sent to the debtor by ordinary prepaid letter post, giving not less than 2 business days' notice, enclosing a copy of the statutory demand or petition to be served, and offering an opportunity of making a different appointment;
- (e) where the appointment is for service of a statutory demand, the appointment letter should state that if the debtor fails to keep the appointment, the creditor proposes to serve the debtor by post and by advertisement, and that in the event of a bankruptcy petition being presented, the Court will be asked to treat such service as service of the statutory demand on the debtor. Where the appointment is for service of a petition, the appointment letter should state that if the debtor fails to keep the appointment, the creditor will apply to the Court for an order for substituted service either by advertisement, or in such other manner as the Court may think fit;
- (f) upon keeping the appointment made by letter, and if the debtor to be served cannot be found, the process server should inquire

whether the debtor has received the appointment letter and the debtor's whereabouts;

- (g) if the process server is informed that the debtor is away, inquiry should be made as to when he will return and whether letters are being or have been forwarded to another address;
- (h) the affidavit for the purposes of Rule 49(9) and/or in support of an application for leave for substituted service of the petition should also deal with the following matters:
 - (i) all relevant facts as to the debtor's whereabouts;
 - (ii) whether the appointment letter has been returned;
 - (iii) whether the debtor was within the jurisdiction or believed to be so at the time when the attempts to effect service were made, giving the facts upon which the inference is founded for such belief;
 - (iv) in the case of an application for leave for substituted service of the petition, whether the debtor to be served is within the jurisdiction or whether he is believed to be so at the time when the application is made, giving the facts upon which the inference is founded for such belief; and
 - (v) in respect of a statutory demand, specify a date by which, to the best of the knowledge, information and belief of the deponent, the demand will have come to the debtor's attention; in respect of a petition, whether the substituted service proposed will probably come to the knowledge of the debtor;
- (i) if an application for the purpose of Rule 49(9) or for substituted service of the petition is based on an evasion of service of the statutory demand or the petition, the grounds for the statement

that the debtor to be served is evading service must be given. In such a case, the efforts which have been made to find the debtor must also be stated.

2.7 Practitioners are reminded of the practice of the Court to require 7 clear days to lapse after service of a bankruptcy petition by advertisement for the hearing of the petition. This is based on the requirements in Order 9 Rule 4(2) of the Rules of the High Court.

3. Application to masters in bankruptcy proceedings

3.1 The following applications may be heard and determined by a master in Chambers under Rule 6(a) of the Bankruptcy Rules:

- (a) for leave to continue or commence proceedings against a debtor under Section 12 of the Ordinance;
- (b) to dispense with a statement of affairs or to extend the time for submitting such statement under Section 18 of the Ordinance;
- (c) for arrest of a debtor under Section 27(1) of the Ordinance and for an order for release;
- (d) for the re-direction of debtors' mail under Section 28 of the Ordinance;
- (e) for a certificate of automatic discharge from bankruptcy where the application is unopposed under Section 30A of the Ordinance and Rule 92;
- (f) for production of documents by the Commissioner of Inland Revenue under Section 30D(1) of the Ordinance;
- (g) to extend the time for trustee to make a decision relating to a proof of debt under Section 34(7A) of the Ordinance;

- (h) to approve the disposition of bankrupt's property under Section 42(1) of the Ordinance;
- (i) to extend the time limit for notice under Section 43C(1) of the Ordinance;
- (j) to include or exclude items from the bankrupt's estate under Section 43D(2) of the Ordinance;
- (k) for income payments order under Section 43E of the Ordinance and to vary and review such order under Rules 128B, 128D and 129;
- (l) for an order to extend the bankrupt's occupation of family home under Section 43F(1) of the Ordinance;
- (m) for disclaimer and extension of time for disclaimer of onerous property under Section 59(1) of the Ordinance;
- (n) for the appointment of a solicitor under Sections 61(c) and 61A of the Ordinance;
- (o) to reduce the allowance to a bankrupt under Section 63 of the Ordinance;
- (p) to approve the dealings relating to copyright work of a bankrupt's estate under Section 65 of the Ordinance;
- (q) for the release of a trustee under Section 94 of the Ordinance and Rule 169;
- (r) for the appointment of a creditors' committee under Section 100E of the Ordinance;

- (s) for leave to commence and prosecute any action in the names of the trustee and of the bankrupt's partners under Section 107 of the Ordinance;
- (t) for leave to disclose the names of the partners in proceedings in partnership name under Section 109 of the Ordinance;
- (u) for summary administration and rescission of a summary administration order under Section 112A of the Ordinance;
- (v) for service of the petition, order or summons on a debtor who cannot be found or is outside the jurisdiction under Rule 31;
- (w) for leave to file a petition under Rule 49(9);
- (x) for security for costs under Rule 55;
- (y) for substituted service of a petition under Rule 59(2);
- (z) to vary the dates relating to the submission of nominee's abstracts and reports under Rule 122Z(6);
- (aa) to extend time for the nominee's notice of final completion of the voluntary arrangement and report under Rule 122ZC(4);
- (bb) to dispense with the production of bills and notes under Rule 124;
- (cc) for leave to disclaim a lease under Rule 130;
- (dd) to give directions to the Official Receiver where there are no available assets under Rule 158A;
- (ee) for disposal of books and papers under Rule 202;
- (ff) for abridgement or enlargement of time under Rule 204;

(gg) to dispense with a public examination under Section 19A of the Ordinance for cases in which bankruptcy proceedings were commenced before 1 April 1998;

(hh) for adjudication under Section 22 of the Ordinance for cases in which bankruptcy proceedings were commenced before 1 April 1998.

4. Corporate petitioners in bankruptcy proceedings

4.1 Many petitions in bankruptcy, purporting to be by corporations, are being presented without proper authority.

4.2 This inevitably leads to adjournments, which cause unnecessary expense and waste of time.

4.3 Practitioners are reminded that an officer of a corporation who lodges a bankruptcy petition on behalf of the corporation, or who swears an affidavit of truth of statements in a bankruptcy petition, must be duly authorized in writing under the seal of the corporation so to do. The petition and affidavit must also recite the authority under seal.

4.4 For a corporate petitioner which does not possess a corporate seal, the petition and the affidavit should recite the fact that the company does not have a seal. The petition and affidavit must also recite the authority by which the officer lodges the bankruptcy petition.

4.5 Forms 10, 10A, 10B, 10C and 11 of the Bankruptcy (Forms) Rules are, therefore, applicable only when appropriately amended. Suitable forms are to be found in the books of precedents.

5. Proof of debt in bankruptcy proceedings

5.1 On the hearing of a petition for a bankruptcy order, to satisfy the Court that the debt on which the petition is founded has not been paid or secured or compounded the Court will normally accept as sufficient a

certificate signed by the person representing the petitioning creditor in the following form:

“I certify that I have/my firm has made inquiries of the petitioning creditor(s) within the last business day prior to the hearing/adjourned hearing and I am informed by (name and position of representative of Petitioner) and verily believe that the debt on which the petition is founded is still due and owing and has not been paid or secured or compounded for (save as to _____)

Signed _____ Dated _____”

5.2 For the convenience of practitioners, this certificate will be printed on the attendance slips. It will be filed after the hearing. A fresh certificate will be required at each adjourned hearing.

6. Application for certificate of discharge of bankruptcy

6.1 Discharged bankrupts can apply to Court for a certificate of discharge pursuant to Rule 92 of the Bankruptcy Rules. Such kind of application should be made ex-parte to the master in charge of the Bankruptcy and Winding-up List with an appropriate supporting affidavit. A letter from the Official Receiver indicating no objection to the issuance of the certificate should be exhibited to the supporting affidavit.

7. Application to set aside statutory demands

7.1 Where an application to set aside a statutory demand is not dismissed by the Court under Rule 48(1), the Court shall initially schedule an inter partes directions hearing as soon as practicable before fixing a date for the hearing of the application under Rule 48(3).

7.2 A debtor who wishes to apply to set aside a statutory demand after the expiration of 18 days from the date of service of the statutory demand (where service is effected by advertisement in a newspaper the period

of 18 days is calculated from the date of the first appearance of the advertisement) must apply for an extension of time within which to apply.

Part II: Winding-Up Proceedings and Company Matters

1. Application to masters in winding-up proceedings

1.1 The following applications may be heard and determined by a master in chambers under Rule 6(a) of the Companies (Winding-up) Rules:

- (a) for leave to continue or commence proceedings against a company under Section 186 of the Ordinance;
- (b) to extend the time for submission of a statement of affairs under Section 190(3) of the Ordinance;
- (c) to bring or defend an action under Section 199(1)(a) of the Ordinance;
- (d) to appoint a solicitor to assist the liquidator under Section 199(1)(c) of the Ordinance;
- (e) for the release of a liquidator under Section 205 of the Ordinance and Rule 189 of the Companies (Winding-Up) Rules;
- (f) to appoint a liquidator and a committee of inspection under Section 206 of the Ordinance and Rule 45 of the Companies (Winding-Up) Rules;
- (g) to order the arrest of an absconding contributory or officer under Section 224 of the Ordinance and for an order for release;
- (h) for a summary winding-up order and for rescission of a summary winding-up order under Section 227F of the Ordinance;

- (i) to consider under Rule 42 of the Companies (Winding-Up) Rules any default in complying with the requirements of Section 190 of the Ordinance relating to the submission of a statement of affairs;
- (j) for an order to inspect the books and papers of the company under section 219 of the Ordinance;
- (k) to extend time for disclaiming onerous property under section 268 of the Ordinance and Rule 63 of the Companies (Winding-Up) Rules;
- (l) to dispense with a statement of affairs under Rule 44 of the Companies (Winding-Up) Rules;
- (m) to extend time for dealing with proofs under Rules 103 and 104 of the Companies (Winding-Up) Rules;
- (n) to extend time for holding first meetings of creditors and contributories under Rule 106 of the Companies (Winding-Up) Rules;
- (o) for the disposal of books under Rules 167 and 190 of the Companies (Winding-Up) Rules;
- (p) to extend time for sending liquidator's statements under Rule 181 of the Companies (Winding-Up) Rules;
- (q) under Rule 196 of the Companies (Winding-Up) Rules to give directions to the Official Receiver where there are no available assets;
- (r) to give directions relating to gazetting of notices under Rule 202 of the Companies (Winding-Up) Rules;

- (s) for enlargement and abridgement of time under Rule 208 of the Companies (Winding-Up) Rules;
- (t) for the withdrawal of a petition which has not been advertised;
- (u) to reduce the Official Receiver's fees under paragraph 9 of the Companies (Fees and Percentages) Order; and
- (v) to dispense with advertising a petition which only seeks relief under Section 168A of the Ordinance and not a winding-up of the company.

1.2 Applications referred to in paragraph 1.1(d) above shall be supported by an affidavit particularizing the matter(s) in relation to which the assistance of a solicitor is sought. An order will normally not be made except in relation to a specific matter or matters.

2. Advertisement of petition

2.1 For the avoidance of doubt, the reference to at least 2 Hong Kong daily newspapers for the advertisement of a petition under Rule 24 of the Companies (Winding-Up) Rules should include publication once in English in an English language newspaper and once in Chinese in a Chinese language newspaper.

2.2 Where the only relief sought in a petition is under Section 168A of the Ordinance, in the absence of exceptional circumstances, the petition will not be ordered to be removed from the file for failure to advertise pursuant to Rule 24 of the Companies (Winding-Up) Rules. To avoid uncertainty, applications for dispensation from advertising such petitions may be made to the master in charge of the Bankruptcy and Winding-up List at any time after the filing of the petition.

3. Application for certificate of compliance

- 3.1 Under Rule 29 of the Companies (Winding-Up) Rules, the petitioning creditor has to obtain a certificate of compliance from the Registrar prior to the making of a winding-up order. In the case of a contested petition, the master will not adjourn the petition to a judge for hearing in the absence of such a certificate.
 - 3.2 The application for a certificate of compliance will be dealt with by the master in charge of the Bankruptcy and Winding-Up List on Mondays at 9:30 a.m., or at any time fixed by the court if Monday is not available for hearing. Urgent applications for such a certificate shall be made to the same master and if he is unavailable, to the practice master.
 - 3.3 Practitioners are reminded that they should obtain the certificate of compliance without undue delay. Failure to obtain such a certificate without good reasons may result in the dismissal of the petition.
4. Service of the petition
 - 4.1 Rule 25 of the Companies (Winding-Up) Rules sets out the manner in which the petition should be served. Service should ordinarily be effected on business days and during normal working hours.
 - 4.2 The affidavit proving service of the petition should, so far as possible, identify the person with whom a copy of the petition has been left, if applicable.
5. Petitions and other company applications
 - 5.1 The first hearing of an opposed winding-up petition which has been adjourned to be heard by the Companies Judge shall, unless the Companies Judge otherwise directs, be listed for hearing in court on Mondays at 9:30 a.m. before the judge of the Companies Court.
 - 5.2 Where it appears to the judge that the subsequent hearing will be a hearing for directions only, the petition may be adjourned for hearing

in court or in chambers as the court may direct at 9:30 a.m. on any weekday other than a Monday.

- 5.3 Where a winding-up petition has been adjourned for hearing in court on a Monday and further directions become necessary, the parties may apply by way of a consent application lodged 3 clear days prior to any resumed hearing for directions, to vacate the hearing and adjourn it to a day other than a Monday for hearing in chambers. A statement of reasons shall accompany such application. Unless the application is granted, the original appointment for hearing in court shall stand.
- 5.4 Where, after a winding-up petition has been advertised, the parties reach agreement that the petition be dismissed or struck out, the petition shall be listed for hearing in court and the court may dismiss or strike out the petition without the parties having to attend the hearing provided that :
- (a) a consent order is lodged 2 clear days prior to the hearing;
 - (b) provision is made in such order for the costs of the Official Receiver; and
 - (c) the dismissal is not opposed by any creditor or other interested party at the hearing itself.
- 5.5 A summons for directions taken out in a petition filed pursuant to the provisions of Section 59 of the Companies Ordinances or an originating summons for leave to convene any meeting(s) to consider a scheme of arrangement pursuant to Section 166 shall be listed for hearing in chambers on Tuesdays at 9:30 a.m. The hearing bundle must be lodged no later than the preceding Tuesday. Non-compliance with this direction may result in the appointment being vacated or adjourned.
- 5.6 These practice directions apply to proceedings where the *only* relief sought is under s.168A Companies Ordinance i.e. where no winding-

up order is sought.

- 5.6.1. The application should be by way of petition. (See also practice direction 2.2 regarding dispensations from advertising).
- 5.6.2 The petition should specify *briefly* the grounds on which it is presented and the nature of the relief which is sought, in view of directions for particulars of claim, etc. which would likely be given except in very simple cases (see 5.6.6(b) below). The petition shall be delivered to the Court for filing together with sufficient copies for service under 5.6.5.
- 5.6.3. The court will fix a hearing for a day (“the return day”) on which the petitioner and any respondent shall attend before the Companies Judge in chambers for directions to be given in relation to the procedure on the petition.
- 5.6.4. On fixing the return date, the Court shall return to the petitioner sealed copies of the petition for service, each endorsed with the return day and the time of hearing.
- 5.6.5. The petitioner shall at least 14 days before the return day serve a sealed copy of the petition on every respondent named in the petition, including the company.
- 5.6.6. On the return day, or at any time after it, the Court shall give such directions as it thinks appropriate including directions regarding the following matters:-
 - (a) service of the petition on any other person;
 - (b) whether particulars of claim, defence and reply are to be delivered, and the procedure to be adopted on the petition;
 - (c) the manner in which any evidence is to be adduced,

including in particular:-

- (i) directions for adducing evidence by affidavit or affirmation or orally,
- (ii) cross-examination of any deponents to affidavits or affirmations,
- (iii) directions regarding expert evidence on valuation, such as of shares or property.

Part III: Bankruptcy and Winding-Up Proceedings

1. Uncontested petitions in bankruptcy and winding-up proceedings

- 1.1 Where no notice of intention to appear has been served, or no notice to show cause has been filed, it will not be necessary for the petitioner or his representative to attend the hearing.
- 1.2 The judge or master will on the hearing announce in open court that a winding-up or bankruptcy order is being made by him.
- 1.3 This direction is designed to save expense to the parties and the time of the court. This practice direction, however, does not apply to the debtor's petition for self bankruptcy.

2. Urgent applications

- 2.1 Any urgent application relating to a Bankruptcy and Winding-up List matter shall be made to the Companies Judge, not to the Duty Judge.
- 2.2 Only if such an application is so urgent that it cannot wait until the Companies Judge is available should such an application be made to the Duty Judge.

This Practice Direction consolidates, revises and supersedes the Practice Directions now appearing as 3.1 to 3.4.

This Practice Direction shall take effect on 15 July 2002.

Dated this day of June 2002.

(Andrew Li)
Chief Justice