

J. Y. Interpretation No.300 (July 17, 1992) *

ISSUE: Is Article 71 of the Bankruptcy Act constitutional in empowering the court to extend the detention of the debtor while saying nothing about the limit on the number of extensions limit?

RELEVANT LAWS:

Article 8 of the Constitution (憲法第八條) ; Article 71, Paragraph 1 and 2, Article 152 through 159 of the Bankruptcy Act (破產法第七十一條第一項、第二項、第一百五十二條至第一百五十九條) ; Article 22 and 24 of the Compulsory Enforcement Act (強制執行法第二十二條、第二十四條) ; Articles 101 and 108 of the Code of Criminal Procedure (刑事訴訟法第一百零一條、第一百零八條) .

KEYWORDS:

detention, to detain (羈押) , writ of detention (押票) , trustee in bankruptcy, bankruptcy trustee (破產管理人) , bankruptcy estate (破產財團) , take into custody (管收) , physical freedom (身體自由) .**

HOLDING: The Bankruptcy Act provides in Article 71, Paragraph 1, that “where there is probability that the bankrupt may abscond from creditors or con-

解釋文：破產法第七十一條第一項規定「破產人有逃亡或隱匿、毀棄其財產之虞時，法院得簽發押票將破產人羈押。」為保全破產財團之財產，維

* Translated by Raymond T. Chu.

** Contents within frame, not part of the original text, are added for reference purpose only.

ceal, destroy or dispose of his property, the court may issue a writ to have the bankrupt detained.” While detention of the bankrupt may be necessary in order to protect the interests of all creditors by preserving the property of the bankruptcy estate, and thereby to ensure that the bankruptcy procedure may be satisfactorily completed, a time limit is prescribed by Paragraph 2 of the same article, which reads: “The period of detention shall not exceed one month, provided that the court may grant extensions thereof for up to one month each time upon good reasons presented by the bankruptcy trustee.” We have noticed, however, that the proviso does not specify a reasonable limit on the number of extensions that may be granted. This is contrary to the essence of the Constitution in protecting the physical freedom of the people, and must be amended as promptly as practicable, but by no means later than one year from the date of pronouncement of this Interpretation, on which date said proviso shall cease to be operative. Before the law is amended, the foregoing proviso must be applied in a cautious manner consistent with our views

護全體債權人之權益，俾破產程序得以順利完成，固有此必要。惟同條第二項「羈押期間不得超過一個月，但經破產管理人提出正當理由時，法院得准予展期，每次展期以一個月為限」之規定，其中但書對羈押展期之次數未加適當限制部分，與憲法保障人民身體自由之本旨不合，應儘速加以修正，至遲應於本解釋公布之日起屆滿一年時停止適用。在法律修正前適用上開現行規定，應斟酌本解釋意旨，慎重為之。至破產人有破產法第一百五十二條至第一百五十九條犯罪嫌疑者應移送檢察官偵查，於有必要時由檢察官依法羈押，乃另一問題，併此說明。

herein expressed. With regard to the situation where a bankrupt is suspected of having committed any of the crimes under Articles 152 through 159 of the Bankruptcy Act, this is a different matter, and we opine that the case shall be sent to the prosecutor for investigation, who may order the bankrupt to be lawfully detained if necessary.

REASONING: The Bankruptcy Act provides in Article 71, Paragraph 1, that “where there is probability that the bankrupt may abscond from creditors or conceal, destroy or dispose of his property, the court may issue a writ to have the bankrupt detained.” While detention of the bankrupt may be necessary in order to protect the interests of all creditors by preserving the property of the bankruptcy estate, and thereby to ensure that the bankruptcy procedure may be satisfactorily completed, a time limit is prescribed by Paragraph 2 of the same article, which reads: “The period of detention shall not exceed one month, provided that the court may grant extensions thereof for up to one month each time upon good reasons pre-

解釋理由書：破產法第七十一條第一項「破產人有逃亡或隱匿、毀棄其財產之虞時，法院得簽發押票將破產人羈押」之規定，旨在保全破產財團之財產，維護全體債權人之權益，俾破產程序得以順利完成，固其有必要。惟同條第二項則規定「羈押期間不得超過一個月，但經破產管理人提出正當理由時，法院得准予展期，每次展期以一個月為限」。按對人民身體自由之拘束，除因犯罪受無期徒刑之宣告確定者外，現行法律中有關人身自由之拘束，均有期間之限制。例如強制執行程序中對於債務人顯有逃亡之虞或就應供強制執行之財產有隱匿或處分之情事者，強制執行法第二十二條規定執行法院對於債務人無相當擔保者，得拘提管收之。同法第二十四條則規定，管收期限不得逾三

sented by the bankruptcy trustee.” It must be noted that restraint on the physical freedom of any person, with the exception of those found guilty of crimes and sentenced to life imprisonment by irrevocable judgments, is subject to limited periods of time as prescribed by existing statutes. For instance, while a debtor in a compulsory execution proceeding may be arrested and taken into custody by the court under Article 22 of the Compulsory Enforcement Act on the ground that there is apparently a probability that he will abscond from the creditors or has concealed or disposed of his property which is subject to enforcement, and that he has failed to furnish reasonable security required, such custody may not last over three months and thereafter he may be again taken into custody only once if there is new cause for custody. Moreover, in criminal proceedings, Article 101 of the Code of Criminal Procedure authorizes the court to detain the accused whenever necessary if it believes or is made to believe by the occurrence of any event that there is probability that the accused may flee from justice, or destroy, falsify, or alter

個月，且有管收新原因發生而對債務人再行管收時，以一次為限。又刑事訴訟程序中，對於被告如認有逃亡或有事實足認為有逃亡之虞者，或有事實足認為有湮滅、偽造、變造證據或勾串共犯或證人之虞者等情形之一時，刑事訴訟法第一百零一條規定於必要時得羈押之。同法第一百零八條則規定，羈押被告，偵查中不得逾二月，審判中不得逾三月，但有繼續羈押之必要者，延長羈押期間每次不得逾二月，偵查中以一次為限，如所犯最重本刑為十年以下有期徒刑以下之刑者，審判中第一審第二審以三次為限，第三審以一次為限。破產法上之羈押，其主要目的既在保全破產財團之財產，該法第七十一條第二項但書關於羈押展期次數未加限制之規定，與上開其他法律規定兩相比較，顯欠妥當，易被濫用，有違憲法保障人民身體自由之本旨。應就羈押之名稱是否適當、展期次數或總期間如何限制，以及於不拘束破產人身體自由時，如何予以適當管束暨違反管束時如何制裁等事項通盤檢討，儘速加以修正，至遲應於本解釋公布之日起屆滿一年時停止適用。在法律修正前適用上開現行規定，應斟酌本解釋意旨，慎重為之。至破產人有破產法第一百五十二條至第一百五十九

evidence, or engage in collusion with an accomplice or a witness. However, Article 108 of the Code provides that detention of the accused shall not exceed two months during the process of investigation and three months during trial, that if it is necessary to continue to detain the period thus extended shall not exceed two months each time, that only one extension may be ordered during an investigation, and that if the crime is punishable by a maximum principal penalty of imprisonment for not more than ten years the detention during the trial may be extended up to three times by the court of the first instance and the court of the first appeal, and not more than once by the court of the second appeal. Inasmuch as the primary purpose of detention in a bankruptcy procedure is to preserve the property of the bankruptcy estate, the proviso to Paragraph 2 of Article 71 of the Bankruptcy Act, saying nothing about a limit on the number of times for which detention may be extended, is obviously inappropriate and susceptible to abuse when compared with the other statutes quoted above, and is thus against the intent of the Constitution in protecting the

條犯罪嫌疑者應移送檢察官偵查，於有必要時由檢察官依法羈押，乃另一問題，併此說明。

physical freedom of the people. To put it right, said provision must be amended as promptly as practicable upon an overall review to be carried out in respect of such matters as relating to the suitability of the term “detention,” restrictions on the number of times or the aggregate number of days for which extensions may be ordered, what reasonable measures of control may be exercised over the bankrupt without having to place him under physical restraint, and what sanctions may be imposed in case of violation of the measures of control. The amendment shall be made within one year from the date of pronouncement of this Interpretation, on which date said provision shall cease to be operative. Before the law is amended, the foregoing proviso must be applied in a cautious manner consistent with our views herein expressed. With regard to the situation where a bankrupt is suspected of having committed any of the crimes under Articles 152 through 159 of the Bankruptcy Act, this is a different matter, and we opine that the case shall be sent to the prosecutor for investigation, who may order the bankrupt to be lawfully detained if necessary.

Justice Chih-Peng Lee filed dissenting opinion.

本號解釋李大法官志鵬提出不同意見書。