

**Bills Committee on Companies (Corporate Rescue) Bill**

**Summary of 13 submissions**  
(Position as at 21 September 2001)

**Part A — General views on the Bill**

<b>Views of organizations</b>	
1.	<p><b><i>Hong Kong Democratic Foundation (HKDF)</i></b> is against the proposals set out in the Bill -</p> <ul style="list-style-type: none"> <li>(a) HKDF doubts whether it is appropriate to have Government-mandated intervention in corporate failure at all;</li> <li>(b) It has serious reservations about the concept of provisional supervision and the director's responsibility for insolvency; and</li> <li>(c) The proposed provisional supervision process appears to be complex and would be difficult to render transparent to the parties involved. It would therefore provide an opportunity for the unscrupulous to manipulate or take advantage of the position.</li> </ul>
2.	<p><b><i>Employers' Federation of Hong Kong (EFHK)</i></b> supports the concept of corporate rescue but is concerned that the small and medium enterprises may not be able to make use of the procedure because of the relatively high financial burden incurred for the appointment of a provisional supervisor.</p> <p>EFHK stresses that the following two principles must be maintained throughout the corporate rescue process -</p> <ul style="list-style-type: none"> <li>(a) Preferential treatment for employees' outstanding wages and statutory entitlements; and</li> <li>(b) The Protection of Wages on Insolvency Fund should be operated within its current framework and objectives to provide ex-gratia payment to the affected employees, and not be used for any other purposes.</li> </ul>
3.	<p><b><i>Labour Advisory Board (LAB)</i></b> supports the present provisions of the Bill and, in particular, the spirit and concept of a corporate rescue scheme that could help financially troubled companies to turn around and continue operation after clearing all outstanding wages and other entitlements owed to employees.</p>
4.	<p><b><i>Lingnan University (LU)</i></b> is in principle supportive of the corporate rescue concept, which is not uncommon in common law jurisdictions.</p> <p>Although the Bill is drafted in plain English and Chinese, there are too many sections that are "subject to" too many other sections in the Companies Ordinance</p>

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	(Cap. 32) as well as other ordinances. Even a lawyer may have difficulties in understanding the relevant legal concepts under certain sections.
5.	<b><i>Protection of Wages on Insolvency Fund Board (PWIFB)</i></b> supports in principle the spirit and concept of the proposed corporate rescue scheme. The scheme, if implemented, would help reserve jobs.
6.	<b><i>Consumer Council (CC)</i></b> supports in principle the introduction of attempts to rescue companies in financial difficulty by means of provisional supervision by qualified persons. However, CC stresses the vulnerable position of consumers in dealing with companies subject to rescue, either because they are not aware of the attempted rescue or they do not fully appreciate the nature of provisional supervision. It is therefore important: (a) for the operation of corporate rescue to be widely publicized; (b) for adequate warning to be incorporated into notices of provisional supervision to be published to enable consumers to make an informed decision; and (c) to protect unwary consumers by prohibiting issue of prepaid coupons during moratorium, or by putting prepayments during provisional supervision into a trust account. The prepayments will be refunded to consumers if the corporate rescue fails.
7.	<b><i>The Chinese General Chamber of Commerce (CGCC)</i></b> considers that the subject of corporate rescue merits more thorough studies. While the implementation of a corporate rescue procedure may provide companies in financial difficulty an opportunity to make voluntary arrangement, it might not be of effective use if their financial difficulties are caused by the overall poor economic condition. If the number of companies to be benefited is small, it is not cost-effective to introduce and enforce the legislation having regard to the substantial resources involved.
8.	<b><i>PricewaterhouseCoopers (PWC)</i></b> is against the proposal that a company undergoing corporate rescue must clear all arrears of wages, severance pay and other statutory entitlements of its employees as if it were a going concern.
9.	<b><i>Hong Kong Exchanges and Clearing Limited (HKEx)</i></b> is in support of the corporate rescue procedure as it provides a mechanism whereby arrangements could be made to assist business to survive, in whole or in part, as a going concern than simply for it to be wound up.
10.	<b><i>CCIF Corporate Advisory Services Limited (CCIF)</i></b> is against the proposals on insolvent trading and expresses concern about the effect of the proposals on responsible people as defined under the Bill.
11.	<b><i>The Law Society of Hong Kong (LSHK)</i></b> points out that the need for a corporate rescue procedure has long been recognized as a deficiency in Hong Kong's corporate

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	insolvency law. The Bill goes somewhat towards meeting this need. However, in view of the requirement for a company to settle the wages and statutory liabilities owed to employees before the corporate rescue procedure commences, there is doubt that the procedure, if implemented, will in practice be widely used.
12.	<i>The Chinese Manufacturers' Association of Hong Kong (CMAHK)</i> considers that the Bill may provide a more favourable solution to both the debtors and the creditors, and to an extent, part of the workforce of the company can be retained and their employment ensured.
13.	<i>The Hong Kong Association of Banks (HKAB)</i> supports any initiative that promotes a corporate rescue culture but is concerned that the Bill makes the process of corporate rescue more difficult to effect. In various aspects there are flaws both at the technical and conceptual level, such as to call into question its workability. In the circumstances, HKAB does not feel able to support the Bill.  HKAB also considers that there will be an additional cost burden on the Government in having to provide the necessary resources to administer and adjudicate the process.

**Part B — Views on specific provisions of the Bill**

Clause No.	Subject	Views of organizations	Organization
Clause 5	Persons qualified to be provisional supervisor	Persons appointed to be the provisional supervisor of a company must be competent and impartial.	CGCC
Clause 6	Persons who may appoint provisional supervisor	The Bill has excluded the possibility for the small shareholders of a listed company and creditors to apply for the moratorium and participate in the appointment of the provisional supervisor.	CMAHK
Clause 8 and Schedule 2	Settlement of outstanding wages and other entitlements owed to employees	Under clause 8 and Schedule 2, the appointment of a provisional supervisor of the company should not come into effect unless and until, among others, an affidavit has been filed with the Official Receiver and the court confirming that either the company has no debts and liabilities owing by virtue of the Employment Ordinance (Cap. 57) to its employees or former employees; or that the company has a trust account, the exclusive purpose of which is to provide funds to pay all debts and liabilities due and owing by the company to its employees and former employees before the commencement of the corporate rescue procedure. LAB and PWIFB support these provisions.	LAB and PWIFB
Clause 8 and Schedule 2	Settlement of outstanding wages and other entitlements owed to employees	LAB, PWIFB and CGCC note that some members of the Bills Committee on Companies (Amendment) Bill 2000 were concerned that the Bill did not provide a flexibility to allow employees to trade in their claims for, say, shares of the company. Their views are as follows: (a) LAB and PWIFB consider that the proposed flexible arrangements would in fact impair the interests of employees concerned, reduce the	LAB, PWIFB and CGCC

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		<p>level of protection accorded to them under existing labour legislation and, furthermore, impose additional liabilities on the Protection of Wages on Insolvency Fund. PWIFB also considers that the proposed arrangements would change the mandate of the Fund; and</p> <p>(b) CGCC considers the proposed flexible arrangements inappropriate.</p>	
<p>Clause 8 and Schedule 2</p>	<p>Settlement of outstanding wages and other entitlements owed to employees</p>	<p>PWC puts forward the following arguments against the requirement of payment of employees entitlements before the commencement of the corporate rescue procedure:</p> <p>(a) How can a company in such dire financial difficulties find the money to meet employees liabilities, especially if the amount owed to employees is significant or there are many employees?</p> <p>(b) Where the company has a large number of staff or a number of highly paid staff, the requirement to meet employees liabilities in full will greatly restrict the ability of a company to implement the corporate rescue procedure;</p> <p>(c) It is unlikely that a bank would be willing to lend money to a company which is contemplating provisional supervision if the money would go straight to the employees;</p> <p>(d) It appears that the proposed provisions will encourage directors to prejudice the position of unsecured creditors by taking more credit from them in order to give employees a greater priority than they may otherwise have on insolvency;</p>	<p>PWC</p>

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		<p>(e) The requirement would mean that many companies would not be able to use the corporate rescue procedure and would be placed in liquidation. The employees' ultimate goal of keeping their jobs is likely to be lost; and</p> <p>(f) The requirement will result in a major inconsistency between the treatment of employees under provisional supervision and any other form of insolvency.</p>	
Clause 8 and Schedule 2	Settlement of outstanding wages and other entitlements owed to employees	The fact that outstanding wages would have to be provided for in a trust account means that cash has to be available at the outset. This would involve the need for creditor advances before embarking the corporate rescue procedure. This is likely to operate as a disincentive to use the procedure in many cases.	LSHK
Clause 10 and Schedule 4, Part 2	Duties and powers, etc. of provisional supervisor	<p>There are conflicts in the role of the provisional supervisor:</p> <p>(a) the risk of collusion between the provisional supervisor and the directors of the company;</p> <p>(b) the risk of collusion between the provisional supervisor and certain creditors of the company; and</p> <p>(c) the possibility of the provisional supervisor abusing his position for his own benefits.</p> <p>If the concept of provisional supervision is proceeded with, there should be at least a code of conduct for such work and some form of enforcement by a relevant professional body. Statutory remedies should be available for parties who are able to demonstrate abuse and statutory penalties for the provisional supervisor in breach of his duties.</p>	HKDF

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Clause 10 and Schedule 4, Part 2	Duties and powers, etc. of provisional supervisor	There is no mechanism in place to monitor the work of the provisional supervisor to ensure that he will not abuse the extensive powers given. The Official Receiver should have a role to play in appropriate circumstances.	LU
Clause 10 and Schedule 4, Part 2	Duties and powers, etc. of provisional supervisor	In addition to the proposed duties and power of the provisional supervisor, he should also be given the power and resources to investigate any fraud, dishonesty, incompetence, misconduct or irregularity in the management of the affairs of the debtors, and present a statement of such investigation to the creditors' meeting and the court for relevant action.	CMAHK
Clause 11	Moratorium	During the moratorium, there will be a stay of all proceedings against the company. However, this does not apply to a petition under section 168A (Alternative remedy to winding up in cases of unfair prejudice) of the Companies Ordinance. There is not much the provisional supervisor could do, pending the making of an order by the court.	LU
Clause 11	Moratorium	<p>Given that the provisional supervisor has the power to exclude any class or classes of creditors from the moratorium, there is an opportunity that the provisional supervisor will make compromised arrangements with certain secured creditors at the expense of all other parties. Such power of the provisional supervisor should be limited and any decision or arrangement made with the excluded creditors should first be approved by the court.</p> <p>While major secured creditors can be exempted from the moratorium, minor creditors should also be given the right to appoint a representative to discuss with the</p>	CMAHK

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		provisional supervisor collectively with regard to their claims and loan arrangements.	
Clause 12	Cessation of moratorium	The initial 30-day moratorium period is too short to complete the corporate rescue procedure.	CGCC
Clause 13	Extension of moratorium, etc.	On the proposal that the provisional supervisor may make an application to the court for an extension of the 30-day moratorium period, HKAB believes that the commercial issues surrounding a company and its creditors are best dealt with by the interested parties, leaving the court as the final arbiter in any dispute. The proposed amendments will be subject to abuse and serve to delay the liquidation of hopeless cases.	HKAB
Clause 14	Effect of moratorium on directors of company, etc.	Clause 14(1) provides that during the moratorium, a director of the company shall not discharge a duty or exercise a power imposed or conferred on him in his capacity as such a director, and the provisional supervisor shall discharge such a duty and may exercise such a power. As there is no contractual relationship between the Stock Exchange of Hong Kong (SEHK) and the provisional supervisor, it is doubtful whether SEHK would be able to effectively apply the Listing Rules on the listed company. Under such circumstances, upon the appointment of a provisional supervisor, trading of the listed company's securities on SEHK should be suspended. HKEx emphasizes that the right of SEHK to suspend the trading of a listed company's securities on SEHK should not in any way be curtailed by the corporate rescue procedure.	HKEx
Clause 16	Liability for certain	Clause 16 is not particularly easy to interpret. In effect, liabilities under	LSHK

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	contracts of employment	<p>existing contracts of employment, even if not accepted by a provisional supervisor, are charged on and paid out of the property of the company in priority to all other liabilities apart from fixed charges. However, companies seeking provisional supervision are likely to be at the point where they are in effect insolvent and/or have little funds or assets. It may take weeks or months to assess their financial position. The inability to assess the existence and value of company assets for meeting the charge under clause 16 at an early stage may discourage the company from using the corporate rescue procedure.</p> <p>Clause 16(2)(a) provides that where a contract of employment has not been accepted or terminated within 14 days immediately following the relevant date, then it shall be deemed to be terminated by the company. However, it would be unusual for banks or other creditors to be willing or able to make an assessment and commit to support the company within 14 days. As a result, the existing staff may not be retained.</p>	
Clause 23	Effectiveness of resolutions, etc.	Clause 23(1) provides that a relevant meeting of creditors shall not approve a proposal or modification which affects the right of a secured creditor of the company except with the consent in writing of the creditor concerned. LU is of the view that it requires a unanimous consent, which may not be easily obtainable.	LU
Schedule 4, Part 3	Power of delegation of provisional supervisor	Since the provisional supervisor may delegate in writing to any person any of his duties and powers imposed or conferred on him under the Ordinance, there should be a section on the qualifications of the delegate.	LU

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Schedule 4, Part 5	Remuneration of provisional supervisor	A monitoring mechanism should be put in place to ensure that the fees charged by the provisional supervisor are not excessive. The monitoring mechanism should be subject to review.	CGCC
Schedule 4, Part 5	Remuneration of provisional supervisor	The administrative costs involved in the appointment of the provisional supervisor and the remuneration paid to him should be at a reasonable level and be approved by the court before the official appointment.	CMAHK
Schedule 5	Contracts or other agreements to which section 11(2) of this Ordinance shall not apply	HKEx is in support of the exclusion of the contracts and agreements in Schedule 5 from the application of the corporate rescue procedure. It proposes that the contracts and agreements in Schedule 5 be extended to include any security provided to secure the liabilities of the company under an agreement or contract referred to in any of items 1 to 11 of Schedule 5.	HKEx
Schedule 8, clause 8	Insolvent trading	<p>The proposals to hold the directors and senior management of the company responsible for the company's insolvency are unduly harsh and unreasonable. The effect of these proposals may deter conscientious persons from taking up directorships, especially non-executive directorships.</p> <p>HKDF raises the following questions-</p> <p>(a) whether the presumptions of continuing insolvency and of insolvent trading where proper books of account have not been kept raise any difficulties in relation to the Bill of Rights; and</p> <p>(b) whether it is necessary to introduce a new definition of "director" in the insolvency legislation, or whether such legislation could simply refer to the existing definition in the Companies Ordinance.</p>	HKDF

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Schedule 8, clause 8	Insolvent trading	PWIFB considers that the proposed provisions relating to insolvent trading, if enacted, would be to the benefit of the workforce and would have a positive impact on the financial position of the Protection of Wages on Insolvency Fund.	PWIFB
Schedule 8, clause 8	Insolvent trading	CC supports the imposition of civil liabilities on directors and senior management of corporations responsible for insolvent trading, and considers that it is conducive to proper conduct of business.	CC
Schedule 8, clause 8	Insolvent trading	<p>The proposed introduction of the insolvent trading provisions may, instead of promoting debt restructuring plans at an early stage, cause further insolvencies. The effect of these provisions may be too overbearing on directors and senior management and exert too much pressure on them at a financially critical time.</p> <p>It is not sure whether the presumption of insolvent trading will infringe the Bill of Rights.</p> <p>The broadening of the scope of a responsible person to cover senior management is harsh.</p>	CCIF