

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

**The Administration's Comments on
Submissions on the Companies (Corporate Rescue) Bill**

(5 submissions — LC Paper Nos. CB(1)2027/00-01(09) to (13))

Submission from the Hong Kong Exchanges and Clearing Limited

We note that the Hong Kong Exchanges and Clearing Limited (HKEx) is in support of the corporate rescue procedure.

2. On the two specific points raised by the HKEx, we have the following comments –

- (a) the proposed moratorium under the Bill will not affect the right of the Stock Exchange of Hong Kong (SEHK) to suspend the trading of a listed company's securities on the SEHK; and
- (b) we agree that the proposed moratorium should not apply to any security provided to secure the liabilities of a corporate investor participant of the Hong Kong Securities Clearing Company Limited under an eligible financial contract.

Submission from CCIF Corporate Advisory Services Ltd

3. We note that CCIF Corporate Advisory Services Ltd is in favour generally of some form of legalised formal restructuring for companies.

4. On its comments on the provisions in the Bill relating to insolvent trading, we wish to explain that the purpose of such provisions is to encourage responsible persons of a company to face the fact that the company was slipping into insolvency at an early date and cause them to address the situation rather than to trade on regardless of the consequences. Responsible persons should become subject to liability for insolvent trading once a company traded while insolvent and the responsible persons, in certain circumstances, failed to take any step to prevent the insolvent

trading. Without the provision on presumption of continued insolvency in the Bill, the responsible persons may claim that the company was solvent at a particular date or for a certain period during the period between the date when insolvency is shown and the date of winding up, thereby denying liability for insolvent trading during this period.

5. The Bill, however, provides for a statutory defence for a director of a company if he can demonstrate that he took every step to minimise the potential loss to the company's creditors as he ought to have taken. As regards the role of senior management of a company, we consider it necessary for senior management to be under a duty to warn the board of directors when a company is or is about to trade while insolvent. Provided that such warning is given in good time, senior management would be protected from liability for insolvent trading.

Submission from the Chinese Manufacturers' Association of Hong Kong

6. We note the comment of the Chinese Manufacturers' Association of Hong Kong that the Bill can offer an opportunity for companies to carry out necessary corporate restructuring to turn the company around.

7. On the specific points raised by the Association, we have the following comments –

- (a) we do not consider that the creditors or individual shareholders of a company have sufficient knowledge of the financial position of the company to decide whether or not the corporate rescue procedure should be initiated. Hence, the Bill does not provide for them to have the right to initiate such a procedure;
- (b) the provisional supervisor's primary duty is to draw up a voluntary arrangement proposal for the creditors' consideration during the provisional supervision of the company. Whilst he will investigate any voidable transactions entered into by a company and report the outcome to the creditors, we do not consider it practical to require him to investigate fraud, dishonesty or similar malpractices on the part of the directors or the company, given the tight timeframe against which he needs to carry out his work. If he comes across any such malpractices, he may refer these to law enforcement agencies

for follow-up;

- (c) we do not consider it appropriate to require a provisional supervisor to seek the approval of the court for his decision on excluding certain creditors from a voluntary arrangement proposal. To do so would unnecessarily constrain the provisional supervisor's flexibility in discharging his duties. After all, the provisional supervisor is under duty to act in the best interest of the company;
- (d) the Bill contains no provision prohibiting minor creditors from discussing with the provisional supervisor collectively; and
- (e) the remuneration of the provisional supervisor will be determined in accordance with a scale of fees approved in writing by the Official Receiver. Provisional supervisors may not charge fees higher than the approved scale of fees unless with the court's sanction or approved by the relevant meeting of creditors. Moreover, if creditors of more than 50% in value of all relevant creditors do not agree with the remuneration of the provisional supervisor based on the approved scale of fees, they may apply to the court to reduce the remuneration.

Submission from the Law Society of Hong Kong

8. We note that the Law Society of Hong Kong recognises the need for a corporate rescue procedure in Hong Kong.

9. On its comments on the trust account requirement, we briefed the Legislative Council Panel on Financial Affairs on the rationale behind the requirement on 5 February 2001. A copy of the discussion paper is attached to our letter of 21 September 2001 to the Clerk to the Bills Committee. On the Law Society's comments on the use of the corporate rescue procedure, we take the view that the corporate rescue procedure is meant to provide an alternative for companies in financial difficulty to try to turn around. The extent to which the procedure will be used depends on the circumstances facing such companies in the future.

Submission from the Hong Kong Association of Banks

10. We note the concern of the Hong Kong Association of Banks (HKAB) that the Companies (Corporate Rescue) Bill will make the process of corporate rescue more difficult to effect. The purpose of the Bill is to complement the existing section 166 of the Companies Ordinance (which provides for a company in financial difficulty to agree to a voluntary arrangement with its creditors or members) by providing an alternative corporate rescue procedure which will protect a company in financial difficulty from its creditors' actions to wind up the company while a voluntary arrangement is being formulated.

11. Contrary to what was suggested in the HKAB's submission, during the drafting of the Bill, we had regard to the comments in HKAB's previous submission of April 2000 to the then Bills Committee set up to scrutinise the Companies (Amendment) Bill 2000, which contained the legislative proposals relating to corporate rescue. The Bill has already taken on board certain recommendations made by HKAB in that submission, including the following –

- (a) introducing the legislative proposals under a separate ordinance;
- (b) providing that the rights of all secured creditors may not be affected by a voluntary arrangement except with their consent and if a proposal is not acceptable to a secured creditor, he may choose to opt out of the voluntary arrangement and rely on his own security; and
- (c) giving the provisional supervisor the power to investigate the affairs of a company.

12. On the HKAB's comment on the involvement of the court in the extension of the proposed moratorium from the initial period of 30 days to a maximum of six months, we wish to explain that this has been carefully considered by the Law Reform Commission (LRC). The LRC's view is that it is necessary for the provisional supervisor to apply to the court for such extension because creditors' rights are suspended during the provisional supervision of a company and the creditors must be assured that the provisional supervisor is diligently formulating a proposal to be put to them. A requirement that the provisional supervisor must justify the

extension to the court would have the effect of keeping the provisional supervisor aware of his obligations and would force him to re-assess the prospects of a voluntary arrangement on a regular basis. We have accepted this view.

13. On the HKAB's comment on the cost to the Government arising from the proposed legislation, as explained in paragraph 39 of the Legislative Council Brief on the Bill, any additional resources required by the Government in connection with the enactment of the Bill will be absorbed by the Official Receiver through internal re-deployment and from within the global allocation of the Secretary for Financial Services.

Financial Services Bureau
25 September 2001

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