立法會
Legislative Council

LC Paper No. CB(1) 2028/99-00
(These minutes have been seen by the Administration and cleared by the Chairman)

Ref: CB1/BC/6/99/2

Bills Committee on
Companies (Amendment) Bill 2000

Minutes of meeting
held on Friday, 7 April 2000, at 10:45 am
in Conference Room A of the Legislative Council Building

Members present	**:**	Hon Ronald ARCULLI, JP (Chairman) Hon Albert HO Chun-yan Hon Margaret NG Hon HUI Cheung-ching Hon CHAN Kwok-keung Hon SIN Chung-kai
Members absent	**:**	Hon James TIEN Pei-chun, JP Hon LEE Cheuk-yan Hon Eric LI Ka-cheung, JP Hon CHAN Yuen-han Hon Mrs Miriam LAU Kin-yee, JP
Public officers attending	**:**	**Financial Services Bureau** Miss Julina CHAN Principal Assistant Secretary for Financial Services Mr L W TING Assistant Secretary for Financial Services

Official Receiver's Office

Mr E T O' CONNEL
Official Receiver (Ag)

Mr Edward LAU
Assistant Principal Solicitor

Mr Jeremy GLEN
Assistant Principal Solicitor

Department of Justice

Mr Geoffrey FOX
Senior Assistant Law Draftsman

Miss Shandy LIU
Senior Government Counsel

Clerk in attendance : Ms LEUNG Siu-kum
Chief Assistant Secretary (1)4

Mr Andy LAU
Chief Assistant Secretary (1)2

Staff in attendance : Mr KAU Kin-wah
Assistant Legal Adviser 6

Miss Irene MAN
Senior Assistant Secretary (1)9

I Meeting with the Administration
(LC Paper Nos. CB(1)1253 and 1319/99-00(01))

The Chairman advised that the draft Committee Stage amendment (CSA) to the new section 168Z on the purpose of the appointment of the provisional supervisor circulated to members vide LC Paper No. CB(1)1319/99-00(01) would be examined at a later stage. He invited Mr Edward LAU, Assistant Principal Solicitor of the Official Receiver's Office to continue his briefing on the corporate rescue flow chart.

2. Before continuing with the flow chart, Mr LAU clarified that since the chart only showed the major steps in a typical provisional supervision

procedure, there might be some modifications when applying to different circumstances. He also clarified that the provisional supervisor was required to serve a notice to each major creditor within three working days after the relevant date. He then continued to explain the procedure for extending the moratorium. He advised that as the original moratorium would only last for 30 days, the provisional supervisor would, in normal circumstances, have to seek extension of the moratorium from the court and the court would decide the length of the extension. If the provisional supervisor was unable to complete the proposal before the expiration of the extension, he could make another application to the court for another extension. The total moratorium period could not exceed six months from the commencement of the moratorium. If the moratorium needed to be extended beyond six months, a creditors' meeting instead of court approval would be necessary to sanction the extension.

Thresholds for approval and rejection of proposals

3. Mr LAU advised that once the voluntary arrangement plan was finalized, or when the provisional supervisor considered that none of the purposes specified under section 168Z could be achieved or there was a necessity to extend the moratorium to over six months, a relevant meeting of creditors had to be held. At the meeting, the creditors might either approve or reject the provisional supervisor's proposal, or in the latter case, accept or reject the extension of the moratorium beyond six months. To approve a proposal, the majority in number and 2/3 in value of the claims was required. However, for other resolutions to be passed regarding rejecting the proposal and extension of moratorium, apart from the majority in number, only 1/2 in value of the claims was needed.

4. The Chairman enquired about the reasons for a different threshold in section 168ZT(15) between approval and rejection of proposals and about the arrangement when there was less than 2/3 in value but more than 1/2 in number of the creditors approving the proposal. The Official Receiver (Atg) (OR/Atg) referred to paragraph 16.37 of the LRC report and advised that in that case, the proposal would still fail. Mr Jeremy GLEN, Assistant Principal Solicitor of the Official Receiver's Office supplemented that in order to accept a proposal for a voluntary arrangement, it would require a majority number of 2/3 in value which was a clear and definite step. For any other proposals such as extending the moratorium beyond the six months without the protection of court, 1/2 in number and 1/2 in value would be required. In other words, the threshold required for the proposal to be accepted would be higher.

5. The Chairman noted that in accordance with section 168ZR(2)(b)(vi)(B), 2/3 in value was required under (B)(I) for approval of the proposal, 1/2 under (B)(II) for adjournment of the meeting awaiting submission of a modified proposal of the provisional supervisor, and 1/2 under (B)(III) for rejection of the proposal. He considered that so long as the 2/3 in value was

not obtained, it was already a rejection and should not necessarily require 1/2 for the rejection. If the provisional supervisor wished to modify the rejected proposal with some more time but did not obtain support from 1/2 of the creditors, it would also mean the end of the supervision procedure. As such, the difference in the thresholds for approval and rejection was not necessary. SALD agreed that any proposal failed to get an approval would automatically mean a rejection. Mr LAU also agreed that the present form of drafting was not clear enough and undertook to review it.

6. Mr LAU advised that if a proposal was rejected or none of the purposes in section 168Z could be achieved, and no resolution was passed to extend the moratorium, the moratorium would come to an end. The company would end up in creditors' voluntary winding up deemed to commence on the relevant date as provided for in section 168ZT(17). All the same, the moratorium would also come to an end if the proposal was approved. Voluntary arrangement would then take effect binding all relevant creditors concerned. A supervisor of the voluntary arrangement would be appointed. He would have to file copies of the voluntary arrangement with the relevant authorities and publish a notice in the Gazette and newspapers as provided for in section 168ZU(2). He would also start administering the company according to the approved arrangement and terms.

Exemption from moratorium

7. As regards extension of the moratorium period, Mr LAU explained that within the first six months of the moratorium, the decision rested entirely with the court. After the first six months, creditors' consent would have to be sought for any further extension and the court would not be involved. The period of the extension would also be a matter entirely between creditors and the provisional supervisor. SALD and Mr LAU advised that the provisions dealing with the right of creditors of extending the moratorium beyond the first six months were sections 168ZR(2)(b)(vii)(C)(II) and 168ZS(2)(a) and (b).

8. Mr Albert HO asked whether creditors could apply to the court to intervene the extension of the moratorium. OR/Atg advised that section 168ZE(4) provided for individual creditors on grounds of exceptional financial hardship to apply to the court for exemption from the moratorium. SALD added that with the approval for exemption, the creditor concerned would not be bound by the moratorium and could take necessary actions. Section 168ZD(9) provided that the provisional supervisor could make alternative arrangements with these creditors. In the event that a court order of exemption was made to a creditor, the court might also attach to the order conditions that it might consider necessary. As such, the creditor would probably allow more time for the provisional supervisor and would not hurry to institute proceedings for winding up the company concerned.

9. Noting that individual creditors could make an application to the court to be exempted from the moratorium on the ground of significant financial hardship, the Chairman considered that the provisional supervisor would be forced to come to a deal with the creditors exempted. He expressed concern that small creditors could easily justify their significant financial hardship and would be allowed to wind up the company despite the commencement of the rescue procedure. SALD referred to paragraph 5.36 of the LRC report and said that the Chairman's concern had been considered by the LRC. Mr GLEN advised that the provision of exemption on the ground of significant financial hardship was modelled on the Canadian Bankruptcy and Insolvency Act. He said that an alternative proposal could be simply to force creditors into the moratorium.

10. Mr Albert HO supported the court's monitoring of the provisional supervision within a definite period and expressed objection to the intervention by any parties in the course of the moratorium. He also considered that it was not necessary to extend the moratorium further after the first six months for if the company could not be saved in half a year, it would less likely be saved with further extension. The allowance of extension of moratorium after six months and the intervention of creditors during the moratorium would only complicate the procedure and add cost to it. OR/Atg advised that the small creditors could only go to court to apply for exemption when he was unable to reach an agreement with the provisional supervisor over the purchase of all or part of his claims. After the exemption was granted, he could apply for winding up of the company but presumably the provisional supervisor should have told him that more could be recovered in the voluntary arrangement than in the winding up procedure. It would become a commercial choice for that single creditor. The Chairman also held the view that the creditors should not be given a right to intervene the proceedings.

11. Mr Albert HO sought clarification on whether the exempted creditor could immediately bring proceedings against the company under the provisional supervision period. In other words, whether the company might also be wound up theoretically during the moratorium. OR/Atg advised that it was theoretically possible. The exempted creditor could make a commercial decision what was in his best interest i.e. to go for the provisional supervisor's proposal or the winding up procedure.

12. The Chairman enquired whether employees would be included into the category of creditors in seeking exemption. In response, OR/Atg said that outstanding wages owed to employees would be handled by the trust account. For employees on continued contracts of employment after the commencement of the provisional supervision, the provisional supervisor would have to be personally liable for their wages and to pay them on an ongoing basis. If for some reason the provisional supervisor was not able to pay them, they would be entitled to claim against the company, like any other creditors, the debts

arising after the commencement of the provisional supervision. The Principal Assistant Secretary for Financial Services (PAS for FS) added that all debts incurred after the moratorium would not be bound by the moratorium.

Cost and scandal

13. Miss Margaret NG expressed reservation about the practical value of the rescue procedure in view of its heavy cost due to the indemnity to the provisional supervisor who would be paid out of the assets of the company irrespective of his achievement in the end. OR/Atg advised that the LRC had considered the practicability of the corporate rescue model and stressed that it did not matter whether the procedure could be used frequently or not as long as there were some companies which could benefit from the rescue procedure when it was applied.

14. As regards Miss Margaret NG's concern about the possible abuse of the provisional supervision, Mr GLEN advised that the rescue procedure would be used by those who were in genuine need of assistance. The provisional supervisor taking over the control of the company would have to be a very well qualified and recognized person. Since the provisional supervisor would have to go to court after 30 days to give reasons when applying for an extension of the moratorium at the court's discretion, the court would be involved in regulating the action of the provisional supervisor in the first six months. Adequate safeguards would be in place to avoid the abuse.

15. Miss Margaret NG considered that it would be necessary to develop a mechanism through which the feasibility of the proposal could be known at an early stage so that the payment out of the company's assets could be restricted. Mr GLEN said that the provisional supervisor would have been brought in some time before the moratorium. He would have advised the directors on the situation of the company. A lot of preparatory work would have been done by all the parties concerned, including the major secured creditors. Unless there was a good chance that a voluntary arrangement could be achieved, the procedure would not be started.

16. OR/Atg supplemented that since the duties and obligations of the provisional supervisor were so important, the LRC recognized that a professional with expertise and integrity was required to undertake the task. Once the provisional supervision commenced, the provisional supervisor should know quickly whether the company could be saved or not. If there was no chance, the moratorium would come to an end soon. Practically speaking, before the commencement of the procedure, the directors of the company would have discussed with the provisional supervisor, who should already have the books and accounts of the company in hand, on whether to start the formal procedure.

Powers of provisional supervisor

17. Mr Albert HO was concerned about the provisional supervisor's power being greater than that of a liquidator. The duty of a liquidator was to administer the estate in strict accordance with the law and there was a list governing the priority in paying off the creditors, whereas a provisional supervisor had a wide discretion in this respect and could select to pay off certain creditors first. As such, he asked whether the provisional supervisor was obliged to give reasons to the creditors to seek their support for his decision, and what action the creditors could take if they found the decision unacceptable.

18. OR/Atg advised that the role of the provisional supervisor was as an agent of the company under the bill and should bear the duty of care in the course of the supervision. SALD further advised that the provisional supervisor would have to file a notice in the specified form with the OR, the Company Registrar and the High Court Registry. Although the design of the form had not been finalized, it would take into account Mr HO's concerns to include in the form the names of the creditors, details of the debts and how they would be settled so that all parties concerned would be fully aware of the situation. If the creditors had doubts about the reasons provided by the provisional supervisor and believed that the provisional supervisor had breached his duties, they could take appropriate action in court.

19. In response to Mr Albert HO's enquiry on whether the Bill had stipulated the action that could be taken against the provisional supervisor, OR/Atg said that the legislation was too complex to build in more provisions and there were already sufficient safeguards in the present proposal in this respect. After the company had been saved, the board of directors could take action against the provisional supervisor for any breach of his statutory duties in relation to the affairs of the company. In case the company was not saved, the liquidator could also take action against him for any breach of statutory duty under section 276 of the Companies Ordinance (Cap. 32).

20. Mr Albert HO sought clarification on whether the above remedy could only be available after the company had been rescued or wound up, but nothing could be done in the course of the supervision. Mr GLEN explained that a provisional supervisor would have to get his proposal of voluntary arrangement passed by a significant number of creditors in the creditors' meeting. He would therefore have to perform his duties to the satisfaction of the creditors. Moreover, as only few people were qualified to become provisional supervisors, he believed that the potential provisional supervisors would keep up their own professional reputation when discharging their duties. OR/Atg added that the integrity of the professionals who took up the role of a provisional supervisor had to be respected and there would also be adequate checks and balances within their profession organizations.

21. Miss Margaret NG remarked that while the integrity of professionals was to be respected, the Administration should not use it to patch up with any scheme which was not completely sound. Sufficient safeguard should be secured at all times. OR/Atg stressed that in Hong Kong, disqualification proceedings against liquidator had never been instituted by the OR office, and neither had any prosecution been instituted against any liquidator for the breach of duties under the Companies Ordinance (Cap. 32).

22. The Chairman enquired about the requirements for creditors to convene a meeting during the moratorium. SALD advised that section 168ZO(1)(a) stipulated the requirement for creditors to remove the provisional supervisor. If they decided to remove the provisional supervisor, the moratorium itself would still go on until a new provisional supervisor was appointed. The Chairman noted that in order to remove a provisional supervisor in accordance with section 168ZO(1)(a), 50% in value of all relevant creditors would have to agree in writing. Mr GLEN added that paragraphs 11.1, 11.2, 11.3 and 11.4 of the LRC report provided further information on the removal and resignation of the provisional supervisor.

23. Mr Albert HO suggested that the Administration provide an information paper setting out the checks and balances of the powers of the provisional supervisor in the interest of the creditors and shareholders.

(*Post-meeting note*: Members agreed at the meeting on 10 April 2000 that the part of the Bill on corporate rescue should not be considered in the current LegCo session.)

Court intervention

24. The Chairman enquired why the court's approval was required during the first six months of the moratorium for any extension but not after the six-month period. Mr GLEN explained that it was necessary to convey a clear message to creditors that the procedure would be confined to a definite period under the court's protection. The purpose of the six month moratorium was to give the company a breathing space so that everyone could concentrate on developing a plan to rescue the company within the period. In fact, one of the criticisms regarding Chapter 11 of the US Bankruptcy Code was that the procedure dragged on for too long and was too open ended. The present model in the Bill followed the Canadian Bankruptcy and Insolvency Act which also provided for a six month moratorium. After the first six months, it would be a matter for the creditors to decide whether creditors' meetings should be held periodically to approve the extensions.

25. The Chairman remained unconvinced of the involvement of the court only during the first six months but not after. Mr GLEN explained that when the provisional supervision was initiated by the company, a notice would be

filed immediately to get the protection of the court. Maintaining the court's protection in the first six months was to get all parties concentrated on coming up with a proposal during that period. Besides, the provisional supervisor would not have to hold any creditors' meetings but would only have to report to the court direct within the six month period. However, before the six month period came to an end, the provisional supervisor should have a creditors' meeting, subject to the court's approval, reporting on the progress of his proposal. After the six month period, extension of the moratorium would be subject to creditors' consent, and whether there would be regular creditors' meeting was also entirely the creditors' choice. Therefore, the difference in the creditors' meeting before and after the six month period was that the provisional supervisor and the company could be protected by the court from legal action taken by creditors before but not after the six months. SALD echoed Mr GLEN's advice and added that when the provisional supervisor, towards the end of the six months, called a creditors' meeting seeking extension beyond the six months to complete the proposal, it was the time when the creditors kicked in to decide for the company rather than the court.

26. However, the Chairman pointed out that it would not be mutually exclusive even if approval had to be sought from the court after the six month period upon the majority creditors' consent to extend the moratorium and to allow the provisional supervisor to carry on his proposal. SALD advised that it would be meaningless if creditors approved the extension while the court did not. In other words, if it was the creditors' decision to extend the moratorium after the six months, there was no point for the court to get involved under that circumstance.

27. Nevertheless, Mr Albert HO shared the Chairman's view that if the court was trusted in the first six months, it should not be disregarded in the period afterwards. The court could work as a safeguard for creditors who were not satisfied with the extension of the moratorium. He held the view that the extension of the moratorium would in effect continue to take away the right of some unwilling creditors to sue the company, so those who agreed to the extension of the moratorium should also bear the burden of justifying it. In that circumstance, the court would be in a position to decide whether extension should be granted taking into account the interest of the unwilling minority creditors. SALD considered that if unanimous support of creditors was gained for extension of the moratorium after the first six months, it should be unnecessary to go to court. However, according to Mr HO's suggestion, in the absence of the unanimous support, the case would have to go to court even if very small amount was owed to a minority creditor. The Chairman still remained unconvinced of not having the court's intervention after the six month period for he considered the damage after the first six months might even be greater. PAS for FS undertook to consider the court's involvement after the first six months.

Other concerns

28. Miss Margaret NG requested the Administration to provide information on how members of the panel of professional accountants and solicitors were appointed by the OR under section 168W to ensure transparency and fair competition. Besides, she enquired how the Administration would address the potential conflict for the provisional supervisor to become the provisional liquidator as the provisional supervisor might deliberately fail the rescue to make way for him to become the provisional liquidator. OR/Atg advised that towards the end of the provisional supervision, creditors might decide at the relevant meeting that the company be wound up as a creditors' voluntary winding up. The creditors would have to appoint a liquidator. However, if a person other than the provisional supervisor was appointed to be the provisional liquidator, he would have to start things all over again and it might waste much time and cost.

Admin OR/Atg undertook to provide a paper to further address Miss NG's concerns.

(*Post-meeting note*: Members agreed at the meeting on 10 April 2000 that the part on corporate rescue of the Bill was not to be considered in the current LegCo session.)

29. The Chairman reminded the Administration to provide the views of the Small and Medium Enterprises Committee on the bill. The next meeting was scheduled for 10 April 2000.

(*Post-meeting note*: The correspondence between the Administration and the Small and Medium Enterprises Committee were circulated to members vide LC Paper No. CB(1) 1355/99-00(04).)

30. There being no other business, the meeting ended at 12:45 p.m.

Legislative Council Secretariat
1 September 2000