立法會
Legislative Council

LC Paper No. CB(1) 2007/99-00
(These minutes have been seen by the Administration and cleared by the Chairman)

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Bills Committee on
Companies (Amendment) Bill 2000

Minutes of meeting
held on Friday, 31 March 2000, at 8:30 am
in Conference Room A of the Legislative Council Building

Members present	**:**	Hon Ronald ARCULLI, JP (Chairman) Hon HO Sai-chu, SBS, JP Hon Albert HO Chun-yan Hon Eric LI Ka-cheung, JP Hon Margaret NG Hon HUI Cheung-ching Hon CHAN Kwok-keung Hon CHAN Yuen-han Hon Mrs Miriam LAU Kin-yee, JP
Members absent	**:**	Hon James TIEN Pei-chun, JP Hon LEE Cheuk-yan Hon SIN Chung-kai
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

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 1271/99-00(01))

Intervention by regulatory authorities

At the invitation of the Chairman, the Senior Assistant Law Draftsman (SALD) briefed members on the requested information in relation to the intervention by the regulatory authorities under the Banking Ordinance (Cap. 155) and the Insurance Companies Ordinance (Cap. 41). Both Ordinances contained provisions on the appointment of Managers similar to that of the provisional supervisor in the Bill. As a matter of fact, some of the powers given to the provisional supervisor were modelled on the seventh schedule to the Insurance Companies Ordinance (Cap. 41).

2. Addressing Mr Albert HO's enquiry on whether the Insurance Companies Ordinance (Cap. 41) provided for the suspension or removal of directors by the Manager, SALD clarified that according to section 38A(1) of the Ordinance, the appointment of the chief executive and directors of the insurer would be deemed revoked. The Manager would be given extensive power to manage the affairs, business and property of the insurer. Similar provisions were also stipulated under the Banking Ordinance (Cap. 155). Therefore, the powers so given to the provisional supervisor in the Bill had drawn its reference to the existing provisions of these two ordinances.

Legal impact of section 168Z(1)

3. At the invitation of the Chairman, Mr Edward LAU, Assistant Principal Solicitor of the Official Receiver's Office explained to members the corporate rescue flow chart which included the major steps involved in a provisional supervision procedure. Addressing the Chairman's enquiry on the new section 168Z, Mr LAU explained that section 168Z stipulated the purposes of the proposal to be made by the provisional supervisor. The persons who appointed the provisional supervisor would have to satisfy themselves that there was reasonable likelihood that one or more of the purposes stated in section 168Z(1)(a) to (d) could be achieved.

4. The Chairman enquired whether there would be informal discussions with the prospective provisional supervisor before the procedure commenced. Mr LAU advised that there was no statutory requirement for such discussion sessions but informal discussions should have started as soon as the prospective provisional supervisor had been identified. It would be important for the provisional supervisor to make assessments and to discuss with the directors before the commencement of the rescue procedure on how the purposes in section 168Z(1) could be achieved, since he would only have a limited period of 30 days initially to come up with a proposal. Mr Jeremy GLEN, Assistant Principal Solicitor of the Official Receiver's Office added that not only would the directors discuss with the prospective provisional supervisor, but also with the main lenders, such as the bankers.

5. The Chairman enquired about the position of the company if the proposal of the provisional supervisor could not gain the support from the creditors or could not be made within the first 30 days. OR/Atg advised that in that circumstance, there would be no difference from what had already existed under section 166 where the company might find itself in financial difficulty and seek to reach an agreement with the creditors through informal corporate workout. Under section 166, there was no moratorium and the creditors could come in any time objecting to the proposals put forward by the company. Therefore, the provision of corporate rescue would not take away the creditors' right but would only provide a further procedure for directors to save the company without the major support of their lenders.

6. The Chairman said that Chapter 11 of the US Bankruptcy Code was able to draw a clear line at the initial stage of the procedure that the assets of the company would be frozen once its case was filed. However, for the proposed rescue procedure, certain procedures had already been taken before the appointment of a provisional supervisor; and if the proposal turned out to be not workable, the whole proceedings would be futile and the company had to fall back on section 166. In response, Mr GLEN said that there were large differences between the two procedures. Under the corporate rescue proposal, the directors could seek advice from the identified provisional supervisor to first assess whether the company could be saved and whether it should commence the provisional supervision procedure. However, the Chapter 11 proceedings were basically a debtor protection procedure whereby the directors put the company to such proceedings and got the protection of the court in order to work out a deal. Although a debtor protection procedure had not been proposed in the consultation, it was generally believed that the procedure was not a favourite option in Hong Kong. As regards the current proposal for corporate rescue, Mr GLEN said that the board of directors taking the initiative to bring in a provisional supervisor to make a rescue proposal for the company was believed to be a responsible board, because they did not wait until the last moment, but handed the control of the company over to a provisional supervisor for a corporate rescue.

7. As the new section 168Z(1) stated that a provisional supervisor should not be appointed unless the company was satisfied that there was a reasonable likelihood that the person so appointed could make a proposal, the Chairman sought the Administration's clarification on whether the informal discussions among the directors of the company were considered a pre-condition for the 30-day moratorium. SALD explained that after identifying a person to be the provisional supervisor, the company would examine whether any of the purposes in section 168Z(1) could be achieved if the provisional supervisor was appointed. Although the company might not yet be certain of its chance of survival, the provisional supervision procedure could already stop the creditors from taking any legal action against the company while the provisional supervisor was making a proposal to achieve the purpose(s) specified in section 168Z(1) within the 30-day moratorium. OR/Atg supplemented that since the moratorium would be a serious step affecting the interest of the creditors, the provisional supervisor should have the qualifications and capability to satisfy the directors that one or more of the purposes in section 168Z(1) could be achieved before he was appointed.

8. Miss Margaret NG noted that in practice, responsible directors would have gone through informal discussions with the prospective provisional supervisor. She enquired about the legal effect of section 168Z. SALD advised that if creditors believed that the appointment of the provisional supervisor was purely to try to delay repayment of their debts, they could go to the court and challenge that there was no reasonable ground for the board of

directors to conclude that any of the purposes specified in section 168Z(1) could be achieved by the provisional supervisor.

9. Miss Margaret NG enquired whether a person in the middle of the provisional supervision process could claim that section 168Z(1) had not been really satisfied before the commencement of the process and take legal action on the dispute. OR/Atg advised that the situation would not occur if the provisional supervisor managed to come up with a proposal to the satisfaction of the creditors within the 30-day moratorium and started the voluntary arrangement. However, if he failed to come up with a proposal during the 30-day moratorium, he would have to convince the court that there were reasonable prospects of saving the company with an extension of the moratorium. If the court was not satisfied that there was any chance to turn the company around, it would give no extension and the matter would come to an end leaving the creditors to decide further actions.

10. Miss Margaret NG said that the directors of the company would have already gone through a process of assessments on whether there was a reasonable likelihood of achieving the purposes designated before appointing a provisional supervisor. However, once such process was put in the legislation, it could be litigated. SALD suggested redrafting section 168Z(1) so that it would simply encapsulate the power to appoint a provisional supervisor with a view to achieving one of those purposes without putting any burden on the directors or any parties. OR/Atg advised that the section could be amended to clarify the position so that the provisional supervisor would know one of the purposes had to be achieved once the procedure was initiated. Miss Margaret NG agreed that the purpose of the appointment be clearly stated in the legislation for the benefit of the appointee.

(*Post-meeting note*: The proposed Committee Stage amendment on section 168Z(1) was circulated to members vide LC Paper No. CB(1) 1319/99-00 (01).)

Providing flexibility to the trust account requirement

11. Regarding Miss CHAN Yuen-han's concern on settling all the arrears of payments owed to employees by means of setting up a trust account before the rescue procedure, the Chairman reiterated his concern raised at the previous meeting that the Administration should consider providing flexibility in the legislation so that a company, with its employees' consent, could still initiate the rescue procedure even if the trust account was not set up.

12. Miss CHAN Yuen-han considered that employees often had little say at the critical moment when a company was in financial difficulty. The present proposed requirement of the trust account could therefore best protect the employees' rights. She emphasized that any amendment to the employee

arrangements proposed in the Bill should be carefully considered as under the corporate rescue proposal, the employees were already deprived of their original right of seeking assistance from the Protection of Wages on Insolvency Fund. She suggested that any proposal for imposition of flexibility in respect of the requirement for setting up a trust account should first be discussed in the Labour Advisory Board (LAB).

13. Miss Margaret NG pointed out that without stating the flexibility in the legislation, even with the employees' consent, the company could not enter into the rescue procedure. She nevertheless showed understanding that employees might not be able to express their free will in various circumstances. As to the suggestion of going back to the LAB for discussion of the flexibility proposal, she considered that since there were employee representatives in the Legislative Council, the matter should be settled without referring back to the LAB.

14. Mr Albert HO considered that it might be helpful if certain levels of employees could be given an option to save the company by receiving less than the full payments while others, especially the lower ranks, would still receive full payments. This kind of flexibility might also help reduce unemployment. He pointed out that should there be flexibility introduced in respect of the trust account requirement, it might not be possible to obtain consent from 100% of employees and a majority's consent should be considered.

15. However, the Chairman remarked that if the flexible arrangement had to be passed by voting, every person of the company should have an equal share of voting right instead of taking different votes from different ranks of employees. Nevertheless, he did not reject the possibility that employees of the same company might have different arrangements.

16. Miss CHAN Yuen-han said that from her past experience in handling employee cases arising from winding ups, if a company was not able to settle the arrears of payments owed to employees by establishing the trust account as proposed in the Bill, that company might not worth saving. Companies which had used up the employee payments for struggling through their businesses usually failed in the end and employees would gain nothing ultimately. Furthermore, when a company was in financial difficulty, the employee representatives who negotiated with the employers were usually of senior levels, employees of lower levels would have little say since they were usually not aware of the real situation of the company. The requirement of a trust account was therefore necessary for the protection of the lower rank staff. She added that since employee payments often made up a small part of the company's debts only, many companies should be able to settle them before the rescue procedure. From her experience, companies which could be saved in the end were normally those capable of paying up the arrears of payment to employees.

17. Miss Margaret NG held the view that the proposed corporate rescue procedure might only be able to apply in few circumstances if the setting up of a trust account had to be a prerequisite. She considered that the practicability of such requirement should be assessed in order to help determine the benefit of passing the Bill. Mrs Miriam LAU shared Miss NG's view that the Bill might only be used under very few circumstances. She agreed to the suggestion of introducing flexibility in respect of the trust account requirement so that both the company and the employees could have an additional alternative. On the contrary, Miss CHAN Yuen-han maintained the view that the chance of survival for a company which was in heavy debts, including those owed to employees, was indeed very little. She was worried that the provision of flexibility might not be able to provide adequate protection to employees of lower ranks.

18. Mr Eric LI said that a similar suggestion of providing flexibility to the requirement had been made to the Administration before. It had been proposed that in the event that a company did not have sufficient funds to establish the trust account, a guarantee fund could be set aside so that it served a minimal protection for employees. As to the establishment of the trust account, the employer sectors had suggested that the Administration finance the account. However, it was turned down in the end.

19. Miss Margaret NG and Mrs Miriam LAU reiterated their concern on whether the requirement for a trust account was too impractical. Mr Albert HO said that providing flexibility to the requirement might be helpful to those companies which only had short-term cash flow difficulties and might need more time, for instance, to sell their assets, to resolve the problem.

20. Mr Eric LI pointed out that many companies had financial difficulty not because they did not do well in their business but because of the loss suffered from overseas investment after the recent financial downturn and the decline in the local property market. The earnings they gained from their business often had to pay off the debts to banks making them suffer from serious financial problem. With the introduction of the moratorium, debts could be frozen and with the normal business return, there should not be problems with the payments to employees. The companies could also sell their assets within the moratorium to settle their debts and it was not difficult for them to settle payments to employees with the continuation of business.

21. Miss CHAN Yuen-han remarked that unlike the loans owed to big lenders such as banks, employee payments usually did not constitute the biggest part of the debts of a company. The directors could have come up with some agreements with the employees before initiating the corporate rescue procedure. The provision of flexibility in the trust account requirement would therefore not be very useful.

22. The Chairman however held an opposite view and cited the example of the restaurant trade which had suffered serious financial difficulty during the economic recession. He said that some restaurant owners handed over the management to the employees and as long as the employees could keep the restaurant running, the owners did not charge any rent from the employees (provided the owners were also landlords of the restaurant). He considered that flexible arrangement between employers and employees could really help to save the business in one way or the other. Mr Albert HO expressed concern that even if employees were willing to give the company a chance to turn around, it was often the creditors who ruined the rescue and petitioned for immediate winding up of the company.

23. Mr Eric LI reiterated the benefit of introducing the corporate rescue procedure in the Bill. He said that the companies usually would have done a lot to rescue themselves. However, without an effective statutory procedure and legal protection, creditors often did not have enough confidence in the directors for there was no guarantee of the implementation of the resolutions after the discussions and nothing to bind the promise of the directors. Moreover, the absence of a statutory procedure would hinder new investments from investors since they would also be subject to no legal protection. As far as he knew, a lot of informal discussions or workouts had been carried out in many cases but almost none succeeded in the end simply because of the lack of confidence in the management. Very often, it was the small creditors that hindered the rescue procedure. With the introduction of an independent provisional supervisor, a one-month moratorium and the supervision of the court, creditors' right would be better protected and the company would have a chance to turn around. A legal arrangement recognized by all parties concerned was important in corporate rescue.

24. Miss CHAN Yuen-han agreed that the small creditors were usually more anxious about their debts because they often did not know much about the internal situation of the companies and did not have confidence in the directors. With the provision of the rescue procedure in the Bill, their anxiety could be relieved. Mrs Miriam LAU followed up on the point that since small creditors should be encouraged to wait and give the company a chance to turn around, the employees should also be able to show their consideration for the company by giving the company a flexibility in the provision of the trust account so that full payments were not required from the employer at one time. Miss CHAN Yuen-han however pointed out that if the payments owed to employees were a huge amount, the company concerned might not be saved even with the introduction of the rescue procedure. Companies which could be saved in the end were usually those owing only a small amount of payments to employees and in such circumstances the provision of flexibility in the trust account, therefore, would not be necessary. She considered that the rescue procedure proposed in the Bill would be helpful in that the provisional supervision could effectively hinder the small creditors from winding up the company

immediately. She stressed that very often, it was not employee payments that mattered but the creditors' trust in the directors.

Funding in the trust account

25. The Chairman sought clarification on section 168ZA(c)(iv) regarding the authorized institution. Mr LAU advised that an authorized institution usually referred to a bank. When the rescue procedure commenced, the company would have to fulfill certain conditions, one of which was the establishment of a trust account with a bank in which there should be sufficient funds to settle the arrears of payments for employees. However, he clarified that the trust account need not include any possible arrears of payments to employees in the future. Once sufficient funds were deposited into the trust account, the provisional supervision procedure could commence.

26. Miss Margaret NG considered that the trust account should be set up before the directors entered into any discussion with the prospective provisional supervisor. SALD however advised that there was no point of setting up a trust account if no qualified person to be the provisional supervisor could be found.

27. Mr Eric LI enquired whether the director or the member making an affidavit under section 168ZA(c) would bear personal liability if the money in the trust account turned out to be insufficient to pay the liabilities and debts. SALD advised that it depended on whether the affidavit was intentionally false. However, the Chairman considered that an unintentional mistake might not exclude the person concerned from personal liability. Besides, he enquired how the amount required to settle all the arrears of payments to employees was determined, for instance, whether the consent of every employee would have to be obtained.

28. In response, Mr LAU advised that in practice, the amount to be deposited in the trust account was likely to subject to dispute. The intention of setting up the trust account was to have sufficient money set aside so that payments to employees could be made available when necessary. SALD suggested that subject to the agreement of the Bureau, a provision could be added to protect a person who inadvertently made a mistaken affidavit from personal liabilities. The Chairman however expressed reservation on this suggestion.

Notice served on major creditors

29. At the enquiry of the Chairman on the three working days for the provisional supervisor to serve notice on major creditors, Mr LAU explained that after the provisional supervision process had started from the relevant date which was the time of the last filing of documents and from the commencement

of the moratorium under section 168ZD, the provisional supervisor would be required under section 168ZQ to give notice within three working days to the major creditors of a company in accordance with section 168ZQ(5). The purpose of serving the notice on the major creditors was to seek their agreement on the continuation of the provisional supervision procedure. The major creditors would be given three days to reply. Where a major creditor did not agree with the provisional supervisor proceeding to prepare the proposal, the moratorium would end and the provisional supervision procedure would come to an end; if he agreed, the procedure would continue with the provisional supervisor carrying on the proposal.

30. Addressing the Chairman's enquiry about the threshold for approving the proposal at the meeting of the relevant creditors, the Principal Assistant Secretary for Financial Services explained that for any resolution to approve the proposal or the modification of a proposal, there had to be a majority in number and in excess of $66^{2}/3$% in value of the creditors present in person or by proxy and voting on the resolution.

31. The Chairman enquired about the arrangement should there be no secured creditor as in the case of huge corporations which might have a huge but unsecured debt. SALD advised that if there was no major creditor, section 168ZQ would not apply and the process would go on as if the creditors had been consulted. Where there were no secured creditors and no major creditors, the provisional supervision process would still continue. The provisional supervisor could ignore section 168ZQ and might go down the same line in the flow chart as if the consent of the major creditors was obtained and proceed to section 168ZR direct. Addressing the Chairman’s enquiry on the relevant creditor, SALD advised that the relevant creditor was defined in section 168U.

32. The next two meetings were scheduled for 7 and 10 April 2000. There being no other business, the meeting ended at 10:30 a.m.

Legislative Council Secretariat
21 August 2000