

嶺南大學的信頭
Letterhead of LINGNAN UNIVERSITY

20 March 2000

Ms Leung Shi-kum
Clerk to Bills Committee
Legislative Council

Dear Ms Leung

I refer to your letter of 8 March 2000 addressed to our Dean of Faculty of Business in connection with the Companies (Amendment) Bill 2000. It was received on 10 March and was subsequently passed to me for reply on or before 21 March.

In view of the short notice I shall focus on the proposed law relating to (i) provisional supervision and voluntary arrangements, and (ii) insolvent trading.

Provisional Supervision and Voluntary Arrangements

The principal purpose of the Bill is to amend the Companies Ordinance (cap 32) to give effect to the recommendations contained in the Report on Corporate Rescue and Insolvent Trading issued by the Law Reform Commission of Hong Kong in October 1996.

It is common ground that section 166 of the Companies Ordinance is not very useful in an insolvency situation, because it lacks a moratorium element. Until the court makes the order sanctioning the scheme of arrangement, there is nothing in section 166 to prevent a creditor presenting a petition to wind up the company. The question is do we need a new procedure, i.e, the sophisticated corporate rescue procedure operating in jurisdictions such as the United Kingdom, Australia, Canada and the United States of America, or can we simply amend section 166 by providing for a stay of proceedings against the company upon the application of the company, a member or a creditor when the company was insolvent?

My personal view is in the case of insolvency situation, the parties should solve the problems themselves, with the assistance of an expert- the insolvency practitioner. Therefore, section 166 of the Companies Ordinance can be amended to provide for two different circumstances-

solvency situations and insolvency situations. In the case of solvency situations, no amendment is required. But in the case of insolvency situations, there should be provisions for the moratorium, which will cease upon the expiration of a certain period of times, say, 30-45 days immediately following the relevant date, subject to further extension by the court. The relevant parties to the proposed scheme of arrangement should appoint an insolvency practitioner to assist them to devise a scheme acceptable to all the parties concerned. The Government should set up a list of qualified insolvency practitioners and prepare a Code of Conduct for them to follow.

Insolvent Trading

I am in favour of having provisions for insolvent trading, as this will encourage responsible persons to face the fact of company insolvency at an early date and cause them to address the situation rather than to trade on regardless of the consequences. I have the following points to make:

- (i) As regards the definition of 'responsible person' in clause 295A, the expression includes a 'manager' of the company who is involved to a substantial or material degree in directing the company's business or affairs. But there is no definition of 'manager'. Does the word 'manager' include a company secretary or other officers of the company? Obviously, the law does not simply look at the label. Rather, regard should be had to the nature of responsibility of the employee concerned.

- (ii) To discourage 'insolvent trading' I believe there should be provisions for criminal sanction.

If I can assist you further, please do not hesitate to contact me.

Yours sincerely,

Clement Shum
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