



By hand

24 November 2015

Our ref: SB/836006
Your ref: CB1/BC/1/15

Legislative Council
Legislative Council Complex
1 Legislative Council Road
Central
Hong Kong

Attention: Hugo Chiu, Bills Committee

Dear Sir

In response to your letter dated 11 November 2015 I wish to highlight two key issues which the Administration has chosen not to address as part of this review, both of which, if implemented, would help lead towards Hong Kong developing a modern corporate recovery and insolvency regime which would both protect the interests of creditors and facilitate the handling of complex cross border insolvencies and restructurings with the saving of businesses and jobs in Hong Kong.

These comments are made in my personal capacity and do not necessarily represent the views of the Technical Committee of the HKICPA's Restructuring and Insolvency Faculty of which I am the convenor.

Licensing of Insolvency Practitioners

The proposed amendments to the winding up provisions of the Companies (Winding-up and Miscellaneous Provisions) Ordinance ("C(WUMP)O") are littered with new clauses relating directly to imposing potential additional penalties on liquidators. It is clear that many of these have not been adequately thought through insofar as their practical implementation is likely to be extremely problematic.

If a licensing regime for insolvency practitioners were introduced it would not be necessary for the legislation to contain these clauses, several of which are ambiguously worded. Only those with a license would be allowed to accept appointments and there would be no need for example, for an Eligibility Statement (S.262C). Only those with the requisite experience and/or qualifications would be allowed to act as liquidators unlike the current position where there are few limitations on those who can undertake this often complex and technically demanding work.

It has been argued that Hong Kong is too small to support a licensing regime. The size of the market has not dissuaded jurisdictions such as the BVI, the Cayman Islands and indeed Singapore from introducing licensing regimes.

The UNCITRAL Model Law on Cross Border Insolvency ("Model Law")

Hong Kong is unarguably one of the world's premier jurisdictions for the purposes of cross border insolvency. It is the hub of considerable economic activity involving China and the world's major offshore jurisdictions such as the BVI and the Cayman Islands among others. This has resulted in significant numbers of cross border insolvency issues coming before the Hong Kong courts.

The Model Law is an effort create a protocol or framework which makes it simpler and more cost effective for a foreign insolvency office holder to access the court system of a foreign jurisdiction. Accordingly, it focusses on issues such as access, recognition, relief and cooperation. One of its key aims is to remove the barriers and formalities that hinder communication between foreign insolvency office holders and the courts in those jurisdictions that have enacted the Model Law and where assets and claims can be pursued.

It is important to make clear that it is not an attempt to harmonise the insolvency laws of those countries who adopt the Model Law.

It seems to be clear to all concerned in the restructuring profession that implementation of the Model Law would facilitate the insolvency and restructuring process in Hong Kong for the benefit of all stakeholders. As it is, there was no mention of its implementation in the Administration's proposals and no indication that it is even being considered. In the longer term, unless this issue is addressed it is likely that other Asian jurisdictions such as Singapore will become the venue of choice when it comes to complex cross border restructurings.

Even if the Model Law is not enacted, there would appear to be no reason why provisions such as those contained in s.426 of the UK Insolvency Act should not be implemented. Section 426 says:-

The courts having jurisdiction in relation to insolvency law in any part of the United Kingdom (here insert Hong Kong) shall assist the courts having the corresponding jurisdiction in any . . . relevant country or territory.

Is there any reason why a similar provision should not be inserted into the draft bill currently before LegCo. If no progress is made by the Administration at this point in time, it is very unlikely that it will come before Legco at any time in the foreseeable future given that reform of insolvency law, as evidenced by the failure to make any meaningful progress on introducing a form of corporate rescue procedure, seems to have a low priority in Hong Kong.

Yours faithfully



Stephen Briscoe