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***Legislative Council***

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**Panel on Financial Affairs**  
**Meeting on 2 November 2020**

**Updated background brief on the  
introduction of a statutory corporate rescue procedure and insolvent  
trading provisions in Hong Kong**

**Purpose**

This paper provides background information on the Administration's proposal to introduce a new statutory corporate rescue procedure ("CRP") and insolvent trading provisions ("ITPs") in Hong Kong. It also summarizes views and concerns expressed by Members on the subject at the meetings of the committees of the Legislative Council ("LegCo") in recent sessions.

**Background**

2. At present, Hong Kong companies that are in financial difficulty have various options for going forward, such as coming to a non-statutory arrangement with their creditors, coming to a compromise or arrangement under the relevant legislation, or effecting a corporate restructuring by a provisional liquidator. It has been the Government's policy to develop a statutory CRP and introduce ITPs to facilitate companies in short-term financial difficulty to turn around and revive their business, as well as to increase protection of creditors when they deal with a company which is in financial difficulty. The Administration's efforts in providing a new CRP and introduce ITPs in Hong Kong are summarized in **Appendix I**.

3. Based on the outcomes of a public consultation on the review of CRP legislative proposals conducted in October 2009, the Administration developed in the subsequent years a package of detailed proposals on a new statutory CRP and ITPs, and briefed the Panel on Financial Affairs ("FA Panel") on the subject in July 2014 ("the 2014 proposals"). The key features of the 2014 proposals and a flowchart on the procedural flow of a typical CRP case are in

**Appendices II and III** respectively. According to the Administration, in view of the technical complexities involved in the subject, it has been engaging and having discussions with various stakeholders in preparing a bill on statutory CRP and ITPs. The Administration's latest plan is to introduce the bill into LegCo in the 2020-2021 session.

### **Major concerns/views expressed by members of the Panel on Financial Affairs and the Establishment Subcommittee**

4. The Administration briefed FA Panel on the legislative proposals relating to CRP and ITPs as well as the feedback to the relevant public consultation exercises at meetings on 7 December 2009, 19 July 2010 and 7 July 2014. Panel members also raised questions on CRP and ITPs when FA Panel discussed other relevant issues at meetings on 7 November 2011 and 3 May 2013, and when the Administration consulted the Panel at meetings on 6 January 2014, 22 March 2016, 5 March 2018 and 6 January 2020 on staffing proposals to retain two supernumerary directorate posts in the Financial Services and the Treasury Bureau to spearhead legislative initiatives relating to, amongst others, the introduction of a statutory CRP and ITPs.<sup>1</sup> The staffing proposals were subsequently endorsed by the Establishment Subcommittee and approved by the Finance Committee.<sup>2</sup> The ensuing paragraphs summarize the major views and concerns raised by Members at these meetings.

#### Timeframe for introducing a statutory corporate rescue procedure and benefits for small and medium-sized enterprises

5. At the FA Panel meetings on 19 July 2010, 7 November 2011, 3 May 2013, 6 January 2014, 7 July 2014, 22 March 2016 and 6 January 2020, some members enquired about the timetable for introducing the bill on a statutory CRP, and urged the Administration to put forward the relevant legislative proposals to LegCo as soon as possible. Members also suggested that, in preparing the bill, the Administration should make reference to overseas experience to better understand the essential factors contributing to a successful CRP.

6. Some other members had reservations over the proposed CRP and expressed concern that only large corporations would benefit from the procedure since small and medium-sized enterprises ("SMEs") would not be

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<sup>1</sup> In the proposal endorsed by the Establishment Subcommittee ("ESC") on 17 June 2020 and submitted to the Finance Committee ("FC"), the Administration proposed to make the two supernumerary directorate posts permanent.

<sup>2</sup> The proposal endorsed by ESC on 17 June 2020 is still under deliberation by FC.

able to afford the high professional fees involved. Furthermore, there was concern about including ITPs in the proposed CRP which might place unfair responsibilities on company directors. These members pointed out that directors would face a dilemma when a limited company became insolvent. This was because if the company was declared insolvent by the directors, banks would be reluctant to provide credit facility for the company. These members called on the Administration to consider the proposal on CRP carefully.

7. The Administration advised that it had conducted a public consultation on the conceptual framework and some key issues of a CRP in 2009 and briefed FA Panel on the consultation conclusions in July 2010. Relevant parties, including SMEs, had been consulted. The Administration further developed the 2014 proposals taking into account feedback from the public and the stakeholders. At the FA Panel meeting on 6 January 2020, the Administration advised that the drafting work of the relevant bill was in the final stage. Given the complexities of the issues involved, the Administration would need more time to work out the detailed provisions and discuss with stakeholders on the draft provisions in specific areas. The Administration's target was to introduce the relevant amendment bill in the second half of 2020.

8. As regards the benefits of a CRP regime for SMEs, the Administration pointed out that while sizable corporations were more likely to benefit from a CRP, the legislative provisions would provide more protection to the employees and suppliers in case a corporate became insolvent. In addition, the provisional supervision and the moratorium proposed under the procedure would improve the chance of survival of corporations, as more time would be allowed for the provisional supervisors to work out the voluntary arrangement proposal for approval of the creditors. For the purpose of protecting the interests of directors, the Administration could explore the possibility of providing appropriate safe harbours in the proposed legislation.

9. Regarding the concern about incorporating ITPs under the CRP, the Administration advised that the provisions were modelled on similar arrangements in other jurisdictions including Australia and the United Kingdom. The provisions aimed to encourage directors to act on insolvency earlier and to enhance corporate governance. Only if the directors continued the business of the company without taking steps to prevent insolvent trading, would they be liable, under civil proceedings, for the debts of the company incurred during the insolvent period. Taking into account the views of the respondents expressed during public consultation, the standard in establishing liability had been modified by dropping the ground of "reasonable grounds for suspecting", and other defence factors for the directors might be considered during the drafting of the legislative provisions. The liquidator of a company would consider factors

such as the cost involved and the repayment ability of the director(s) concerned before making an application to the court.

Provisional supervision and moratorium and initiation of the corporate rescue procedure

10. At the FA Panel meeting on 19 July 2010, members raised a number of questions relating to the provisional supervision and liquidation arrangement of the proposed CRP regime. Some members opined that certain financially troubled companies might not be suitable to pursue CRP and enquired whether a threshold would be set for a company to initiate the procedure, such as the need for seeking a court order. The Administration responded that CRP provided an alternative arrangement to rescue insolvent companies. There was no intention to set any restriction on the types of companies which might seek to initiate CRP (except those companies which were subject to other regulatory regimes, e.g. banks).

11. Some members also raised concern about whether the provisional supervision arrangement would be adequate for protecting creditors' interests. It was noted that as in the United States ("the US"), appointment of a trustee would be required to oversee the operation of the company when a company pursued CRP. Some members suggested that apart from the support of secured creditors, consideration should be given to seeking the support of non-secured creditors for CRP to continue after initiation, as non-secured creditors would be most affected by the liquidation of the company concerned. The Administration explained that based on the recommendation of the Law Reform Commission, CRP could only be continued with the concurrence of the major secured creditors ("MSCs"). A meeting of the creditors would be held after commencement of CRP to consider the suitability of the appointment of the provisional supervisor, who would be personally liable for debts and liabilities under certain conditions.

12. On the concern that some multi-national corporations facing insolvency might arrange transfer of their capital out of Hong Kong before initiating CRP, the Administration advised that there was legislation in Hong Kong and other jurisdictions to enable the liquidators to challenge the transfer of property to other overseas branch offices of an insolvent corporation before liquidation, i.e. the anti-avoidance provisions. The proposed ITPs would hold those who abused credit and the availability of credit to account in this regard.

13. At the FA Panel meeting on 7 July 2014, members enquired why a company seeking to commence the CRP process would need to obtain prior written consent from its MSC, and what arrangements would be in place in case the company did not have a MSC. Some members further enquired whether

the Administration would make reference to the practice of some jurisdictions including the US in stipulating the consent from employees as one of the pre-requisites for the initiation of the CRP process.

14. The Administration advised that having regard to prevailing international practices that the MSC of a company was allowed to play a significant role in the process for initiating CRP, a company seeking to commence CRP should be required to obtain prior written consent from its MSC. If the MSC did not agree, CRP could not commence. The requirement of obtaining prior consent of all employees of the company for commencing CRP would not accord with the policy objective which was to enable a company in financial difficulty to commence CRP within a reasonably short timeframe. The Administration also pointed out that it would consider further, in consultation with relevant stakeholders, the triggering conditions for companies which did not have a MSC.

#### Protection for employees' interests

15. At the FA Panel meetings on 7 December 2009 and 7 July 2014, some members expressed concern about the protection for employees' interests under the proposed CRP, in particular the treatment for employees' arrears of wages, severance payments and other outstanding statutory entitlements, and whether the treatment of employees' outstanding entitlements would meet the Administration's target of being no worse off than those under the Protection of Wages on Insolvency Fund ("PWIF") in a winding-up (a principle put forward in the 2014 proposals). There was also a concern about the efficacy of the phased payment schedule for outstanding employees' entitlements to be introduced at the commencement of CRP of a company (an arrangement set out in the 2014 proposals). Members further emphasized the need to improve the arrangements for payment of employees' outstanding entitlements under CRP. They considered it undesirable that certain pre-commencement entitlements, including employers' outstanding contribution under the Mandatory Provident Fund ("MPF") Schemes Ordinance (Cap. 485) or the Occupational Retirement Schemes Ordinance (Cap. 426), would only be paid in full within 12 months after the voluntary arrangement under CRP had taken effect. They urged the Administration to consider mandating settlement of all employees' outstanding entitlements in the first phase after commencement of provisional supervision.

16. The Administration advised that the treatment of employees' outstanding entitlements had been a major contention during previous discussions on the statutory CRP in the past decade, including the suggestion in previous legislative attempts of setting up a trust account by the company seeking to commence CRP for the purpose. It would be a tall order for a company in financial difficulty to settle all arrears due and owed to its

employees before commencing CRP or shortly afterwards, therefore the focus of discussion in recent years had been to put in place a mechanism to ensure that employees would be no worse off than in the situation when the company went into immediate insolvent winding-up. The issue had been considered thoroughly and carefully in the public consultation exercise in 2009-2010 when a broad consensus had been reached on the phased-payment approach. Moreover, the proposed phased payment schedule for outstanding employees' entitlements would afford employees more protection than PWIF because the employees concerned would be entitled to a third payment for those outstanding entitlements (like outstanding employers' MPF contributions) which PWIF would not cover.

### **Latest Development**

17. The Administration will brief the FA Panel on legislative proposals to introduce a statutory CRP and ITPs at the meeting on 2 November 2020.

### **Relevant papers**

18. A list of the relevant papers on the LegCo website is in **Appendix IV**.

Council Business Division 1  
Legislative Council Secretariat  
29 October 2020

**Administration's efforts in developing a new statutory corporate rescue procedure ("CRP") and insolvent trading provisions ("ITPs")**

Period/Year	Development
1996	The Law Reform Commission ("LRC") recommended the introduction of a statutory CRP called "provisional supervision" to provide a moratorium on legal action to a company in financial difficulty, and ITPs to encourage directors and senior management to act on insolvency earlier.
2000	The proposals of LRC were incorporated as part of the Companies (Amendment) Bill 2000 which was introduced into the Legislative Council ("LegCo") in January 2000. As the Bills Committee on the Bill considered that the Administration should consult the Labour Advisory Board ("LAB") on the proposal to provide flexibility on the requirement for a financially troubled company to settle all arrears due and owed by the company to its employees as if it were a going concern, the Bills Committee recommended that the relevant provisions be removed from the Bill and fine-tuned for re-submission to LegCo at a later stage.
2001-2004	<ul style="list-style-type: none"> <li>● After consulting LAB and other stakeholders, the Administration proposed to maintain the original proposal of requiring a company to settle all outstanding arrears that it owed to its employees before starting a statutory corporate rescue operation. The Administration introduced the Companies (Corporate Rescue) Bill ("the 2001 Bill") into LegCo in May 2001.</li> <li>● During the scrutiny of the 2001 Bill, members expressed the following concerns: (a) as no ceilings were proposed on the amount of outstanding wages and liabilities of employees to be paid by a company or the amount of fund to be kept in a trust account for this purpose, it was doubtful if a company in financial difficulty could fulfill the requirement before commencing CRP; and (b) it might not be appropriate to hold the directors and senior management of a company liable for insolvent trading.</li> <li>● The Bills Committee latter decided that the scrutiny of the 2001 Bill should be held in abeyance to allow time for the Administration to conduct consultation on the new proposals.</li> </ul>

<b>Period/Year</b>	<b>Development</b>
	Due to the complexity of the legislative proposals and diverse views among stakeholders, the 2001 Bill was not enacted and lapsed at the end of the second term of LegCo ending 2004.
2009-2010	<ul style="list-style-type: none"><li>● The Administration launched in October 2009 a three-month public consultation on the review of CRP legislative proposals.</li><li>● The consultation conclusions were published in July 2010. According to the Administration, the majority of respondents' submissions received during the consultation indicated general support for many of the proposals. Nevertheless, there were a few proposals that drew disparate views from stakeholder groups.</li></ul>
July 2014	The Administration briefed the Panel on Financial Affairs on its proposals to introduce a statutory CRP and ITPs, which were based on the outcomes of the public consultation in 2009.

Sources: Extracts from the background brief on review of corporate insolvency law and introduction of a statutory corporate rescue procedure for the meeting of Panel on Financial Affairs on 7 July 2014 (LC Paper No. CB(1)1668/13-14(02))



**Key Features of the Administration's proposals on a statutory corporate rescue procedure ("CRP") and insolvency trading provisions in 2014**

<b>Issues</b>	<b>Details</b>
Key considerations in designing CRP	<ol style="list-style-type: none"> <li>1. Moratorium on legal actions and proceedings against the company when the company is under provisional supervision.</li> <li>2. A defined timeframe for specified actions to facilitate speedy determination by creditors on the way forward for the company.</li> <li>3. Predominantly out-of-court arrangements to save time and costs.</li> <li>4. Employees of the company should be no worse off than in the case of an immediate insolvent winding-up.</li> <li>5. An independent third party, namely the provisional supervisor ("PS"), to take temporary control of the company and prepare proposals for a "voluntary arrangement" ("VA").</li> </ol>
<b>Procedures of CRP</b>	
(a) Pre-requisite	<ul style="list-style-type: none"> <li>● Insolvency or likely insolvency of the company</li> <li>● Prior written consent of the major secured creditor</li> </ul>
(b) Initiation	<ul style="list-style-type: none"> <li>● By resolution of the members or directors of the company</li> <li>● By the provisional liquidator/liquidator in case the company has already entered into winding-up process</li> </ul>

<b>Issues</b>	<b>Details</b>
(c) Subsequent process	<ol style="list-style-type: none"><li>1. The PS to call a creditors' meeting to be held within 45 business days, and make recommendation on three specified alternative outcomes:<ol style="list-style-type: none"><li>i. to implement a VA;</li><li>ii. to wind up the company; or</li><li>iii. to end the provisional supervision, for the company to revert to its pre-CRP status.</li></ol></li><li>2. Usually lasts for up to 45 business days.</li><li>3. Period can be extended for six months by approval of the creditors.</li><li>4. Period can also be extended by court order, without a limit on the length of the extended period.</li></ol>
Protection of creditors' interests	<ol style="list-style-type: none"><li>1. Prior written consent of the company's major secured creditor on the commencement of CRP and the appointment of PS is required.</li><li>2. The creditors may appoint a committee of creditors to monitor the work of the PS.</li><li>3. The PS may be replaced by a decision at the first creditors' meeting to be held within 10 business days from the commencement of CRP.</li><li>4. Creditors to decide on the way forward for the company. i.e. whether to implement any one of the specified alternative outcomes.</li><li>5. PS must apply to the court and obtain the court's approval before he could dispose of a security of secured creditor.</li><li>6. Creditors may apply to the court for an order against a PS for his misfeasance, or his act in respect of the company which would be prejudicial to the creditors' interest.</li></ol>

<b>Issues</b>	<b>Details</b>
Protection of employees' interests	<ol style="list-style-type: none"><li>1. Protection to creditors applies to employees who are creditors of the company.</li><li>2. A phased payment schedule for outstanding pre-commencement employees' entitlements:<ul style="list-style-type: none"><li>• 1<sup>st</sup> phased payment - Arrears of wages before the commencement of the CRP should be paid up to the cap of the Protection of Wages on Insolvency Fund ("PWIF-cap") within 30 days after commencement of the CRP;</li><li>• 2<sup>nd</sup> phased payment - Any outstanding wages in lieu of notice of termination, severance payments, pay for untaken annual leave etc. should be paid up to the relevant PWIF-caps within 45 days after the approval of the VA; and</li><li>• 3<sup>rd</sup> phased payment - Any remaining pre-commencement entitlements, including the outstanding MPF employers' contributions, should be paid in full within one year after the VA has come into effect.</li></ul></li></ol>
Qualifications, duties and powers of PS	<ol style="list-style-type: none"><li>1. Assumes control of the company's business and properties temporarily, and acts as an agent of the company in exercising his functions. The functions and powers of company officers would be suspended during the provisional supervision.</li><li>2. Must be a certified public accountant or a solicitor with practicing certificate in Hong Kong.</li><li>3. To maintain the confidence of others dealing with the company, PS subject to personal liability in respect of:<ol style="list-style-type: none"><li>i. pre-appointment contracts positively adopted by him within a specified period from commencement of CRP; and</li><li>ii. new contracts entered into by him.</li></ol></li></ol>

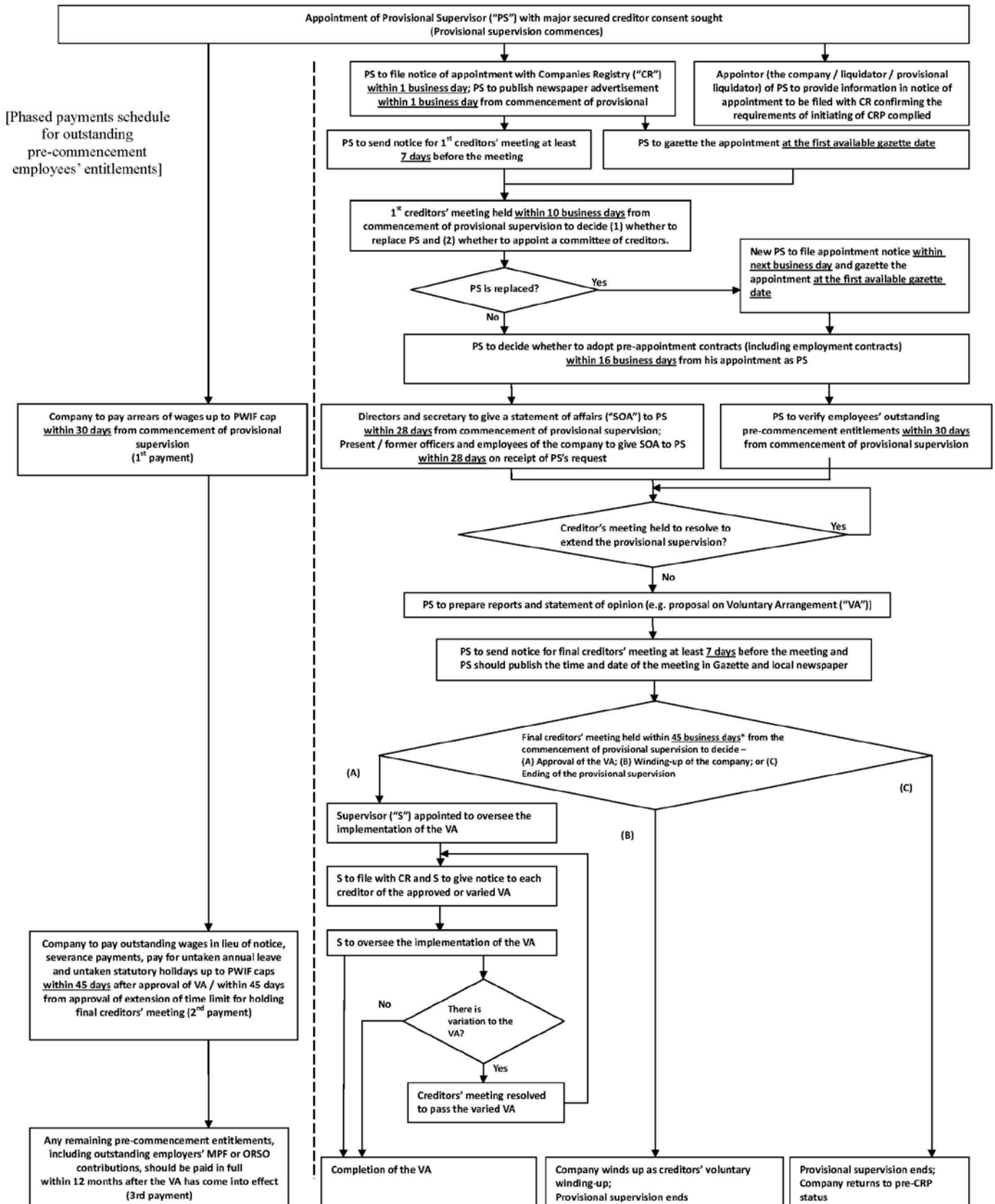
<b>Issues</b>	<b>Details</b>
Process of VA	<ul style="list-style-type: none"><li>● If a resolution to approve the proposed VA is passed at the final creditors' meeting, PS would become the supervisor of VA (unless the creditors appoint another person to be the supervisor), who would oversee the implementation of the VA. The qualification requirements for and the disciplinary regime of supervisor would be the same as those for a PS.</li><li>● VA would bind the company, its officers and members, the supervisor and all relevant creditors (including employees with pre-commencement outstanding entitlements). There would be a moratorium on legal proceedings and actions by persons bound by VA.</li></ul>
<b>Insolvent Trading Provisions</b>	
(a) Objectives	<ul style="list-style-type: none"><li>● Encourage directors of companies in financial difficulty to act on insolvency earlier rather than later.</li><li>● Protect the interests of creditors dealing with a company which is getting into financial difficulty.</li></ul>
(b) Constituents of liability	<ul style="list-style-type: none"><li>● The following requirements must be satisfied before the court makes a declaration of insolvent trading:<ol style="list-style-type: none"><li>1. An incurrance of a debt by the company;</li><li>2. The person concerned is a director of the company at the time the company incurs the debt;</li><li>3. The company is insolvent at that time or becomes insolvent by incurring that debt;</li><li>4. The director concerned failed to prevent the company from incurring the debt; and</li><li>5. The director concerned knew or ought to have known that the company was insolvent at that time or would become insolvent by incurring that debt.</li></ol></li></ul>

<b>Issues</b>	<b>Details</b>
(c) Statutory defence	<ul style="list-style-type: none"><li>● It is a statutory defence if :<ol style="list-style-type: none"><li>1. The director has taken all reasonable steps to prevent the company from incurring the debt; or</li><li>2. The incurring of the debt is part and parcel of the steps to initiate the CRP process.</li></ol></li></ul>

Sources: Powerpoint presentation made by the Administration at the meeting of Panel on Financial Affairs on 7 July 2014 (LC Paper No. CB(1)1762/13-14(02)) and paragraphs 6 to 37 of the Administration's paper entitled "Consultation Conclusions on Corporate Insolvency Law Improvement Exercise and Detailed proposals on a new Statutory Corporate Rescue Procedure" (LC Paper No. CB(1)1536/13-14(01))

# Appendix III

## Corporate Rescue Procedure ("CRP") FLOWCHART



\* The time limit for holding the final creditors' meeting can be extended with the approval by the creditors up to six months from the commencement of provisional supervision. The court may grant an extension for such period as it thinks fit.

Source: Annex D to the Administration's paper entitled "Consultation Conclusions on Corporate Insolvency Law Improvement Exercise and Detailed proposals on a new Statutory Corporate Rescue Procedure" (LC Paper No. CB(1)1536/13-14(01))

**List of relevant papers**

<b>Date</b>	<b>Event</b>	<b>Paper/Minutes of meeting</b>
7 December 2009	The Panel on Financial Affairs ("FA Panel") was briefed on the public consultation on corporate rescue procedure ("CRP")	<a href="#">Administration's paper</a> (LC Paper No. CB(1)191/09-10(01))  <a href="#">Minutes</a> (LC Paper No. CB(1)976/09-10)
19 July 2010	FA Panel was briefed on the consultation conclusions of CRP	<a href="#">Administration's paper</a> (LC Paper No. CB(1)2525/09-10(03))  <a href="#">Minutes</a> (LC Paper No. CB(1)2933/09-10)
7 November 2011	FA Panel was briefed on the Administration's plan to modernize Hong Kong's corporate insolvency law	<a href="#">Administration's paper</a> (LC Paper No. CB(1)237/11-12(05))  <a href="#">Minutes</a> (LC Paper No. CB(1)614/11-12)
3 May 2013	FA Panel was briefed on the public consultation on improvement of corporate insolvency law	<a href="#">Administration's paper</a> (LC Paper No. CB(1)876/12-13(01))  <a href="#">Updated background brief</a> (LC Paper No. CB(1)929/12-13(06))  <a href="#">Minutes</a> (LC Paper No. CB(1)1789/12-13)
6 January 2014	FA Panel was briefed on the staffing proposal to retain the supernumerary posts of an Administrative Officer Staff Grade B ("AOSGB") and an Administrative Officer Staff Grade C	<a href="#">Administration's paper</a> (LC Paper No. CB(1)625/13-14(08))  <a href="#">Background brief</a> (LC Paper No. CB(1)625/13-14(09))  <a href="#">Minutes</a> (LC Paper No. CB(1)1310/13-14)



Date	Event	Paper/Minutes of meeting
	("AOSGC") in the Financial Services Branch ("FSB") of the Financial Services and the Treasury Bureau ("FSTB")	
19 February 2014	The Establishment Subcommittee ("ESC") deliberated on the staffing proposal	<a href="#">Administration's paper</a> (EC(2013-14)23)  <a href="#">Minutes</a> (LC Paper No. ESC43/13-14)
6 June 2014	The Finance Committee ("FC") approved the staffing proposal	<a href="#">Minutes</a> (LC Paper No. FC55/14-15)
7 July 2014	FA Panel was briefed on the consultation conclusions on corporate insolvency law improvement exercise and proposals on the introduction of a statutory CRP	<a href="#">Administration's paper</a> (LC Paper No. CB(1)1536/13-14 (01))  <a href="#">Powerpoint presentation materials</a> (LC Paper No. CB(1)1762/13-14 (02))  <a href="#">Minutes</a> (LC Paper No. CB(1)1998/13-14)
22 March 2016	FA Panel was briefed on the staffing proposal to retain the supernumerary posts of AOSGB and AOSGC in FSB of FSTB	<a href="#">Administration's paper</a> (LC Paper No. CB(1)686/15-16 (02))  <a href="#">Minutes</a> (LC Paper No. CB(1)919/15-16)
8 June 2016	ESC deliberated on the staffing proposal	<a href="#">Administration's paper</a> (EC(2016-17)10)  <a href="#">Minutes</a> (LC Paper No. ESC131/15-16)
11 July 2016	FC approved the staffing proposal	<a href="#">Minutes</a> (LC Paper No. FC329/15-16)

<b>Date</b>	<b>Event</b>	<b>Paper/Minutes of meeting</b>
5 March 2018	FA Panel was briefed on the staffing proposal to retain the supernumerary posts of AOSGB and AOSGC in FSB of FSTB	<a href="#">Administration's paper</a> (LC Paper No. CB(1)625/17-18 (07))  <a href="#">Minutes</a> (LC Paper No. CB(1)924/17-18)
29 May 2018	ESC deliberated on the staffing proposal	<a href="#">Administration's paper</a> (EC(2018-19)4)  <a href="#">Minutes</a> (LC Paper No. ESC142/17-18)
22 June 2018	FC approved the staffing proposal	<a href="#">Minutes</a> (LC Paper No. FC72/18-19)
6 January 2020	FA Panel was briefed on the staffing proposal to make the supernumerary posts of AOSGB and AOSGC in FSB of FSTB permanent	<a href="#">Administration's paper</a> (LC Paper No. CB(1)282/19-20(04))  <a href="#">Minutes</a> (LC Paper No. CB(1)467/19-20)
17 June 2020	ESC deliberated on the staffing proposal	<a href="#">Administration's paper</a> (EC(2020-21)4)  <a href="#">Minutes</a> (LC Paper No. ESC67/19-20)