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香港大律師公會的信頭

Letterhead of HONG KONG BAR ASSOCIATION

Your Ref: CB1/BC/6/99 14th April 2000

Ms. Leung Siu-kum
Clerk to Bills Committee
Legislative Council
Legislative Council Building
8 Jackson Road
Central
Hong Kong

Dear Ms. Leung,

Re: Bills Committee on Companies (Amendment) Bill 2000

Thank you for your letter on 2nd and 29th March 2000. The submission papers on Bills Committee on Companies (Amendment) Bill 2000 has been considered by some of our members whose views have been endorsed by the Bar Council. I enclose the same for your consideration.

Yours sincerely,

Ronny Tong, SC
Chairman

Encl.

COMPANIES (AMENDMENT) BILL 2000

COMMENTS

1. We note that the reason for the proposed repeal of s.228A is because of complaints that the procedure has been abused and creditors' interests adversely affected. In that respect the proposed Part IVB confers upon, inter alia, the directors of companies a powerful mechanism which, unless proper safeguards are put in place, are just as much (if not more) open to abuse.

2. The proposed section 168Z allows directors or members of a company to appoint a provisional supervisor upon being "satisfied" that there is a "reasonable likelihood" that the provisional supervisor "could" make a proposal which "would" achieve one of the specified purposes. These grounds are highly open-textured and would make it very difficult to challenge a decision of the directors or members of the company to appoint a provisional supervisor, and thus obtain an automatic 30 day moratorium against virtually all hostile proceedings against the company.

3. There does not appear to be any specific sanction for the invocation of the mechanism in circumstances where even these loose criteria are not met: contrast existing section 228A(2) which provides that any director of a company making a declaration under section 228A(1) without having reasonable grounds for the relevant opinion shall be liable to a fine and imprisonment.

4. We note that an automatic 30-day moratorium is imposed. Furthermore, this moratorium is automatically extended if prior to the expiration of the moratorium, an application is made by the provisional supervisor for an extension of the moratorium. The moratorium does not cease before such application is determined: section 168ZE(3). We query whether a moratorium with such extensive effects should be available at the option of the directors and members upon the filing of certain documents without seeking any order from the courts.

5. The subsequent meetings of creditors involve only "relevant creditors". The term is defined as a creditor who is affected by the moratorium in his capacity as such a creditor: section 168U(1). It seems to us that in the important context of who is to attend and vote at a meeting and be bound by any voluntary arrangement voted upon the definition may be ambiguous.

6. It is also to be noted that for the purpose of voting at a meeting of relevant creditors the creditors are treated as forming one class of voters only. Further, votes of relevant creditors are calculated by reference to the amount of the creditor's debt. It is not clear how the amount of debt is to be calculated for any particular creditor, for example, a secured creditor. The consequence may be that a secured creditor with a large (but substantially secured) debt might be able to muster more votes than an unsecured creditor with a smaller debt, even though the former's interest in the outcome (if his security is not affected) might be much less significant. Conversely, the effect of requiring all creditors to vote as a single class may mean that a secured creditors rights could be

abrogated by a majority of unsecured creditors - a result which might be thought to be unfair.

7. We note that while it is said that every creditor who is entitled to attend is entitled to vote at a meeting: section 168ZT(12), it is also provided that a relevant creditor shall not vote in respect of certain debts: section 168ZT(18). In this connection, it is notable that under section 168ZU(1)(b) every creditor who was given notice in respect of the meeting is bound by the voluntary arrangement, which seems to suggest that even a creditor who is not entitled to vote is bound. This could obviously work unfairly to a creditor who is determined by the chairman of the meeting to be not entitled to vote. The equivalent English provision in the Insolvency Act 1986 (section 5(2)(b)) provides that the voluntary arrangement binds a person who had notice of, *and was entitled to vote at*, the relevant meeting.

8. We also note that the Bill contains no equivalent to the provisions of section 6 of the Insolvency Act 1986, which enables the Court to intervene on the application of (inter alia) an affected creditor on the grounds of either unfair prejudice to the interests of a creditor, contributory or member, or on the grounds of a material irregularity in the conduct of the meeting. The absence of such provisions would appear to highlight the problem posed by the apparent intention of the draftsman that all creditors should be bound whether or not they are allowed to vote.

9. Further, the grounds on which the Court can intervene on an appeal by an aggrieved creditor appear to be much more restricted than is the case under the English Insolvency Rules. In particular, the Court is only entitled to disturb the decision of the chairman of a creditors' meeting in cases of manifest unreasonableness (section 168ZT(20)(a), cf. Rule 1.17 of the Insolvency Rules). This would seem to compound the injustice that might be produced in the case of a creditor who is barred from voting, but may find himself bound by the arrangement regardless.

10. Finally, we note that the Court's powers of intervention on an appeal appear to be wider in Hong Kong than in England, since Rule 1.17(7) of the English Insolvency Rules provides that the Court should only intervene where the matter gives rise to unfair prejudice or a material irregularity.

Dated 13th April 2000