By email (corporate_rescue@fstb.gov.hk) and by post

28 January 2010

Our ref: CB/ad/861096

Division 4, Financial Services Branch
Financial Services and Treasury Bureau
15/F Queensway Government Offices
66 Queensway
Hong Kong

Dear Sirs

Review of Corporate Rescue Procedure Legislative Proposals ("Consultation Paper")

We refer to the Consultation Paper published by the Financial Services and the Treasury Bureau to consult the public on the concept framework and the key issues relating to Corporate Rescue in Hong Kong.

This submission is made by Borrelli Walsh and the views expressed within this document are held by our directors, all of whom are experienced insolvency practitioners. Borrelli Walsh is a specialist insolvency and restructuring firm. While based in Hong Kong, we are regularly instructed in respect of assignments in PRC, throughout the Asia Pacific region and internationally. We have gained valuable experience in respect of many corporate rescue regimes in other jurisdictions. In light of this, we believe we are highly qualified to comment on the proposed corporate rescue legislation for Hong Kong.

The defined terms adopted in the Consultation Paper have also been adopted in this letter.

Question 1

Do you agree with the proposed procedural changes relating to initiation of provisional supervision in paragraphs 2.4 to 2.6 above? If not, please provide reasons and suggest alternatives.

Paragraph 2.4

We agree that the notice of appointment and documents in respect of the appointment of a provisional supervisor should only be required to be filed with Registrar of Companies and that there be no requirement to file these appointment - related documents with OR and the Court.

The public has ready access to documents filed with Companies Registry and the Companies Registry is usually the first source of information for anyone making enquiries in relation to a company.

A key focus of the proposed Corporate Rescue Procedures is to provide an efficient and effective means by which the rescue of Hong Kong companies can be undertaken. Accordingly, the involvement of the Court and the Official Receiver should be kept to a minimum. Should there be any need to engage either the Court or the Official Receiver in respect of any proposed restructuring or provisional supervision, the appointment documents can be provided to the OR and the Court at that time.

It is important to recognise that minimising the involvement of the Court is a principle upon which the current review of the Consultation Paper has been based.

We do not agree that the notices to be filed with the Companies Registry should set out the level of remuneration of the provisional supervisor as referred to in paragraph 2.2 of the Consultation Paper. Unfortunately, the level of remuneration of insolvency and restructuring professionals is often the subject of a disproportionate level of focus by the wider public who often are far removed from the key stakeholders of a distressed company (such as the employees, directors and secured and unsecured creditors). Such disclosure therefore runs the risk of diverting valuable resources (such as time, money and the attention of key personnel) from the company's financial and operational affairs at a very important time.

The current proposals envisage the approval of the provisional supervisor's remuneration at the first meeting of creditors. This is a sound proposal with which we agree and which will enable the creditors as a whole to consider the provisional supervisor's remuneration in a context of the company's state of affairs and the anticipated work of the provisional supervisor by those who are key stakeholders.

Paragraph 2.5

We do not support the view that the company should confirm, before the commencement of provisional supervision, that it has a valid insurance policy to cover its employee compensation liabilities. As described in paragraph 1.13(c) of the Consultation Paper, a principal adopted in the review of the provisional supervision proposals is that an employee should generally been no worse off than in the case of insolvent liquidation. In the period leading up to the appointment of the provisional supervisor to a distressed company, there will typically be many major or complex issues, each of which will require the application of what will be, at that stage, the limited resources of a company. It may be, for any number of reasons, that at that time, the company does not have a valid insurance policy to cover employee compensation liabilities and this will be a matter that the provisional supervisor will need to address quickly following his appointment. However, the lack of any such insurance policy should not prohibit a distressed company from seeking the valuable assistance afforded by the current provisional supervision proposal.

In all likelihood, in circumstances where there is no insurance policy in place while a company is considering the appointment of a provisional supervisor, securing an insurance policy and otherwise dealing with employee compensation issues is very likely to be better handled by an experienced professional such as the provisional supervisor rather than be left in the hands of those who have continued the Company's affairs without any such insurance.

Paragraph 2.6

We agree that the statement of affairs of the Company should be submitted at the directors' meeting that decides to appoint the provisional supervisor and that the provisional supervisor should have the power to request additional information after the commencement of the provisional supervision.

The submission of the statement of affairs of the company at the directors' meeting will ensure that all directors have considered and are aware of the company's financial position prior to the commencement of provisional supervision and will enable the provisional supervisor to understand the affairs of the company as quickly as possible.

It is crucial for the provisional supervisor to be granted the necessary power to request additional information in respect of the company's financial and operational affairs from the directors of the company and that the directors be obligated to provide this information to the provisional supervisor in a timely fashion. As the provisional supervisor is new to the company's affairs, the provisional supervisor will benefit most from the assistance of those who have had the conduct of the company's affairs prior to his appointment. Whether an insolvency and restructuring professional has the assistance and cooperation of the directors of a company is often a key driver to the success or failure of rescue initiatives and other actions undertaken by insolvency and restructuring professionals in Hong Kong.

Question 2

Do you see any need for other changes to the initiation of provisional supervision, including who may initiate the procedure? If so, please elaborate on the suggested changes and reasons.

We believe that there are good reasons, with the appropriate safeguards, for unsecured and secured creditors to be able to initiate provisional supervision.

The LRC's view is that there should be no provision for the procedure to be initiated by creditors because, for the most part, creditors would not have sufficient knowledge of the financial position of the company to make a judgment on whether the company is a candidate for provisional supervision. We disagree. Further, the LRC's view in respect of major secured creditors being able to simply ask the management to initiate provisional supervision as an alternative to the appointment of a receiver, in our view, does not make allowance for the competing interests of the various stakeholders of a distressed company and in particular, those of guarantors, directors and secured creditors.

Creditors who seek to pursue a provisional supervision, but who are poorly informed as to the affairs of the company, will run the risk of the provisional supervision not succeeding as the directors of the company or other stakeholders who are more informed will be able to challenge and defeat any proposals put forward by the provisional supervisor and thus risk the company going into liquidation.

Any concerns that exist about unsecured or secured creditors initiating the provisional supervision procedure can readily be abated by introducing thresholds such as only permitting a majority of the group's creditors or secured creditors with security over a substantial part of the assets of the company to initiate provisional supervision. This will also have the benefit of ensuring that creditors consult with the company and amongst themselves before taking such a step and thus maximise the information flow between them.

Question 3

Do you agree that the notice of appointment of provisional supervisor should be published in the local newspapers on the same day as the date on which the last document is filed with the Registrar of Companies? If you prefer additional or alternative means of publishing the notice of appointment, please describe and explain.

We agree with this proposal but some flexibility is required to allow for the scheduling required for publishing notices in local newspapers within 48 hours of the last filing within Registrar of Companies. Further, rather than relying on a definition or an interpretation of "last document", we believe that it would be prudent to define the documents which must be filed with the Companies Registry and ensure that the notice requirement be triggered upon the filing of those (exact) documents.

Question 4

Do you support an initial moratorium period of 45 days? If not, please suggest alternatives and explain.

We agree with an initial moratorium period of 45 days.

Question 5

Do you support the proposal to allow for extension of the moratorium up to a maximum period of six months from the commencement of provisional supervision, subject to approval by the creditors at a meeting of creditors? If not, please explain and suggest alternatives.

A key benefit of the proposed provisional supervision procedure is to facilitate the prompt and effective restructuring of a distressed company in an out of court procedure. Ensuring that the restructuring is undertaken on a timely basis requires sufficient pressure on all stakeholders to focus on the timely completion of any restructuring proposal. In our experience, the initial 45 day moratorium will, regardless of the size or nature of the distressed company, allow any experienced provisional supervisor to obtain a good

understanding of the key issues associated with the distressed company and, in many instances, prepare a meaningful restructuring proposal for consideration by creditors.

Question 6

Do you agree with the proposal to allow for extension of the moratorium beyond six months only upon court approval? If not, please explain.

We do not agree with the proposal to allow for extension of the moratorium beyond six months only upon Court approval.

When setting deadlines or timelines for restructuring proposals and their implementation, flexibility is necessary and each case needs to be considered on its own merits, but that flexibility should be permitted only on a basis that ensures that there is sufficient incentive and pressure on the provisional supervisor and the stakeholders to facilitate the restructuring as quickly as possible. In our experience, an extension of six months will only be required in exceptional cases.

We propose that any extension beyond the only original 45 day period should only be given for periods of 45 days or less at any one time and subject always to the approval by creditors at a meeting of creditors and that there be only two extensions – that is, a maximum of 135 days. This will enable interested parties to make submissions to the Court as to why an extension beyond the 135 days should be permitted and the length of that extension. The Court will then be able to make a decision tailored for the specific company and its affairs based on the information before it.

Question 7

If your answer to Q6 is yes, do you agree that any court extension should not exceed a maximum of 12 months from the commencement of provisional supervision? If not, please explain and suggest alternatives.

The time required to complete a restructuring will vary from company to company and require flexibility. Imposing a definite time limit (whether 6 months or 12 months) runs the risk of limiting the options available to the company and its stakeholders.

Accordingly, we do not agree with the proposal that any court extension should not exceed a maximum of 12 months. Time extensions beyond the proposed 135 day maximum should be at the direction of the court (without limitation).

Question 8

Does the list of contracts and agreements which should be exempted from the moratorium, as set out at Appendix, need to be revised? If so, please suggest and explain.

We do not believe that there is any meaningful basis for exempting the suggested contracted or other agreements from the Moratorium. There is no information or supporting data

which explains how imposing a moratorium on each and every of such contract *"would involve unraveling innumerable other contracts which would cause chaos in the market concerned"*. As a result, the proposal in respect of exempting contracts or other agreements to which the Moratorium shall not apply will benefit a select few without proper justification.

Question 9

Which of the above three options (namely, the 2003 Proposal, Alternative A or Alternative B) would you prefer? Please explain. If you have any suggestion to refine any of the above three options, please describe and explain. If you prefer another alternative, please describe and explain.

Unfortunately, both alternatives described in Chapter 4 of the Consultation Paper use the consideration suggested by the Government in the 2001 Bill as a starting point, but no meaningful justification has been provided for the preferential treatment of employees of distressed companies beyond what is currently available to these employees in Hong Kong. The alternatives put forward in the Consultation Paper will (both) unreasonably restrict the use of provisional supervision where a company, in financial distress has difficulty in finding sufficient cash to settle employees outstanding claims or may divert cash which may best be used to ensure the continuation of the business as a going concern.

Further, while paragraph 4.5 of Consultation Paper indicates that the alternatives discussed in this chapter are based on the principle that employees should not be treated less favourably than in a winding up, the two alternatives put forward do prefer employees beyond their treatment in a winding up. The Consultation Paper does not provide any meaningful justification for this treatment.

Our consideration of this matter with fellow practitioners, bankers and directors indicates that it is likely that the alternatives that the Consultation Paper proposes will put the provisional supervision procedure beyond the reach of those companies that likely require it most – those with underlying businesses that are able to support a restructuring and thus are likely to have and be able to maintain employees.

The practical reality is that distressed companies, and especially distressed companies with substantial employees, are unlikely to have the resources available to them to meet either Alternative A or Alternative B and thus are unlikely to be able to take advantage of the provisional supervision procedures as currently proposed. This will in turn lead to employees losing their jobs.

We urge the government to consider a more balanced approach to employee entitlements that will afford employees a sufficient priority (by way of monetary limit) from both the assets of the company and the PWIF with the balance of the employee entitlements remaining as an unsecured claim against the company. The priority amount should be sufficient to provide short term financial support to the employees.

Question 10

Independent of which of the above options are adopted, what are your views on the treatment of outstanding employers' MPF Scheme Contributions?

We consider that outstanding employer's MPF Scheme Contributions should be treated like all other employee entitlements.

Question 11

Do you agree with the proposal that solicitors holding a practising certificate issued under the Legal Practitioners Ordinance (Cap 159) and certified public accountants registered in accordance with the Professional Accountants Ordinance (Cap 50) may take up appointment as provisional supervisors?

We do not agree with this proposal. We believe that the good conduct of insolvency and restructuring in Hong Kong requires that provisional supervisors be selected from a panel comprising solicitors and professional accountants to be operated by the OR and that the panel members meet certain criteria to demonstrate that they possess the necessary expertise and resources for such work.

In many advanced economies, including those to which the Government has looked to develop the Consultation Paper, such a panel is required in order to ensure that the quality of provisional supervisors meets the standards expected of a professional in this field.

The Government's concern that establishing and maintaining such a panel will require considerable time and resources is misguided and disappointing. While those involved in the insolvency and restructuring industry in Hong Kong (as practitioners and their employees) bankers and other regulatory bodies are expected to devote substantial time and resources to the development of a provisional supervision regime for the benefit of Hong Kong, that same Government is not prepared to provide or commit relatively few resources to ensuring that those to be entrusted with this provisional supervision procedure are properly qualified and experienced.

The current proposals ignore / reject established procedures in the very jurisdictions that those drafting the proposals have looked to establish the provisional supervision procedure. However, without reasonable justification, have ignored this very important aspect.

Paragraph 5.6 of the Consultation Paper seeks to dilute any concerns associated with the proposal by claiming that in the event that there are complaints against the provisional supervisors conduct, such complaints will be referred to the relevant professional body for investigation as appropriate and additionally, that the imposition of personal liabilities will defer unsuitable people from accepting provisional supervision appointments. These are very limited and not well thought out considerations.

The insolvency and restructuring industry in Hong Kong is a necessary part of the business environment and it is important that those who rely on it can expect skilled and experienced

practitioners who are responsible to a licensing body which itself has sufficient skills and experience to undertake the task expected of it.

Question 12

Do you think that other persons without the above qualifications could also be appointed as provisional supervisors on a case-by-case basis? If so, should such an appointment be made by the OR or the court? Please elaborate, in particular on the appeal channel in case of aggrieved applicants and on the associated investigatory and disciplinary regime in case of complaints against appointed persons.

No, we do not think that persons without the above qualifications could also be appointed as provisional supervisors on a case-by-case basis and refer you to question 11 above where specialist skills are required, the provisional supervisor will be able to employ suitably qualified people.

Question 13

Do you agree with giving creditors the choice to replace the provisional supervisor appointed by the company or its directors or the provisional liquidators or liquidators of the company and approve the remuneration of the provisional supervisor at the first meeting of creditors to be held within 10 working days from the commencement of provisional supervision? If not, please elaborate on the reasons and suggest alternatives.

We agree with this proposal. The threshold for such a creditors vote should be set so as to ensure that a small group of creditors is not able to take advantage of or disrupt proceedings by seeking an unnecessary change of the provisional supervisor.

Question 14

Do you support imposing personal liability on provisional supervisors as proposed in paragraphs 5.14 to 5.17 above? If not, please suggest alternatives which would effectively address the issues set out under paragraphs 5.16(a) to (c).

We agree with the imposition of personal liability on provisional supervisors as proposed in paragraphs 5.14 to 5.17 above. We believe that maintaining personal liability on provisional supervisors will ensure that the work of the provisional supervisors is undertaken with the utmost prudence and diligence.

Question 15

Do you support the introduction of insolvent trading provisions? In case you do not, please explain and suggest alternatives to (a) encourage timely initiation of provisional supervision; and (b) deter irresponsible depletion of the company's assets.

We strongly support the introduction of insolvent trading provisions.

Question 16

Do you agree with the proposed revised formulation of "insolvent trading"? If not, please suggest alternatives.

We agree with the revised formulation of "insolvent trading".

Question 17

Do you agree with the way that "major secured creditors" was defined in the 2001 Bill? If you think any changes are needed, please elaborate and explain.

We agree with the way that "major secured creditors" was defined in the 2001 bill.

Question 18

Do you support the proposal to largely follow the 2001 Bill approach with respect to protection of "major secured creditors" and other secured creditors' rights? If you think any changes are needed, please elaborate and explain.

We support the proposal to largely follow the 2001 Bill approach with respect to protection of "major secured creditors" and other secured creditors' rights.

Question 19

What are your views on retaining or removing the "headcount test" in the voting at meetings of creditors (i.e. requirement (a) stated in paragraphs 8.1 and 8.2 above) for resolutions to be passed at meetings of creditors?

We agree with the removal of the "headcount test". We believe that the "headcount test" in the voting at meetings of creditors should be removed in order to avoid potential distortion at creditors meetings by small creditors.

However, consideration should be given to extending the decision process for major secured creditors to beyond 3 days, as 3 days may not be sufficient for secured creditors to properly evaluate their position. We believe that a period of 5 to 7 days is more appropriate and will avoid secured lenders requesting a provisional supervision as a result of not having sufficient time to consider it properly.

Thank you for the opportunity to be able to consider and comment on the Consultation Paper.

Should you have any queries or require any further information, please contact me or Jacqueline Walsh. Our contact details are as follows:

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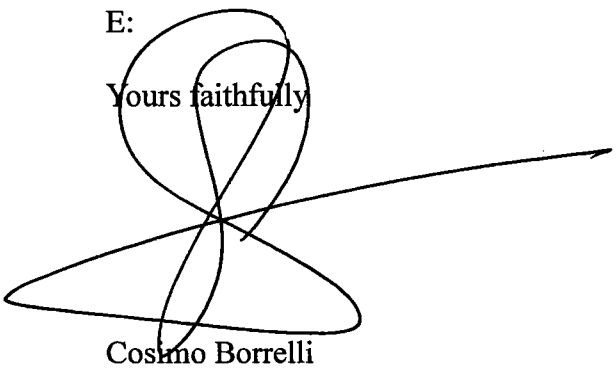
Yours faithfully



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