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附件:  2010 Corporate Rescue Review.doc (58 KB)

Please find attached the response of the British Chamber of Commerce to the questionnaire which makes up the captioned consultation. We apologise for its late submission.

Yours sincerely

Christopher Hammerbeck

	
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We welcome this consultation and earnestly hope this legislation will be enacted as soon as possible, and that it will not be thwarted by relatively minor issues, on this occasion, as it was in 2001 and 2003.

Whilst many banks, as the usual major creditors, rely on an informal "London Rules" approach to a corporate rescue in Hong Kong this process has no statutory backing and puts the onus on banks who are still vulnerable to any other creditor putting the company into liquidation at any time. A moratorium on legal action and a professional who will usually be better placed to work through the 'provisional restructure', is likely to achieve a much better overall result, for all stakeholders, and to keep a viable business going.

We are happy for this to be a separate Ordinance, as the main Companies Ordinance is being rewritten and its timeframe is slower, if this will accomplish this legislation more quickly. In view of the still fragile business environment we agree these proposals should be enacted as soon as possible. We also agree that Court involvement should be minimized so as to save time and costs, and employees should not be protected over and above the level applicable in an insolvent liquidation.

The answers to specific questions are;

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.

We agree with the procedures proposed in terms of who can initiate a 'provisional supervision'.

Creditors or employees should not be able to initiate the process.

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 do not see who else can initiate the process. We agree Employee Compensation insurance should be in place, and if it is not, a statement about same and the reasons therefore filed at the same time as the notice of appointment of the 'provisional supervisor' and who it is. This should be filed with the CR within 2 working days, subject to a major fine for failure to file such information on a timely on a timely basis.

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.

Agreed.

Question 4

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

The initial moratorium should be 30 working days. The end of the moratorium period should be stated in the notice. If Christmas, New Year and Chinese New Year fall close together it could be a problem, and allowance made.

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.

Agreed.

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.

Agreed.

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.

There may be exceptional cases where the Court may extend the moratorium beyond 12 months for proper reasons.

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 agree that any contracts should be exempted from the moratorium. Those contracts as set out in the Appendix are usually the problem contracts.

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.

We prefer Alternative B, according priority to employees debts in the rescue plan.

Question 10

Independent of which of the above options is adopted, what are your views on the treatment of outstanding employers' MPF scheme contributions?

Outstanding employers MPF contributions (and surcharges for late payment) should be treated in the same way as other arrears of emoluments.

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?

Agreed. This covers members of the HK Law Society and Members of the HKICPA.

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.

Yes there can be an approved list of suitable persons, kept by the OR of suitably experienced or qualified personnel capable of acting as the Provisional Supervisor, which could include members of the ACCA in Hong Kong. In all cases they should be a member of a Professional Body (in HK or overseas) who can handle complaints against their members.

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.

Agreed.

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).

Agreed.

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 do support the introduction of insolvent trading provisions, as described. Directors and shadow directors (but not senior managers) should be liable for insolvent trading which they knew about, or ought reasonably to have known about.

We would also support the alternative concept of "wrongful trading" as implemented in the UK.

Question 16

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

We agree with the proposals relating to 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 "major secured creditor" 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 agree with the approach proposed regarding "major secured creditors" and other secured creditors.

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 propose to keep the headcount test. If the headcount is abused the matter can be taken before the Courts, to undo the result, as happened in other similar situations.