

**Eirene Yeung**  
Director, Corporate Strategy Unit &  
Company Secretary

11 February 2010

**BY HAND**

Mr. John Leung  
Deputy Secretary (Financial Services),  
Financial Services and the Treasury Bureau,  
15/F, Queensway Government Offices,  
66 Queensway,  
Hong Kong.

Dear Sir,

**Re: Consultation Paper on Review of Corporate Rescue Procedure Legislative Proposals**

I am writing in response to your invitation to comment on the above consultation paper.

Generally, I have serious reservations about the concept of provisional supervision. For the reasons stated below, the proposed procedure falls short of the purported goal to rescue the company in question. On the other hand, it tampers with the well-established rights of creditors that are otherwise governed by pre-agreed contractual terms of the parties which were negotiated at arm's length basis.

**Views on the Proposals**

**1. Convoluted Objectives for Provisional Supervision**

As stated in the captioned consultation paper, the objectives of provisional supervision are: -

- (a) The survival of the company, and the whole or any part of its undertaking, as a going concern;
- (b) A more advantageous realization of the company's property than would be effected on a winding up of the company; and
- (c) The more advantageous satisfaction, in whole or in part, of the debts and other liabilities of the company.

With due respect, it is submitted that the stated objectives are inherently convoluted, and are inconsistent with the stated goal of corporate rescue.

The procedure under Chapter 11 of the US Bankruptcy Code is a corporate rescue procedure in that it provides a breathing space for the company, allowing it to freeze and place its existing debts and liabilities into a vacuum, with a view to enabling it to source new funding in the interim, by way of new financing and/or new equity, so that the company may sail through the difficult time. Different from the proposal under consideration, the existing management of the company will continue to manage and operate the company.

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Under the proposed procedure, objectives (b) and (c), which aim to wind up the company more efficiently, are repugnant to objective (a) of the survival of the company as a going concern.

## **2. No Obvious Advantage over Existing Liquidation Procedures**

The proposals contained in the consultation paper introduce no apparent or obvious advantage to the existing liquidation procedures or corporate rescue procedures, which are largely on a voluntary and contractual basis by way of a contractual arrangement or compromise between a company and all its creditors or by way of a scheme of arrangement under section 166 of the Companies Ordinance (Cap.32) which, subject to the approval by at least 75% in value and 50% in number of the classes of creditors or shareholders voting at their respective meetings and the court's approval, is a binding arrangement between the company and its creditors and shareholders.

Rather, the proposed exemption of certain financial contracts from the moratorium tend to arbitrarily alter the otherwise contractually agreed or commercially accepted priority currently accorded to the different classes of creditors of a company, thus upsetting the current priority pattern in the absence of compelling reasons in support.

## **3. Deprivation of Creditors' Rights**

The provisional supervision procedure is premised upon a moratorium on preventing the creditors to wind up the company. However, such moratorium cannot be effected without depriving creditors of their basic right to pursue their debts during the moratorium. It is only until the moratorium period (which, pursuant to the proposals, may extend up to 12 months) comes to an end that creditors can petition for winding up or pursue other legal proceedings against the company. In other words, creditors not only will suffer from a delay in recovering their debts, but will also be forced to face the risks of the company's assets being dissipated and/or the value of their securities substantially reduced after the procedure.

On the other hand in the absence of new funding, the proposal fails to provide any apparent incentive to the creditors for forestalling their rights in the interim to pursue their debts during the moratorium. It follows that it lacks incentives or justification for any creditor to support the proposals. Further, if creditors know that they may be so deprived of their rights, they will tend to be more cautious about extending credit. As a result, borrowing by company in the financial market may become more difficult.

With due respect, it is submitted that secured creditors should be exempted from the moratorium as otherwise the purpose of providing security would be defeated.

## **4. Provisional Supervisor has no Vested Interest in the Rescued Company**

It is doubtful if the idea of putting the company in hands of an independent provisional supervisor who has no ownership or vested interest in the continuous operation of the company and allowing him to manage the business, property and affairs of the company during the moratorium might work successfully to achieve the stated objectives of the proposal.

CHEUNG KONG (HOLDINGS) LIMITED

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It is proposed in the consultation paper to make all solicitors holding a practising certificate issued under the Legal Practitioners Ordinance (Cap.159) and certified public accountants registered under the Professional Accountants Ordinance (Cap.50) eligible to be appointed as provisional supervisors so long as they are independent from the company. In reality, however, not all accountants or lawyers have the relevant business acumen and experience to discharge the duties of a provisional supervisor so as to achieve the stated objectives of the proposal, in particular objective (a).

The recommendation to impose personal liability on the provisional supervisors tends to further deter suitably qualified persons (e.g. restructuring professionals) and/or experienced businessmen in the relevant industry from taking up provisional supervisor appointments and reduces the chance of achieving the stated objectives of the proposal.

I hope the above comments are helpful.

Yours faithfully,

A handwritten signature in black ink, consisting of a large, stylized initial 'C' followed by several fluid, connected strokes.