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28 January 2010

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

Dear Sirs,

REVIEW OF CORPORATE RESCUE PROCEDURE LEGISLATIVE PROPOSALS

We refer to the captioned matter and enclose herewith the comments of Deloitte Touche Tohmatsu to the list of 19 questions for consultation.

Please note that if our above comments will be quoted in the future under any circumstances, we will appreciate if you can seek our agreement in advance.

If you require any further information or have any questions on our comments, please let us know.

Yours faithfully,
DELOITTE TOUCHE TOHMATSU

Derek Lai
Partner

Enclosure

DELOITTE TOUCHE TOHMATSU:
Submission for Consultation Paper on
'Review of Corporate Rescue Procedure Legislative Proposals'

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 proposed changes for the initiation of provisional supervision ("PSN") as mentioned in paragraphs 2.4 and 2.5.

In order to avoid abuse of the PSN process, we suggest that when a company is to be placed in PSN the directors prepare an affidavit in which they state that: (i) they have reviewed and considered the latest financial position of the company; and (ii) they have formed the opinion that sufficient grounds exist to warrant placing the company into PSN and that PSN is in the best interests of the company and its stakeholders.

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.

Yes, we suggest that creditors (including employees) should have a right to initiate PSN but to avoid an abuse of the process we suggest that such an application by creditors should be subject to the sanction of the court.

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.

Rather than requiring the notice of appointment of provisional supervisor to be published in local newspapers on the same day as the date on which the last document is filed with the Registrar of Companies, we suggest that the notice of appointment of provisional supervisor should be published in the local newspapers as soon as practicable but within 3 days from the date on which the last document is filed with the Registrar of Companies.

Question 4 Do you support an initial moratorium period of 45 days? If not, please suggest alternatives and explain.

We suggest that an initial moratorium period of 70 days rather than 45 days be implemented for the following reasons:

1. In our view, (i) it could require up to 8-9 weeks (i.e. approx 55–65 days) for a provisional supervisor to ascertain, review and analyse the financial position of a company in financial difficulties, collect the necessary financial information for assessing the feasibility of carrying out a corporate rescue and preparing the voluntary arrangement proposal; and (ii) additional time could be required by certain major creditors (particularly certain banks) to have the voluntary arrangement proposal reviewed and considered in accordance with their internal approval procedures.; and

2. The initial moratorium under the corporate rescue procedure in Singapore is set at 60 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.

Yes, we support this proposal.

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.

Yes, we agree with the proposal to allow for an extension of the moratorium beyond six months only upon court approval.

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.

No, we do not agree that any court extension should be limited to a maximum of 12 months from commencement of provisional supervision. We suggest that the court be given the discretion to decide on the length of the moratorium period based on the particular circumstances of each case.

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.

While we have no particular comment on the list we do suggest that it be reviewed and updated from time to time.

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 believe there are pros and cons for each of the three options, the 2003 Proposal, Alternative A and Alternative B:

From the employees' perspective the 2003 Proposal would appear to be the best option in terms of protecting the interests of employees. However, a company about to enter PSN is unlikely to have readily available the financial resources to meet all employees' liabilities.

While Alternative A, may serve to improve employees' protection, it would increase uncertainty in carrying out provisional supervision and increase the difficulty in achieving a successful turnaround plan.

Alternative B would appear to be more workable than Alternative A. However, under this proposal, the possibility of rescuing the company will still be subject to the risk that the company may not have sufficient cash flow to settle the employees' outstanding entitlements.

In view of the above, we believe that if employees are to be allowed the right to petition the court to wind up the company. Such a right to petition to wind up the company should only be allowed solely for triggering the ex-gratia payment from the Protection of Wages on Insolvency Fund ("PWIF"). Thereafter, the winding up petition should be stayed. This alternative is suggested because the employees would be entitled to apply for ex-gratia payments from PWIF if the company were placed in insolvent liquidation.

Question 10 Independent of which of the above options is adopted, what are your views on the treatment of outstanding employers' MPF scheme contributions[41]?

We believe the treatment in a provisional supervision of outstanding

employers' MPF scheme contributions should be consistent with the provisions of the relevant MPF legislation.

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 are of the view that a person with the requisite knowledge, skills and experience should be appointed as provisional supervisor and that such persons are likely to be drawn mainly from the ranks of accountants and, to a lesser extent, lawyers. However, not all accountants and lawyers are likely to have the necessary qualifications.

We would expect that qualified accountants with restructuring knowledge and experience should have priority in acting as a provisional supervisor.

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 suggest that other persons without the above qualifications be appointed as provisional supervisors. Provisional supervision is different from procedural matters like liquidation where a liquidator has prescribed procedures to follow when performing some statutory and administration matters but for PSN, the success of turnaround of a company in financial difficulties almost entirely depends on experience, restructuring knowledge and negotiation skills of the provisional supervisor and there are no hard and fast rules that can replace these. Allowing individuals without sufficient resources/manpower and relevant experience to manage the company's affairs/operations will affect the company's chances of survival, to the .possible detriment of creditors and other stakeholders.

Complaints of an aggrieved applicant against a provisional supervisor should be made to the professional body to which the provisional supervisor belongs. This is a useful and necessary deterrent.

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.

Yes, we agree that creditors should be given the choice to replace the provisional supervisor and to approve the remuneration of the provisional supervisor at the first meeting of creditors.

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).

Yes, we support the proposal to impose personal liability on provisional supervisors in paragraphs 5.14 to 5.17. We further suggest that in respect of their personal liability they should be indemnified out of the assets of the subject company.

With regard to paragraph 5.17, the Provisional Liquidator has to decide whether to accept pre-existing employment contracts within 16 working days and he will be personally liable for those contracts if accepted. We support that the creditors should have a choice to replace the provisional liquidators at the first creditors' meeting held within 10 working days (Q 13 above refers).

In view of the above, if a new Provisional Supervisor was appointed by the creditors to replace the initial one, he/she will have only 6 working days to decide the issue of pre-existing employment contracts. In this regards, our view is that the new Provisional Supervisors should be given 10 working days (rather than 6 working days) to investigate the issue and make the informed decision. However, if there is no replacement of provisional supervisor, we agreed that the original proposed 16 working days period should be adhered in order to protect the employees' interests.

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.

Yes, we support the introduction of insolvent trading provisions as it should act as an incentive to encourage directors and senior management to take appropriate action earlier so as to to avoid insolvency and insolvent trading.

Question 16 Do you agree with the proposed revised formulation of "insolvent trading"? If not, please suggest altematives.

Yes, we agree with the proposed 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.

Yes, we agree with the way that "major secured creditors" is 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.

Yes, 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 are of the view that the "headcount test" should be removed because it is open to abuse and could operate to the disadvantage of creditors who are small in number but whose claims represent a significant percentage of the total claims of the company.