HONG KONG BAR ASSOCIATION

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1st March 2010

Mr. John C.Y. Leung
for Secretary for Financial Services and the Treasury
Financial Services Branch (Division 4)
Financial Services and the Treasury Bureau
15/F Queensway Government Offices
66 Queensway
Hong Kong.

Dear Mr. Leung,

Consultation on
Review of Corporate Rescue Procedure Legislative Proposals

I am pleased to enclose herewith a copy of the comments of the Hong Kong Bar Association dated 1st March 2010 which has been endorsed at the Bar Council Meeting held on 24th February 2010, for your consideration.

Yours sincerely,

Kumar Ramanathan SC
Vice Chairman

Encl.

香港大律師公會
香港金鐘道三十八號高等法院低層二樓

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Hong Kong Bar Association's Comments on
Rewrite of Corporate Rescue Procedure Legislative Proposals

1. Unless otherwise stated in these Comments, the Hong Kong Bar Association ("the Bar") adopts its Comments on Companies (Corporate Rescue) Bill dated 12 October 2001, a copy of which is annexed to these comments.

Question 1

2. §2.4 Filing of notice and documents:

 2.1 If, despite our comments in §3 below, it is still considered desirable to allow a company under the control of provisional liquidators and a company in liquidation to make use of the scheme for provisional supervision, the requisite notices and documents should be filed with the Court so that they can form part of the records relating to the winding up of the company concerned.

Question 2

3. The interaction between the proposed regime of supervision and compulsory liquidation and provisional liquidation:

 3.1 The Bar considers that the relationship between liquidation and provisional supervision is not clear under the Proposals. Section 11(6) of the 2001 Bill provides that where a provisional supervisor is appointed, the appointment of the provisional liquidator or liquidator of the company shall "terminate" and the winding up is "stayed". It is not clear what will happen if the restructuring is unsuccessful and provisional supervision ends, in particular whether the winding up resumes with retrospective effect over the whole period after petition and whether the liquidator or provisional liquidator is "reinstated".

 3.2 Further and in any event, it is difficult to envisage a situation where it is necessary or advantageous to appoint provisional supervisor over a company which has already been put under the control of provisional liquidators or liquidators. This is because once a company is put under the control of provisional liquidators, no action or proceedings can be proceeded with or commenced against the company except with leave of the Court[1] and no creditors can present any further winding-up petition against the company. So there is in effect a moratorium in place. Any restructuring proposal and compromise can be dealt with by the provisional liquidators.

 3.3 The present law is that a company should only be allowed to revive upon an application made to stay the winding up[2] which requires the applicant to address the concerns identified by the liquidator and the Official Receiver. It is not enough that the entire body of creditors favour a stay. If the court considers the

[1] Section 186 of CO
[2] Under section 209 of CO

conduct of the directors has been such that it is not in the public interest to grant a stay, it will not do so regardless of the wishes of creditors[3]. It is not clear whether there would actually be circumstances where the Court would consider that a company in liquidation should be put into provisional supervision resulting in a stay of the winding up.

Question 3

4. The present proposal, if adopted, means that the notice of appointment will be published in local newspapers on the same day when the appointment of provisional supervisor takes effect.

5. If the purpose of publishing the notice of appointment is to give the creditors an opportunity to oppose the initiation of the provisional supervision scheme, it is necessary to require the notice to be published before the appointment takes effect.

6. Subject to the above, the Bar agrees with the proposal.

Question 4

7. The Bar supports the proposal.

Questions 5 to 8

8. The Bar supports the proposals in Questions 5 and 6.

9. In relation to Question 7, while normally a period of 12 months should be sufficient and should act as a spur to all concerned to act expeditiously, the circumstances of companies vary infinitely and we believe there should be power for the Court to extend time without limit in exceptional circumstances.

10. On Question 8, the Bar does not have any proposal for revising the list of exempted contracts and agreements.

Question 9

11. The Bar prefers Alternative B. It strikes the right balance between the threshold for invoking the provisional supervision procedure and the need to protect the employees. In fact, the requirement that the remaining employees' debts (that is, the amount over and above the "employees' protected debts") must be paid within 12 months represents a better recovery from the point of view of the employees. This is because in a scheme of arrangement, these "remaining employees' debts" will usually be treated in the same way as the claims of other unsecured creditors.

12. The concern about the possible impact on PWIF is unlikely to be substantial. Under the current regime, the employees are able to petition for a winding up of the company with the assistance of the Director of Legal Aid if they want to benefit from PWIF. The

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[3] Re Telescriptor Syndicate Limited [1903] 2 Ch 174 at 180 and adopted in Hong Kong in Re Sharp Brave Company Limited (in liquidation) [1999] 4 HKC 79; Re Asean Interests Limited, HCCW 1233/2000, 5 October 2005, §44

employees will not simply allow the company to be put in voluntary liquidation without receiving the amounts owed to them.

Question 10

13. The Bar considers that the treatment of outstanding employers' MPF scheme contributions should be the same as other outstanding entitlements under the EO.

Question 11

14. The Bar disagrees with the proposal for the following reasons:-

14.1 It is wrong to assume that any solicitors holding a practising certificate and certified public accountants registered in accordance with the Professional Accountants Ordinance may take up appointment as provisional supervisors. The suggestion ignores the fact that most solicitors and accountants do not have the necessary experience or knowledge in dealing with matters relating to corporate restructuring and insolvency of companies.

14.2 In view of the wide powers conferred on the provisional supervisor, it is vital that the appointee has the necessary knowledge, experience and professional integrity in dealing with such matters.

14.3 If the practitioners have been vetted and placed on a panel administered by the Official Receiver, there will be consistency in professional standards. The practitioners will have the incentive to discharge their duties in an impartial, independent and professional manner as the consequence for their failure to do so will result in their removal from the panel or other actions taken by the Official Receiver. The Official Receiver performs an invaluable role to act as a filer in deciding who should be admitted as a member of the panel. This is an important safeguard to ensure that the procedure for provisional supervision will not be abused by the directors appointing some "friendly" solicitors or accountants so as to delay or defeat the creditors' right to petition for the winding up of the company.

14.4 If there is a concern about delay in streaming the provisional liquidation procedure, it can easily be addressed by the Official Receiver inviting the necessary applications by the practitioners using a tight timetable and, in the meantime, adopting the panel A scheme in relation to the persons who may be appointed as provisional supervisor.

Question 12

15. The Bar considers that there should be procedures for the appointment of other persons who are not on the Official Receiver's panel on a case-by-case basis. The appointment can be made either:-

15.1 By order of the Court; or
15.2 With the consent of the Official Receiver.

16. As stated above, the panel should be maintained under the auspices of the Official Receiver. If any person is aggrieved by the decision of the Official Receiver, an application can be made to the Court. We anticipate that such application will be rare as the Official Receiver will not lightly make a decision to appoint or remove a practitioner from the panel unless there are sufficient grounds to do so.

17. In addition to the above, the Bar considers there is advantage in requiring the appointee to confirm that he or she will abide by the Code of Conduct similar to the one required to be adopted by expert witnesses pursuant to O.38 rr.35, 37B & 37C (as stated in Appendix D of Court Forms).

Question 13

18. The Bar agrees with the proposal. This right is particularly important if, contrary to our comments, it is considered that any practising solicitor or accountant is entitled to be appointed as provisional supervisor.

Question 14

19. The Bar supports the proposal.

Questions 15 and 16

20. The Bar supports the proposals and would add that the liability should extend to directors, *de jure* or *de facto,* as well as shadow directors.

Questions 17 and 18

21. The Bar agrees with the proposals.

Question 19

22. Consistently with the provision in s.166 of the Companies Ordinance, the Bar considers that the headcount test should be retained notwithstanding a creditor's right to assign his debts to others. The possibility of manipulation is not a reason for not imposing the headcount test which serves an important purpose of ensuring that the small creditors' voices are heard.

23. There is no substantial empirical evidence for the concern about manipulation. In practice, where there is a scheme of arrangement under s.166 of the CO, it is rare for the creditors to "split" their debts so as to achieve the headcount test. This is because the small creditors are in general less inclined to take any active role in a scheme of arrangement or liquidation.

Hong Kong Bar Association
1 March 2010