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副本抄送:
標題: Comments on Consultation Paper of Review of Corporate Rescue Procedure Legislative Proposals

Dear Sir/Madam,

Below please find my personal feedback to your Consultation Paper on Review of Corporate Rescue Procedure Legislative Proposals introduced in October 2009.

Question 2

On the proposed initiation procedures for provisional supervision (PS), secured creditors should be given the right to initiate PS. It is in line with the philosophy of secured creditors' right to initiate liquidation which is to protect their legitimate rights under the spirit of contracting. If receivership and liquidation are the final measure that can be raised by a secured creditor, why the same secured creditor does not entitle to the right of raising a corporate rescue scheme which may save the company with a better result for most stakeholders. It is also inconsistent with creditors' other rights in the rescue process like if creditors' approval is required for the extension of moratorium, why they have no right to initiate one from the start.

The assumption that corporate rescue can be initiated by secured creditor via company management is a redundant procedure and may not work if there are conflicting interest between management and secured creditors. US's practice can be referenced where creditor could face the risk of bearing debtor's cost and court's punitive order if the petition was disallowed by court in the end. For applying to HK, instead of direct involvement of court, the provisional supervisor can review the legitimacy of the case and refer any abnormal situation to court.

Question 3

Referring to point 2.7 in the Consultation Paper, the 3 working day notice period to creditors may only cover those existing creditors. For new suppliers and other creditors, a compulsory note of PS on trading documents may be more practical (especially for those foreign trading partners which may not aware of the announcements on local newspapers) and as a complement to original point 2.7.

Question 12

On the issues of what other persons can qualified as provisional supervisors, reference can be made to the practice of arbitration where industrial experts can qualify to be an arbitrator. Corporate rescue is industrial specific and entrepreneurship should not be under-estimated. Professional lawyers and accountants may fall short of such knowledge. The appointment system and registry should not be narrowly designed to completely slanting towards the 2 mentioned professionals only. In UK, there is corporate rescue professional organization like R3. Reference can also be made to CPA Australia where accountants can be further certified for specific practice.

A tier system (like SC and C of Bar) can be introduced to distinguish the different skill and competency levels of PS practitioners. A scaling system can be introduced to guide the selection of PS practitioners so that practitioners with the right exposure and skills can be matched to specific rescue cases.

Despite PS practitioners can be held liable for any contracts they entered into in performing their duties, indemnity clause may transfer the risk back to the company.

Apart from the answers to the above questions, I wish to suggest the followings which may not have a direct relationship to specific questions:

1. It is recommended to consider adopting a hybrid mode of PS+Debtor-in-possession (DIP) (referring to US model under Chapter 11). Similar models have been practiced in other countries like Ireland. As HK business entities are characterized by SME in majority, family controlled and low transparency on business decisions/directions, an externally appointed PS practitioner (i.e. appointed by provisional liquidators or liquidators) can hardly be trusted and be able to assess the sustainability of the proposed rescue plan in the 45 days period. On the other hand, PS practitioners appointed by directors or company may slant towards the interest of directors (e.g. in supporting a Management Buyout).
2. There has been global trend of corporate rescue through direct negotiation or ADR between insolvent company and creditors to arrive at a compromised plan. In such model, it needs an assumption that the debtor can still be in-charge of company business. Such debt reconstruction as well as critical supply contracts negotiations (referring to essential supplies critical to continuous operation of the business entity) are better to be carried out by debtors for obvious experience reasons and the family control/relationship reasons stated above.
3. PS practitioner can serve as agent of court and an external auditor (can make reference to the roles of US Trustee and Examiner under US model), and has the role to approve all important contracts (including those mentioned in points 1 and 2) but he need not to run the company business directly during the moratorium.
4. The above practice can also better leverage the resources of PS practitioners which may not be sufficient in the early stage and to reduce the overhead for the practitioner to learn the business of the company.
5. PS practitioners should have an important duty of weeding out those hopeless cases in the earliest stage, and this judgment can still be made without the need to operate the business directly.
6. Corporate Rescue can be an independent piece of Ordinance to make it self-contained and be positioned at an appropriate statutory level as bankruptcy.
7. The Consultancy Paper seems silent on Group Companies and Group assets handling. Referring to Wah Kwong Shipping case in the 1980's, each ship was a company by itself under the Group. As mentioned by Vanessa Finch in her 2009 publication "Corporate Insolvency Law Perspectives and Principles", the "Substantive Consolidation" practice of USA can be referenced.

Hope the input can be useful.

Warm Regards,

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