

Review of Corporate Rescue Procedure Legislative Proposals

Consultation Conclusions

BACKGROUND

On 29 October 2009, the Financial Services and the Treasury Bureau launched a public consultation on the review of corporate rescue procedure legislative proposals. The consultation paper on the proposals (“Consultation Paper”) was circulated to relevant stakeholders in the labour, insolvency, business, legal, banking and academic sectors, as well as the Standing Committee on Company Law Reform (“SCCLR”). The Consultation Paper has been posted on the Financial Services Branch’s website and copies of it were also made available for distribution at Home Affairs Department’s Public Enquiry Service Centers.

2. During the consultation period, we organised a consultation forum to seek public views on 16 December 2009. We also attended several meetings/forums organised by interested organisations to brief the participants on the proposals and listen to their views. A list of the forums and meetings we attended is at **Appendix I**. We also consulted the SCCLR, the Labour Advisory Board and the Protection of Wages on Insolvency Fund (“PWIF”) Board on the consultation feedback and conclusions.

OUTCOME OF CONSULTATION

3. The consultation ended on 28 January 2010. We received a total of 59 submissions, including six submissions from individuals and 53 submissions from organisations, and their views are reflected in this document. A list of the respondents is at **Appendix II**. Copies of the submissions received are available at the Financial Services Branch’s website.¹

¹ Available at http://www.fstb.gov.hk/fsb/topical/review_crplp.htm.

4. We have considered the respondents' views. Many of the submissions welcomed the introduction of a statutory corporate rescue procedure. The majority of submissions indicated general support for many of the proposals. Nevertheless, there are a few proposals that drew disparate views from stakeholder groups. A summary of the respondents' comments and our responses are set out below.

Initiation of Provisional Supervision

Procedural changes for initiation of provisional supervision (Question 1)

5. We proposed that the following procedural requirements should be instituted for the initiation of provisional supervision:

- (a) the notice of appointment of provisional supervisor and relevant documents should be required to be filed only with the Registrar of Companies;
- (b) a company should confirm before the commencement of provisional supervision that it has in place a valid insurance policy to cover its outstanding and future employees' compensation liabilities; and
- (c) the statement of affairs should be submitted at the directors' meeting that decides to appoint a provisional supervisor.

Respondents' views

6. The overwhelming majority of responses supported the proposals outlined in paragraph 5 above.

7. A few submissions suggested that the notice of appointment and documents should also be filed with the High Court as they considered that to be a more efficient way to give notice to creditors and other interested parties, and for the documents would already be on record in case court involvement was required at a later stage.

Our response

8. We plan to include the proposals outlined in paragraph 5 above in the draft legislation. We do not intend to require additional filing with the High Court in order to keep the process simple and streamlined.

Other changes for initiation of provisional supervision (Question 2)

9. We asked whether there was any need for other changes to the initiation of provisional supervision, including who may initiate the procedure.

Respondents' views

10. The number of submissions which did not consider there to be any other change was almost the same as the number of submissions considering that creditors should also be allowed to initiate provisional supervision.

11. Some of the submissions which considered that creditors should be allowed to initiate noted the concern of possible abuse by creditors and suggested that creditors could only initiate provisional supervision with the court's sanction or if certain minimum creditors' value was satisfied.

Our response

12. We note that creditors are allowed to initiate corporate rescue procedures in some overseas jurisdictions. However, according to our understanding, it is not common for such creditors to do so despite having that right.

13. In view of the clearly divided views on whether creditors should be allowed to initiate provisional supervision and the observation we made in paragraph 12 above, we consider that it is not yet necessary to provide for creditors' right to initiate in the draft legislation. We are also mindful not to overly complicate the legislative regime. Nevertheless, after the corporate rescue procedure is introduced, we will review from

time to time, in response to market developments, the need for creditors' right to initiate.

Publishing the notice of appointment of provisional supervisor (Question 3)

14. We asked whether the notice of appointment of provisional supervisor should be published in local newspapers on the same day as the date on which the last document is filed with the Registrar of Companies and invited views on any additional or alternative means of publishing the notice of appointment.

Respondents' views

15. The majority of responses agreed with the proposal to require prompt publication of the notice in local newspapers. However, a considerable number of submissions, mainly those from practitioners², considered it impracticable for the notice to be published on the same day as filing the last document, because lead time was required to place an advertisement in newspapers.

16. A number of submissions also suggested publishing the notice of appointment by electronic means, e.g. by email and by posting on the company's website, etc. Some submissions also suggested the following alternative means:

- (a) to include a statement that the company was subject to provisional supervision on every trading document or correspondence bearing the name of the company;
- (b) to send the notice of appointment to creditors; and
- (c) if the company has substantial business activities or number of creditors in overseas jurisdictions, to publish the notice of appointment in internationally circulating newspapers or newspapers circulating in these jurisdictions.

² Including accountants, solicitors and other relevant professionals in the business of insolvency and restructuring.

Our response

17. We note that there would be practical difficulty in publishing the notice of appointment of provisional supervisor in local newspapers on the same day as the date on which the last document is filed. We plan to require that the notice of appointment should be published only in local newspapers on the working day following the day on which the last document is filed with the Registrar of Companies.

18. We also plan to require the company to state that the company was under provisional supervision on every trading document or correspondence bearing the company's name.

19. With respect to electronic and website communications, amendments will be made to the Companies Ordinance (Cap 32) to facilitate electronic communications by a company to another person including its creditors under the Companies (Amendment) Bill 2010³. As not every company has a website and not every creditor has agreed to communications through electronic means or has provided an email address to the company, it would be inappropriate to make electronic or website communications mandatory. Nonetheless, for a company which has a website, we propose that the company should be required to post a notice on its website on the same day that the last document is filed.

Moratorium

Exemption from moratorium: debts and liabilities incurred after the commencement of provisional supervision

20. Under clause 11(3)(a) of the Companies (Corporate Rescue) Bill ("2001 Bill")⁴, debts or liabilities incurred by the company *after* the commencement of provisional supervision ("post-commencement claims")

³ The Bill was passed by the Legislative Council (LegCo) on 7 July 2010 and provisions concerning electronic and website communications are expected to come into force later in 2010.

⁴ The Bill was introduced into the LegCo in 2001 but was allowed to lapse in 2004 as it was not possible to complete the scrutiny of the Bill by the end of the LegCo term.

were not bound by the moratorium.⁵ The rationale was to ensure that the company could continue with its normal business during the corporate rescue by maintaining the necessary credit facilities with its business partners.⁶

Respondents' views

21. A few submissions requested clarification of the intent of clause 11(3)(a) with respect to rent. Those submissions suggested that the clause should be amended to make it clear that a landlord should not be bound by the moratorium in case of default in payment of rent which falls due *after* provisional supervision has commenced under a tenancy agreement entered into *before* the commencement of provisional supervision.

Considerations

22. On reflection, exempting all post-commencement claims from the moratorium (i.e. all creditors of post-commencement claims may sue the company or even petition to wind up the company) may not be in the interest of rescuing the company for the following reasons:

- (a) litigation against the company would take the provisional supervisor's attention away from preparing a voluntary arrangement proposal within a relatively short period of time;
- (b) it may incur substantial legal costs for the company and provisional supervisor; and
- (c) it may discourage lenders from providing lending or funding for a company under provisional supervision because of the risk of potential claims and litigation from other creditors for post-commencement claims.

⁵ Clause 11(3)(a) of the 2001 Bill reads "Subsection (2) shall not apply to or in relation to...any debt or other liability of the company incurred on or after the relevant date (including any creditor in respect thereof)...". Clause 11(2) of the 2001 Bill provided for the operation of the moratorium.

⁶ As set out in the LegCo brief for the introduction of the 2001 Bill (LC Paper No.: C2/1/12/1C(2001)IX).

23. We also note that in comparable jurisdictions like Australia, the UK and Singapore, there is no blanket exemption from the moratorium for all post-commencement claims.

Our response

24. We now suggest that the general exemption proposed in clause 11(3)(a) of the 2001 Bill be removed. However, we consider that claims in respect of:

- (a) arrears of wages and other entitlements under the Employment Ordinance (Cap 57); and
- (b) outstanding employers' contributions to mandatory provident fund (MPF) scheme or other occupational retirement scheme

arising *after* the commencement of the provisional supervision should be exempted from the moratorium because employees are generally in a vulnerable position and deserve special treatment to enable them to pursue their claims, say, in the Labour Tribunal, or even through petition for winding up of the company.

25. Under the 2001 Bill, a creditor who is affected by the moratorium may apply to the court to be exempted from the application of the moratorium. Under clause 13(4) of the 2001 Bill, the court must be satisfied that the moratorium is causing, or will cause, the creditor *significant financial hardship* before it may grant such an order for exemption from the moratorium.

26. We suggest removing the condition of causing significant financial hardship. The court will have the discretion to decide whether a particular creditor (whether in respect of pre or post-commencement claims after the deletion of clause 11(3)(a)) should be exempted from the moratorium and make such order as the court thinks fit.

27. In other words, in deciding whether to exempt the creditor from the moratorium, the court will consider whether there are good reasons for allowing the creditor to depart from the general intention of corporate rescue, which is that a creditor ought not to be able to take action against the company during the provisional supervision, and conduct a balancing exercise weighing the interests of that creditor against those of the company's other creditors.

Exemption from moratorium: Set-off

28. Under clause 11(2)(f) of the 2001 Bill, any set-off would be disallowed except with the consent of the provisional supervisor or in relation to certain financial contracts. The concern was that banks might get hold of all the cash of the company by exercising their right to combine accounts.

Respondents' views

29. There were views that the rights to set-off should not be taken away by legislation.⁷

Our response

30. Our research indicates that the corporate rescue laws in the UK, Australia and Singapore do not prohibit set-off. It may be argued that mutual set-off should be allowed so that the parties can net their obligations when the moratorium comes into operation. This will result in more equitable share of creditors' voting rights. The concern about banks getting hold of all the cash of the company by exercising their right to combine accounts may be overstated. Practically, the provisional supervisor should assess the prospects of the company, including its free cashflow and unsecured assets, prior to the appointment.

31. We therefore propose to remove the general prohibition against set-off.

Length of initial moratorium (Question 4)

32. We proposed an initial moratorium period of 45 days.

⁷ In the consultation paper, we separately invited views on whether the list of financial contracts to be exempted from the moratorium needed to be revised. See paragraphs 48 to 52 below.

Respondents' views

33. The majority of responses, including those from the business and banking sectors, supported an initial moratorium period of 45 days. Most of the dissenting submissions considered that a period of 45 days was too short and suggested a period ranging from 60 days to 90 days.

34. One submission suggested that the initial moratorium period should be expressed in the number of working days to reduce the impact of holiday periods.

Our response

35. We agree that expressing the initial moratorium period in the number of working days would be more appropriate. We will propose an initial moratorium period of 45 working days in the draft legislation. We will review all time durations and use “working days” instead of “calendar days” wherever appropriate.

Extension of moratorium up to six months from commencement of provisional supervision by creditors' approval (Question 5)

36. We proposed 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.

Respondents' views

37. A vast majority of responses supported the proposal. Some submissions suggested that the extension should be made possible either by approval of creditors or by court approval. There were also suggestions that any party aggrieved by such extension should be allowed to appeal to court for redress.

38. The few dissenting submissions generally considered that extension up to a maximum of six months would be too long, as they considered that formulating a rescue proposal should generally take less time.

Our response

39. To minimise the involvement of the court, we plan to provide in the draft legislation that creditors at a meeting of creditors may approve an extension of the moratorium up to a maximum period of six months from the commencement of provisional supervision.

40. We have decided to maintain the maximum extension of moratorium period by way of creditors' approval to be six months, taking into account the majority view that six months is a reasonable length of time.

Extension of moratorium beyond six months from commencement of provisional supervision (Question 6)

41. We proposed that any extension beyond six months from the commencement of provisional supervision should only be granted by the court on application by the provisional supervisor.

Respondents' views

42. A vast majority of responses supported the proposal. Some submissions suggested that creditors' approval should be sought before applying to court to further extend the moratorium. There were suggestions that the court should have discretion to extend the moratorium even during the first six months of the provisional supervision.

43. The dissenting submissions considered that extension beyond six months should only require creditors' approval or should also be made possible by creditors' approval.

Our response

44. As the moratorium period should only be extended beyond six months in exceptional cases, we consider it appropriate to require court approval as a safeguard and to assess progress. To give greater flexibility, we plan to provide in the draft legislation that, in addition to the extension in the manner as stated in paragraph 41 above, extension of the moratorium may be granted by the court at any time on application by the provisional supervisor.

Maximum limit of extension of moratorium by the court (Question 7)

45. We proposed that any court extension should not exceed a maximum of 12 months from the commencement of provisional supervision.

Respondents' views

46. The majority of responses, including those from practitioners and the business and banking sectors, disagreed with the proposal to impose a 12-month limit on the moratorium period. Many of these submissions considered the court should have the discretion to decide the period of extension in order to cater for exceptional cases.

Our response

47. We plan to provide in the draft legislation that the court may extend the moratorium for a period as it thinks fit.

Exemption from moratorium: specified contracts and agreements (Question 8)

48. We asked whether the list of contracts and agreements proposed to be exempted from the moratorium needed to be revised.

Respondents' views

49. Many submissions did not address this question or stated that they had no comment. Among those who commented, the views were diverse.

50. A slight majority of those who addressed this question agreed that there was a need for the exemption list and supported updating or expanding the list of contracts and agreements exempted from the moratorium. They highlighted the increase of systemic risk if close-out netting of over-the-counter derivative contracts were not allowed. On the other hand, a number of submissions considered that there was no need to set up an exemption list and it should be left to the provisional supervisor to decide whether a certain contract or agreement should be exempted. Some of them argued that the provision of an exemption list might not be fair to creditors whose contracts or agreements were not one of those on the exemption list.

Our response

51. While the proposed removal of the general prohibition against set-off as set out in paragraph 31 above may address to some extent the concern over the impact of the moratorium on certain financial contracts, there are issues such as agreements relating to financial collateral which cannot be adequately addressed in this way. Moreover, the approach of providing for an exemption list has the merit of providing greater certainty to the implementation of close-out netting.⁸

52. Therefore, we plan to retain the exemption list approach and to update the list of contracts and agreements proposed to be included in the light of market developments since the 2001 Bill. The revised list may be introduced in the form of subsidiary legislation to facilitate further updates in the future. We will further work out the details on revising the list in consultation with the Hong Kong Monetary Authority, the Securities and Futures Commission and relevant stakeholders.

⁸ For example, there should be no settlement in cash and/or in kind by the company. The counterparty should only have claim against as a creditor for the net termination values. See clause 11(5) of the 2001 Bill.

Employees' Outstanding Entitlements

Employees' outstanding entitlements (Question 9)

53. We set out three options (namely, the 2003 Proposal, Alternative A and Alternative B) to deal with employees' outstanding entitlements for public consultation. The three options are summarised below:

2003 Proposal	Trust fund to be set up before the commencement of provisional supervision and capped at the PWIF level; any outstanding amounts above the cap to be included in the rescue plan and settled within 12 months of approval of the plan
Alternative A	Exempt employees from moratorium (i.e. while other creditors may not initiate any civil action during the moratorium period, employees who are owed entitlements retain the right to petition for court winding up)
Alternative B	Accord priority to "employees' protected debts" in the rescue plan (i.e. employees' debts capped at PWIF level settled within 45 to 60 days after the start of the moratorium; any outstanding amounts above the cap to be included in the rescue plan and settled within 12 months of approval of the plan)

Respondents' views

54. The majority of responses, mostly from practitioners and the business and banking sectors, supported Alternative B. Many of those who favoured Alternative B considered that Alternative B could strike a balance between protecting employees' interests on one hand and providing a breathing space for the company to organise its finances on the other hand. However, submissions from the labour sector were more skeptical about Alternative B, considering that it would delay repayment to employees as compared to payments under PWIF in the event of winding up. Some submissions also noted that Alternative B would

require the expansion of the ambit of PWIF to cover creditors' voluntary winding up cases and this might not be consistent with the original intent of setting up the PWIF.

55. Most of those who favoured Alternative B expressed doubts over the 2003 Proposal and Alternative A. Those submissions generally considered that it was too onerous to require a financially distressed company to set aside the significant upfront payment as required under the 2003 Proposal. They also considered that Alternative A would grant unduly favourable bargaining power to employees and worried that a single disgruntled employee would defeat corporate rescue effort, increasing the uncertainty of undergoing provisional supervision. To reduce the uncertainty of Alternative A, some suggested that employees might be allowed to petition for winding up the company only if a certain number or percentage of employees agreed to do so either by headcount or by percentage of total employees' outstanding entitlements.

56. Submissions from the labour sector, and a few non-labour sector submissions, supported either the 2003 Proposal or Alternative A. They considered that those two options could better protect employees' interests. However, concern was raised that even though employees could exercise their right to petition to the court for winding up under Alternative A, the court might decline to grant a winding-up order on the ground that the company was undergoing provisional supervision.

57. A number of other options were also floated in the submissions. Some supported using the PWIF or setting up a new Government fund to meet employees' outstanding entitlements with a subrogated right of claims against the company for the monies paid out.

58. Some submissions suggested prescribing a phased timeframe for repaying different components of employees' outstanding entitlements, subject to certain upper limits, at various junctures during the provisional supervision process.

59. There were also suggestions that employees be allowed to petition to wind up the company solely for the purpose of triggering the ex-gratia payment from PWIF and then the winding-up petition should be stayed thereafter.

60. A few submissions also suggested treating employees' outstanding entitlements owed to the company's directors and senior management more strictly and perhaps differently than other employees' outstanding entitlements.

Our response

61. We acknowledge that there are difficulties in expanding the scope of PWIF, and note that the Labour Advisory Board, the PWIF Board and some labour sector representatives have clearly voiced their strong objection to including creditors' voluntary winding up cases under the PWIF for fear of abuse and rapid depletion of the PWIF. We also do not consider it appropriate to use public money to fund employees' outstanding entitlements of distressed companies.

62. Although there was majority support for Alternative B, given that the labour sector expressed clear reservations, we have further considered the issue.

63. With the benefit of written comments and other formal⁹ and informal discussions, we propose a phased payment schedule for pre-commencement employees' outstanding entitlements along the following lines:

- (a) Arrears of wages before the commencement of provisional supervision should be paid up to the PWIF cap (i.e. \$36,000 per employee) by the 30th calendar day after the commencement of provisional supervision;
- (b) For employees whose employment had been terminated before the commencement of provisional supervision, any outstanding wages in lieu of notice of termination and severance payments should be paid up to the PWIF caps:
 - (i) within 45 calendar days after the voluntary arrangement has been approved; or

⁹ Including a symposium on "Corporate Rescue in Hong Kong: The Government's 2009 Legislative Proposals" organised at the University of Hong Kong on 22 January 2010 by the Institute of Asian-Pacific Business Law, William S. Richardson School of Law, University of Hawaii at Manoa and the Asian Institute of International Financial Law, Faculty of Law, University of Hong Kong.

- (ii) if the initial moratorium period is extended, within 45 calendar days from the date of extension;
- (c) Any remaining pre-commencement entitlements, including outstanding employers' contributions under the Mandatory Provident Fund Schemes Ordinance (Cap 485) ("MPFSO") or the Occupational Retirement Schemes Ordinance (Cap 426) ("ORSO"), should be paid in full within 12 months after the voluntary arrangement has come into effect.
- (d) If the company fails to pay according to the above schedule, the employees concerned will no longer be bound by the moratorium and may petition the court for winding up the company; and
- (e) To facilitate employees to take legal action against the company in case it fails to pay according to the schedule in sub-paragraphs (a) and (b) above, the provisional supervisor will be required to verify the details of debts owed to employees prior to the commencement of the provisional supervision with the employees concerned within 30 days after the commencement of provisional supervision.

A flowchart illustrating our proposal for phased payments is at **Appendix III**.

64. The payout timeframe in paragraph 63 above provides for earlier payment of owed wages.¹⁰ In addition, the owed amount will be included in full in the voluntary arrangement plan, to be repaid within 12 months. This would be more advantageous to the employee than in the case of winding up, since apart from PWIF ex-gratia payments, employee creditors' generally only receive a very low return on the amount owed. In the unfortunate event that the corporate rescue fails, the employee will still be entitled to PWIF ex-gratia payments if he is still owed entitlements.

65. With respect to the suggestion that different treatment be made to employees' entitlements owed to company directors and/or senior

¹⁰ For reference, the performance pledge of the Labour Department regarding protection of wages on insolvency is to issue payments to qualified applicants for the PWIF within 10 weeks upon receipt of all relevant information and documents required for processing the applications.

management, we note that a similar proposal was put forward by the Bills Committee in 2001. As we pointed out at that time, we see no justification for such differential treatment and are aware that there are likely to be legal issues for this proposal.¹¹

Treatment of outstanding employers' MPF scheme contributions¹²
(Question 10)

66. We asked how outstanding employers' MPF scheme contributions should be treated.

Respondents' views

67. The majority of responses considered that the outstanding employers' MPF scheme contributions should be treated in the same way as arrears of wages and other employees' outstanding entitlements, subject to the option to be adopted on dealing with employees' outstanding entitlements.

68. A number of submissions considered that outstanding employers' MPF scheme contributions should not be given any special treatment.

69. One submission noted that MPF scheme contributions were meant for investment and employees would not be able to retrieve them for consumption in near future. This submission considered that it should be sufficient as long as it was mandatory for the voluntary arrangement proposal to provide for full repayment of the outstanding contributions.

70. Some submissions considered that outstanding employers' MPF scheme contributions should be dealt with in accordance with the relevant MPF legislation.

¹¹ See the LegCo brief for the Bills Committee on Companies (Corporate Rescue) Bill, "The Administration's Comments on Proposals relating to Treatment of Wages and other Statutory Entitlements owed by a Company to its Employees" (LC Paper No.: CB(1)82/01-02(04)).

¹² This applies equally to outstanding employers' ORSO scheme contributions which are not covered by PWIF.

Our response

71. We plan to provide in the draft legislation for the treatment of outstanding employers' MPF scheme contributions as proposed in paragraph 63(c) above and as shown in the flowchart at **Appendix III**.

Provisional Supervisor

Qualification requirements for provisional supervisor (Questions 11 & 12)

72. We proposed 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 a provisional supervisor. We also asked whether other persons without the aforementioned qualifications could also be appointed as provisional supervisors on a case-by-case basis.

Respondents' views

73. Many submissions, including those from practitioners, considered that additional requirements should be imposed on registered certified public accountants and practising solicitors (e.g. a certain number of years of experience in insolvency or restructuring) before they should be allowed to take up appointment as a provisional supervisor. A considerable number also considered that experienced practitioners in relevant fields or those with other relevant professional qualifications should also be allowed to take up appointment. A few submissions expressed reservations about whether solicitors were suitable persons for taking up the role as a provisional supervisor.

74. A considerable number of submissions considered that eligibility should not be determined only by reference to a person's professional qualification; instead, a panel or licensing system should be set up to admit suitable persons to take up the appointment of a provisional supervisor. Some of them considered that the panel or licensing system should be operated by the Official Receiver while others considered that the panel or licensing system should be developed based on existing

“Panel A” administered by the Official Receiver’s Office for non-summary winding-up cases.¹³

75. Views were split, even among practitioners, on whether other persons could be appointed as a provisional supervisor on a case-by-case basis. There were slightly more submissions in support of allowing such appointment, and of those, most considered the Official Receiver to be a suitable appointment authority.

Our response

76. We are attracted to the increased reassurance offered by a registration system for provisional supervisors, as certain qualification and experience requirements in addition to professional qualifications of being an accountant or solicitor can be imposed. However, we have also been cautioned that such a registration system would limit creditors’ choices, possibly to well-established firms, and may result in higher fees.

77. On balance, we have therefore proposed to adhere to the original proposal at this time i.e. allowing all registered certified public accountants and practising solicitors to take up appointment as provisional supervisor, as part of this initial operation of the corporate rescue regime rather than implementing any premature regulation that may stifle developments in this new area of practice. The intention is to allow greater market flexibility and provide wider choices for creditors.

78. To protect creditors’ interests and ensure smooth running of the corporate rescue procedure, there must be suitable safeguards and sanctions against incompetence or misconduct on the part of the provisional supervisor. We shall rely on the oversight regimes of the Hong Kong Institute of Certified Public Accountants and the Law Society of Hong Kong to ensure that their members act in accordance with their professional requirements. In addition, we propose to amend section 168D of the Companies Ordinance to expand the court’s existing powers of disqualification to prohibit a person from being a provisional supervisor or supervisor.

¹³ Panel A is a scheme set up in the Official Receiver’s Office to outsource non-summary compulsory winding-up cases, i.e. where assets are estimated to be over \$200,000, to a liquidator on an approved panel of insolvency practitioners – Panel A – who have appropriate qualifications, experience and resources to undertake the administration of such cases. In non-summary cases where there is no nomination of liquidator by the creditors and contributories, the OR will then recommend a liquidator on the Panel A List on a roster basis for the creditors and contributories and the court to consider.

79. We do not plan to admit any person who is neither a registered certified public accountant nor a practising solicitor as a provisional supervisor at this stage, as there is no investigation, disciplinary or appeal mechanism in place for oversight purposes.

80. We will review the need for any revision to the qualification requirements from time to time after the corporate rescue procedure is introduced.

Appointment and remuneration of provisional supervisor (Question 13)

81. We proposed to give creditors the choice to replace the provisional supervisor and approve the remuneration of the provisional supervisor at the first meeting of creditors which is to be held within 10 working days from the commencement of provisional supervision.

Respondents' views

82. The overwhelming majority of responses, including those from practitioners, supported the proposal. Those submissions which elaborated on their reasons for support indicated that the proposal would provide suitable check and balance against appointment of an unsuitable person as the provisional supervisor.

83. The dissenting submissions considered that the proposal would make provisional supervision more complicated and costly. There were also concerns that it was too early to assess the complexity of the case by the first meeting of creditors, and creditors would likely cap the remuneration at a level that might be unfair to the provisional supervisor.

Our response

84. In view of the overwhelming majority support for the proposal to allow creditors to replace the provisional supervisor at the first meeting of creditors, we plan to include the proposal in the draft legislation.

85. As regards the determination of the remuneration of the provisional supervisor, despite the majority support for empowering creditors to make the determination at the first meeting of creditors, we agree that there is merit in the opposing view that it may be too early for a fair assessment of the remuneration for the provisional supervisor to be made at such preliminary stage. Therefore, in the draft legislation, we plan to provide that creditors may fix the remuneration of a provisional supervisor by:

- (a) agreement between the provisional supervisor and the committee of creditors (if any);
- (b) resolution of the creditors; or
- (c) the court, if there is no such agreement or resolution.

Personal liability on provisional supervisor (Question 14)

86. We proposed to impose personal liability on provisional supervisors for any contracts they had entered into when performing their functions. We also proposed that the provisional supervisor should have 16 working days after the commencement of provisional supervision to decide whether to accept pre-existing employment contracts and he will only be personally liable for those contracts he accepted within those 16 working days (i.e. for entitlements accrued since the commencement of provisional supervision).

Respondents' views

87. The majority of responses were in support of the proposal, including those from the business and banking sectors and many practitioners. Some of these submissions suggested that provisional supervisors should be allowed to be indemnified out of the company's asset for their personal liability, and they should also be allowed to contract out of personal liability if the other contracting party agrees. A few submissions also suggested that if there was a replacement of provisional supervisor at the first meeting of creditors, the replacement

provisional supervisor should be given extra time to decide whether to accept pre-existing employment contracts.

88. The dissenting minority, including some practitioners and their professional bodies, generally considered that the proposal would deter experienced professionals from taking up appointments as provisional supervisor.

Other considerations

89. Under the 2001 Bill¹⁴, the provisional supervisor would only be personally liable for any contract entered into by him in the performance of his function, except in so far as the contract otherwise provides (i.e. he may contract out of such personal liability).

90. If the moratorium is extended to apply to post-commencement claims as set out in paragraph 24 above, sufficient assurances of payment will need to be given to those who supply goods and services to the company under provisional supervision. We also note the concerns of property owners, who wished to ascertain what rights they have over property which was being used, occupied or in possession by the company under a pre-existing agreement, where the rent and other payments falling due during the provisional supervision was not paid, as the owners' post-commencement claims would also be subject to the moratorium.

Our response

91. In view of the majority support for the proposals as outlined paragraph 86 above, we propose to include them in the draft legislation.

92. We consider that four more working days should be given to a replacement provisional supervisor after the replacement to decide whether to accept pre-existing employment contracts. We propose to reflect this revision in the draft legislation. However, if there was no replacement of provisional supervisor at the first meeting of creditors, the time period for the provisional supervisor to decide whether to accept pre-existing employment contracts would be 16 working days after the

¹⁴ Section 1, Part 6, Schedule 4 to the 2001 Bill.

commencement of provisional supervision.

93. The 2001 Bill provided that a provisional supervisor was entitled to be indemnified out of the company's asset for their personal liability for all payments, debts and other liabilities for which he is liable as the provisional supervisor in performance of his functions.¹⁵ It also provided that a provisional supervisor would not be personally liable for a contract he had entered into when performing his functions if the contract provided that he was not so personally liable.¹⁶ We have no intention to deviate from the approach under the 2001 Bill in this regard.

94. In view of considerations set out in paragraphs 89 and 90 above, we plan to extend the scope of personal liability of the provisional supervisor in the following manner:

- (a) The provisional supervisor will be personally liable for those contracts entered into by the company prior to the commencement of the provisional supervision *and* adopted by the provisional supervisor in the performance or exercise of his functions.
- (b) The provisional supervisor will be personally liable for the rent, user fee or other amounts payable by the company for property that it continues to use, occupy or be in possession after the commencement of provisional supervision, provided that the provisional supervisor can give notice to the property owner within the first 10 working days of the provisional supervision stating that the company does not propose to exercise rights in relation to the property and the provisional supervisor will not be personally liable for so much of the rent or other payments payable by the company as is attributable to the period during which the notice is in force. In any event, the provisional supervisor is not personally liable for rent or other payments during the first 10 working days of the provisional supervision.

¹⁵ Section 1(a), Part 4, Schedule 4 to the 2001 Bill.

¹⁶ Section 1, Part 6, Schedule 4 to the 2001 Bill.

Indemnity for the provisional supervisor against personal liability will be first out of the assets of the company as stated in paragraph 93 above.

Insolvent Trading

Introduction of insolvent trading provisions (Question 15)

95. We proposed to introduce insolvent trading provisions so that the liquidator of a company would be empowered to make an application to the court to seek a declaration that a “responsible person” (i.e. a director or a shadow director) who failed to prevent the insolvent trading was personally liable for the debts of a company which traded while insolvent.

Respondents’ views

96. An overwhelming majority of responses supported the introduction of insolvent trading provisions, including many of those from the business sector and practitioners. Some submissions noted that the introduction of insolvent trading provisions would encourage directors to act on insolvency earlier and would enhance corporate governance. One submission suggested that it should be made clear that a company trading while undergoing corporate rescue should not result in insolvent trading liability for its directors and provisional supervisor.

97. Among the minority dissenting submissions, which were from the business sector and practitioners, there were concerns that insolvent trading provisions would deter directors from taking risk and that it might be too easy for companies to be caught by insolvent trading provisions.

Our response

98. In view of the overwhelming majority support for the introduction of insolvent trading provisions, we plan to include it in the draft legislation.

Revised formulation of “insolvent trading” (Question 16)

99. We proposed two adjustments to the formulation of “insolvent trading”:

- (a) excluding senior management from being liable under insolvent trading; and
- (b) modifying the standard in establishing liability by dropping the ground of “reasonable grounds for suspecting”.

Respondents’ views

100. The overwhelming majority of responses supported the two proposed amendments. A few submissions, who were from the business sector and practitioners, suggested that a defence should be provided for directors who had acted reasonably and honestly.

101. Those who did not support the proposed formulation expressed concerns that dropping the ground “reasonable grounds for suspecting” in establishing liability would make the insolvent trading provisions too weak and would undermine the effectiveness of the provisions.

102. One of the proposed constituent elements of insolvent trading was “failure to take any steps to prevent insolvent trading”. There were suggestions that the word “any” in proposed section 295C(1)(c) of the consequential amendments to the Companies Ordinance in the 2001 Bill should be replaced by the word “all”.

Our response

103. We plan to adopt the following adjustments to the formulation of “insolvent trading”:

- (a) excluding senior management from being liable under insolvent trading;
- (b) modifying the standard in establishing liability by dropping the ground of “reasonable grounds for suspecting”; and

- (c) the phrase “failed to take any steps to prevent insolvent trading” should be replaced by “failed to prevent insolvent trading”.

Secured Creditors

Definition of “major secured creditors” (Question 17)

104. We asked if there was any need to change the way how “major secured creditors” was defined in the 2001 Bill.

Respondents’ views

105. A vast majority of responses agreed with the way how “major secured creditors” was defined in the 2001 Bill. Those submissions which elaborated on their reasons for support noted that defining by way of a percentage would be arbitrary and would have valuation problems. A few submissions considered that although the definition in the 2001 Bill might not be sufficiently clear they still supported the way how “major secured creditors” was defined in the 2001 Bill.

106. Among those dissenting submissions, many of them considered that “major secured creditors” should be defined by way of a percentage.

Our response

107. In view of the vast majority agreement, we will define “major secured creditors” in the same way as the 2001 Bill did in the draft legislation.

Protection of “major secured creditors” and other secured creditors’ rights (Question 18)

108. We proposed to largely follow the 2001 Bill approach with respect to protection of “major secured creditors” and other secured creditors’ rights.

Respondents' views

109. The majority of responses supported retaining the 2001 Bill approach. However, a number of supportive submissions considered three working days to be too short for a major secured creditor to decide whether or not to participate in the provisional supervision and many of those submissions suggested five working days instead.

110. Many of those dissenting submissions also considered that major secured creditors should not be given a right to veto the provisional supervision; some countered that major secured creditors should be allowed to enforce their security instead.

Our response

111. In view of the majority support for retaining the 2001 Bill approach with respect to protection of “major secured creditors” and other secured creditors’ rights, we plan to retain this approach in the draft legislation.

Voting at Meetings of Creditors

The “headcount test” (Question 19)

112. We asked whether the “headcount test” should be retained or abolished in the voting at meetings of creditors.

Respondents' views

113. The majority of responses considered that the “headcount test” should be abolished. Those submissions which elaborated on their reasons for abolishment considered that the headcount test would be subject to manipulation by assigning debts to a number of nominees and that the “headcount test” was unfair to creditors who had high value claims.

114. Some of the submissions which supported the retention of the “headcount test” considered that it could ensure a balance of interests of all relevant parties, in particular ensuring that small creditors rights could be better protected. On the other hand, other submissions considered that there were adequate checks and balances to prevent the possible abuse of the “headcount test” and they considered abuse of the “headcount test” to be empirically unlikely.

115. In addition, two submissions considered that it was inappropriate in a corporate context to define “connected persons”¹⁷ by way of reference to the definition of “associate” under the Bankruptcy Ordinance (Cap 6).

116. Submissions from the labour sector did not comment on this issue.

Our response

117. In view of the majority view that the “headcount test” in the voting at meetings of creditors should be abolished, we shall not provide for the “headcount test” in the draft legislation.

118. We propose to refine the definition of “connected persons” in the draft legislation, taking into account the comments in the Law Reform Commission’s Report on the Winding-up Provisions of the Companies Ordinance (1999) and similar provisions in comparable jurisdictions such as the UK.

Other Issues

119. Some issues other than those highlighted in the consultation questions were also raised in some submissions. A summary of such issues and our responses are outlined below.

¹⁷ Under section 25 of Schedule 7 to the 2001 Bill, a person was deemed as being connected with a company if:

- (a) he is a director or shadow director of the company or an associate, within the meaning of section 51B of the Bankruptcy Ordinance (Cap 6), of such director or shadow director; or
- (b) he is an associate, within the meaning of section 51B of the Bankruptcy Ordinance, of the company.

“Debtor in possession” approach

120. In the consultation paper, we noted that the Law Reform Commission recommended against the “debtor in possession” approach in view of concerns that if the existing management was allowed to remain in control, a company could easily avoid or delay its obligations to creditors. Providing for “debtor in possession” would be a fundamental change, which we did not consider appropriate, as it would deviate from the consensus reached during the earlier legislative attempts.¹⁸

Respondents’ views

121. There were a few submissions suggesting that a hybrid approach combining both the “debtor in possession” approach and the provisional supervision approach. They considered that this hybrid approach would make the statutory corporate rescue procedure more attractive to SMEs and family-run businesses.

Our response

122. We observe that there are some merits in the hybrid approach, such as offering more choice for the company, and providing for the option of retaining management in a role which creditors can determine. However, we note that adopting the hybrid approach will mean a major change in the design of the corporate rescue procedure. This would complicate the legislative regime and require more research and consultation. As the introduction of a corporate rescue procedure is long overdue, we do not consider it as appropriate to pursue the hybrid approach at the present stage.

123. We will review the need for developing a hybrid approach after the corporate rescue procedure is introduced.

¹⁸ FSTB, Consultation Paper on *Review of Corporate Rescue Procedure Legislative Proposals* (October 2009), paragraphs 1.6 and 1.9.

Cross-border issues

Respondents' views

124. Some submissions noted that the moratorium under the proposed corporate rescue procedure would neither prevent creditors from instituting legal proceedings against the company outside Hong Kong, nor protect the company's assets which fell outside Hong Kong's jurisdiction. They pointed out that it was very common for Hong Kong companies to have assets and/or operations in Mainland China as well as other jurisdictions.

Our response

125. We are well aware that many Hong Kong companies have assets and/or operations outside Hong Kong. Regrettably, jurisdictional limits on the proposed corporate rescue procedure are not unique to corporate rescue, nor would they be solved by introduction of such a regime. This issue has to be dealt with by the legal cooperation agreements or frameworks between Hong Kong and other jurisdictions. Nevertheless, we believe the introduction of a corporate rescue regime providing for a statutory moratorium would be useful in certain cases, perhaps when the company is undergoing statutory corporate rescue in parallel in other jurisdictions.

CONCLUSIONS

126. In summary, we plan to adopt the following proposals:

- (a) To institute the following procedural requirements for the initiation of provisional supervision:
 - (i) the notice of appointment of provisional supervisor and relevant documents should be required to be filed only with the Registrar of Companies;
 - (ii) a company should confirm before the commencement of provisional supervision that it has in place a valid

insurance policy to cover its outstanding and future employees' compensation liabilities; and

- (iii) the statement of affairs should be submitted at the directors' meeting that decides to appoint a provisional supervisor (*Question 1*);
- (b) Not to provide for other changes to the initiation of provisional supervision, including not to provide for a right for creditors to initiate provisional supervision (*Question 2*);
- (c) To require the notice of appointment to be published in local newspapers on the working day following the day on which the last document is filed with the Registrar of Companies (*Question 3*);
- (d) Not to exempt all claims for debts or liabilities incurred by the company after the commencement of provisional supervision from the moratorium other than claims in respect of:
 - (i) arrears of wages;
 - (ii) arrears of other entitlements under the Employment Ordinance; and
 - (iii) outstanding employers' contributions to MPF scheme or other occupational retirement schemearising after the commencement of the provisional supervision;
- (e) To remove the condition of causing "significant financial hardship" in the provision allowing a creditor to apply to court to be exempted from the moratorium;
- (f) To remove the general prohibition against set-off;
- (g) To provide for an initial moratorium period of 45 working days (*Question 4*);

- (h) To provide that creditors at a meeting of creditors may approve an extension of the moratorium up to a maximum period of six months from the commencement of provisional supervision (*Question 5*);
- (i) To provide that extension of the moratorium may be granted by the court at any time on application by the provisional supervisor (*Question 6*);
- (j) To provide that the court may extend the moratorium for a period as it thinks fit (*Question 7*);
- (k) To adopt the exemption list approach and to update the list of contracts and agreements proposed to be included in the light of market developments since the 2001 Bill (*Question 8*);
- (l) To adopt a phased payment schedule for employees' outstanding entitlements arising before the commencement of the provisional supervision along the lines as set out in paragraph 63 above (*Question 9*);
- (m) To provide that outstanding employees' contributions under the MPFSO or ORSO should be paid in full within 12 months after the voluntary arrangement has come into effect (*Question 10*);
- (n) To allow all registered certified public accountants and practising solicitors to take up appointment as provisional supervisor (*Questions 11 and 12*);
- (o) To amend section 168D of the Companies Ordinance to expand the court's existing powers of disqualification to prohibit a person from being a provisional supervisor or supervisor;
- (p) To provide that the creditor may replace the provisional supervisor at the first meeting of creditors and to provide that creditors may fix the remuneration of a provisional supervisor by:

- (i) agreement between the provisional supervisor and the committee of creditors (if any);.
 - (ii) resolution of the creditors; or
 - (iii) the court, if there is no such agreement or resolution (*Question 13*);
- (q) To impose personal liability on provisional supervisors for any contracts they enter into when performing their functions, except in so far as the contract otherwise provide (*Question 14*);
- (r) To provide that the provisional supervisor should have 16 working days after the commencement of provisional supervision (or, if the provisional supervisor was replaced at the first meeting of creditors, four more working days after the replacement) to decide whether to accept pre-existing employment contracts (*Question 14*);
- (s) To extend the scope of personal liability of the provisional supervisor in the following manner:
- (i) The provisional supervisor will be personally liable for those contracts entered into by the company prior to the commencement of the provisional supervision and adopted by the provisional supervisor in the performance or exercise of his functions.
 - (ii) The provisional supervisor will be personally liable for the rent, user fee or other amounts payable by the company for property that it continues to use, occupy or be in possession after the commencement of provisional supervision, provided that the provisional supervisor can give notice to the property owner within the first 10 working days of the provisional supervision stating that the company does not propose to exercise rights in relation to the property and the provisional supervisor will not be personally liable for so much of the rent or other payments payable by the company as is attributable to the period during which the notice is in force. In any event, the provisional supervision is not personally liable

for rent or other payments during the first 10 working days of the provisional supervision.

- (t) To introduce insolvent trading provisions (*Question 15*);
- (u) To adopt the following adjustments to the formulation of “insolvent trading”:
 - (i) excluding senior management from being liable under insolvent trading;
 - (ii) modifying the standard in establishing liability by dropping the ground of “reasonable grounds for suspecting”; and
 - (iii) the phrase “failed to take any steps to prevent insolvent trading” should be replaced by “failed to prevent insolvent trading” (*Question 16*);
- (v) To define “major secured creditors” in the same way as the 2001 Bill did (*Question 17*);
- (w) To largely follow the 2001 Bill approach with respect to protection of “major secured creditors” and other secured creditors’ rights (*Question 18*); and
- (x) Not to provide for the “headcount test” in the voting at meetings of creditors (*Question 19*).

WAY FORWARD

127. The Administration plans to proceed with incorporating the proposals into a piece of draft legislation.

**Financial Services and the Treasury Bureau
July 2010**

List of Forums and Meetings Attended

Date	Organising Parties	Nature
2 November 2009	Protection of Wages on Insolvency Fund Board	Meeting
4 November 2009	Labour Advisory Board	Meeting
19 November 2009	Hong Kong Institute of Certified Public Accountants - Restructuring and Insolvency Faculty	Seminar
23 November 2009	Hong Kong Chapter of the Risk Management Association	Forum
26 November 2009	Hong Kong Securities Institute	Seminar
10 December 2009	Hong Kong Institute of Certified Public Accountants	Seminar
16 December 2009	Financial Services and the Treasury Bureau	Forum
7 January 2010	Small and Medium Enterprises Committee	Meeting
7 January 2010	Office of Hon Paul CHAN	Seminar

22 January
2010

Institute of Asian-Pacific Business Law, Symposium
William S. Richardson School of Law,
University of Hawaii at Manoa and
Asian Institute of International
Financial Law, Faculty of Law,
University of Hong Kong

Respondents

Organisations

1. Allen & Overy
2. Association of Chartered Certified Accountants, Hong Kong, The
3. Australasian Compliance Institute
4. Borrelli Walsh Limited
5. British Chamber of Commerce in Hong Kong, The
6. Canadian Certified General Accountants Association of Hong Kong
7. CCIF Corporate Advisory Services Limited
8. Chartered Institute of Management Accountants
9. Cheung Kong (Holdings) Limited
10. Chinese General Chamber of Commerce, The
11. Chinese Manufacturers' Association of Hong Kong, The
12. CITIC Ka Wah Bank Limited
13. Consumer Council
14. CPA Australia Limited
15. DBS Bank (Hong Kong) Limited
16. Deloitte Touche Tohmatsu
17. Employers' Federation of Hong Kong
18. Federation of Hong Kong & Kowloon Labour Unions, The
19. Federation of Hong Kong Industries
20. Ferrier Hodgson Limited

21. Gall & Lane Dispute Resolution Lawyers Hong Kong
22. Grant Thornton
23. Hong Kong Association of Banks, The
24. Hong Kong Association of Restricted Licence Banks and Deposit-taking Companies, The
25. Hong Kong Bar Association
26. Hong Kong Confederation of Trade Unions
27. Hong Kong Federation of Insurers, The
28. Hong Kong Federation of Trade Unions, The
29. Hong Kong General Chamber of Commerce
30. Hong Kong Institute of Certified Public Accountants
31. Hong Kong Institute of Chartered Secretaries, The
32. Hong Kong Institute of Directors, The
33. Hong Kong Securities Association
34. Hong Kong Small and Medium Enterprises Association
35. Hong Kong Trustees' Association
36. Institute of Accountants in Management, The
37. International Swaps and Derivatives Association, Inc.
38. K K Yeung Management Consultants Limited
39. Labour Advisory Board, Labour Department
40. Protection of Wages on Insolvency Fund Board
41. Law Society of Hong Kong, The
42. Linklaters (on behalf of CLS Bank)
43. Mandatory Provident Fund Schemes Authority
44. Mazars CPA Limited
45. PricewaterhouseCoopers

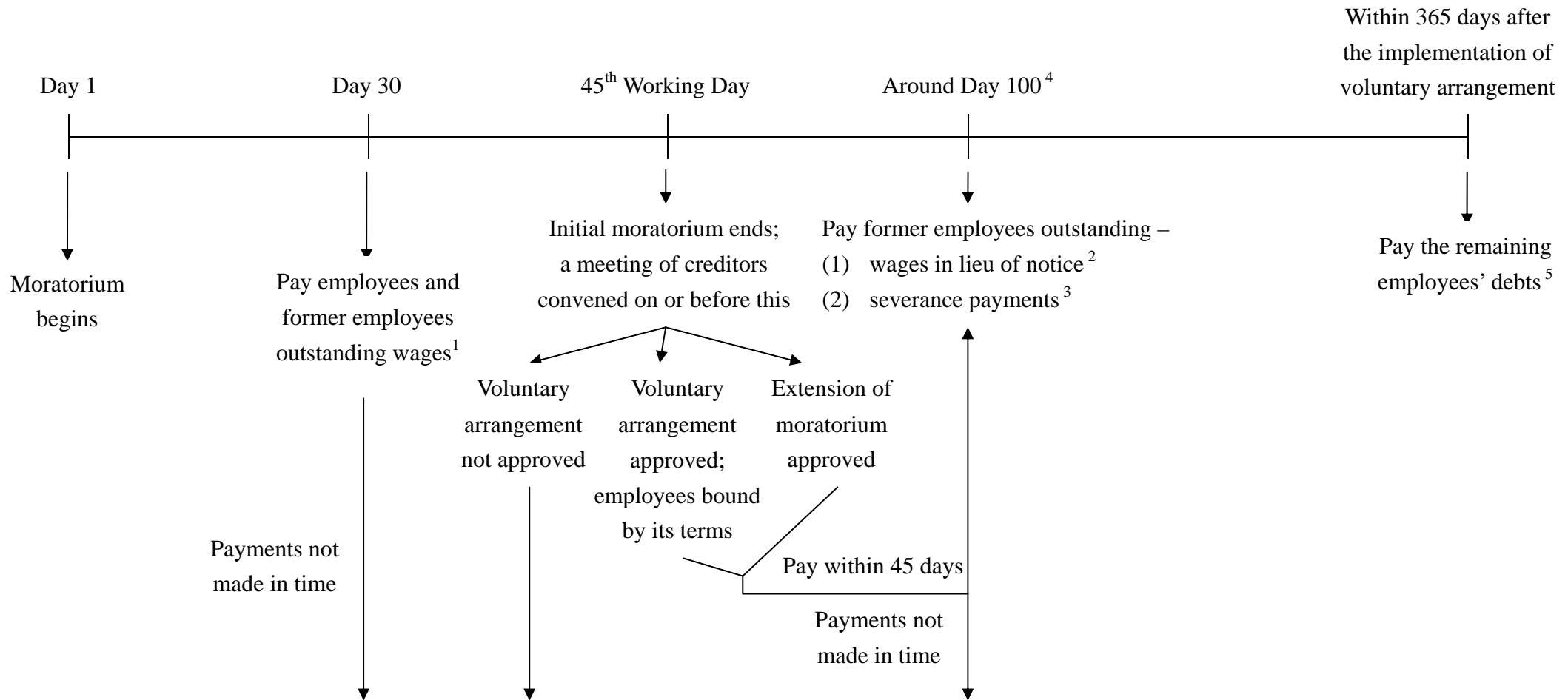
- 46. Real Estate Developers Association of Hong Kong, The
- 47. Society of Chinese Accountants & Auditors, The
- 48. STEP Hong Kong Limited
- 49. Swire Properties Limited

Individuals

- 50. Professor Charles D BOOTH and Trevor N LAIN
- 51. Dr Gary J HAMILTON
- 52. LUI Chi Kin, Eric
- 53. Rupert PURSER
- 54. William M. F. WONG
- 55. Angus YOUNG and Tina CHU

- 56. } Four respondents have requested that their names not be
- 57. } disclosed
- 58. }
- 59. }

**Employees' Outstanding Entitlements
Flowchart of the Revised Proposal**



Employees may petition to the court to wind up the company and apply to the PWIF for ex-gratia payments.

¹ Wages for services rendered during the four months before moratorium begins or prior to former employees' last day of service but not exceeding \$36,000; same as the payments under the PWIF.

² Wages in lieu of notice up to one month's wages or \$22,500, whichever is the lesser; same as the payments under the PWIF.

³ Severance payment being a sum of first \$50,000 plus 50% of the balance; same as the payments under the PWIF.

⁴ On the assumption that the voluntary arrangement is approved on the 45th Working Day or the extension of moratorium is approved on the 45th Working Day.

⁵ Including outstanding employees' contributions under the Mandatory Provident Fund Schemes Ordinance or the Occupational Retirement Schemes Ordinance.