New Insolvency Law: Traps and Gaps

Philip Smart and Charles D Booth argue that poor drafting in Hong Kong's new insolvency law leaves many issues open to challenge

Corporate and insolvency law practitioners will be aware that on a number of occasions in recent years poor legislative drafting has resulted in defective amendments being made to the Companies Ordinance (Cap 32). This problem has recently reared its head again, most notably in *Re Setaffa Investments Ltd* [1998] 2 HKLRD 236 (Le Pichon J). As in previous examples, the difficulties revealed in the *Setaffa* case were created because the draftsman, when in effect copying UK legislation, did not do a thorough enough job and failed to copy fully the UK legislation. As Le Pichon J noted (at 246), such an oversight would 'hardly be the first time that it will have occurred when Hong Kong legislation is modelled on UK legislation.' The purpose of this article is threefold: (1) to note the decision in *Setaffa*; (2) to identify a number of other areas in the new insolvency legislation where similar problems have occurred; and (3) to bring to practitioners' attention a practical difficulty concerning the extraterritoriality of the new avoidance powers that have recently been incorporated into the insolvency legislation.

Setaffa and Post-Liquidation Interest

Major amendments to Hong Kong's insolvency regime were made in the Bankruptcy (Amendment) Ordinance 1996 (Ord No 76 of 1996) (the BAO), which finally came into operation on 1 April 1998 (LN 158 of 1998). One issue dealt with in the BAO is interest on debts in a bankruptcy. However, reform of the law on interest on debts in relation to a solvent liquidation was introduced directly into the Companies Ordinance by the Companies (Amendment) Ordinance 1997 (the CAO), which came into operation on 10 February 1997 (Ord No 3 of 1997). The CAO introduced a new s 264A into the Companies Ordinance. This section deals inter alia with interest on debts, in the post-liquidation period, owed by a company that is not insolvent. Subsection (2) provides that '[a]ny surplus remaining after the payment of debts proved in a winding up' of a company which is not an insolvent company:

> '... shall, before being applied for any other purpose, be applied in paying interest on those debts in respect of the period during which the debt has been outstanding, in the case of ... (b) a voluntary winding up, since the commencement of the winding up ...'

It goes without saying that s 264A will be applicable where the liquidation has commenced after 10 February 1997. The issue raised in *Setaffa*, however, was whether the section operated in relation to a winding up commenced prior to that date.

In *Setaffa* the winding up had begun many years previously (in fact as long ago as 1983), but there remained a substantial sum of money which had not been distributed at the time s 264A came into operation. It was argued that s 264A could be given a partially retrospective operation by applying it to distributions taking place *after* 10 February 1997. The reason why this argument, however unlikely it may appear, could even be advanced is because although s 264A(2) is taken almost verbatim from the Insolvency Act 1986 (UK) (s 189 thereof), the draftsman in Hong Kong failed to copy the relevant transitional provisions. These provisions, contained in the 1986 Act, Sch 11, para 4(1), provide:

> 'In relation to any winding up which has commenced, or is treated as having commenced, before the appointed day, the new law does not apply, and the former law continues to have effect ...'

Clearly, some such transitional provision ought to have been made in the CAO. The failure to do so, which as Le Pichon J suggested (at 246) may have been 'attributable to sheer oversight', led to (what should have been) quite unnecessary litigation. On the facts in *Setaffa*, the court rejected the contention that s 264A had any retrospective effect. For in the absence of any express language or clear indication suggesting retroactivity, the section only applied to liquidations commenced after 10 February 1997.

Transitional Problems and Avoidance Powers

Under s 99 of the BAO (unlike the CAO) there is a general transitional provision which, in effect, provides that where a bankruptcy case had already commenced prior to the coming into effect of the BAO (ie 1 April 1998) the 'old law' will continue to apply to that case (subject to certain important exceptions in relation to the discharge of bankrupts). Thus, if we turn to the avoidance powers of a trustee in bankruptcy, there can be no doubt that if, for example, the bankruptcy commenced on 1 March 1998, then the old law on fraudulent preference will be applicable should the trustee seek to

set aside a payment made by the bankrupt on 1 January 1998. In other words, as in *Setaffa*, the new law is not retrospective. But, one may ask, what of the situation where the bankruptcy is commenced *after* 1 April 1998 — so s 99 of the BAO is not applicable — but the transaction sought to be impeached was entered into *prior to* that date? The trap is to assume that, because the case commenced after 1 April 1998, the new provisions will apply.

The way this issue was specifically resolved in the Insolvency Act 1986 (UK) was to have a special transitional provision relating to avoidance powers (see para 17 in Sch 11 to the 1986 Act). That provision stated that a transaction occurring before the appointed day would only be avoided under the new statutory provisions to the extent that such a transaction could have been avoided under the old legislation. The advantage of this approach is that it puts the focus on the new provisions but, at the same time, prevents any unfairness by not allowing the new provisions to apply where the transaction was unimpeachable (under the old law) at the time it was entered into.

In Hong Kong, however, the draftsman has not copied para 17. As a result, as with the *Setaffa* case, there is no expressly applicable statutory provision in the amending legislation. Nevertheless, basic principles tell us that, in the absence of an express provision or a clear indication, the new avoidance powers cannot be regarded as applying to transactions taking place prior to 1 April 1998. If it were otherwise, a transaction that was perfectly valid and unimpeachable at the time it was entered into might subsequently become voidable. If, as suggested here, the new avoidance powers do not apply, then does the old law continue to operate in respect of such transactions? In light of s 23 of the Interpretation and General Clauses Ordinance (Cap 1), the answer is in the affirmative. Hence, the old avoidance provisions, even though they have been repealed by the BAO, must continue to be applied in relation to transactions occurring before 1 April 1998 despite the fact that the bankruptcy proceedings only commence after that date.

In summary, practitioners should be aware that the new avoidance powers in bankruptcy cases are not retrospective and, moreover, that the old provisions continue to apply to events and transactions occurring prior to 1 April 1998 even where the bankruptcy was only in fact commenced after 1 April 1998. Thus, practitioners had better keep copies of the old provisions for some years to come.

Our only observation is that the total non-discussion of this important topic by the appropriate law reform body is a peculiar way of conducting a law reform exercise

Unfair Preferences under the Companies Ordinance

The BAO not only introduced new avoidance powers in bankruptcy, it also added a new unfair preference provision to the Companies Ordinance. Section 266B contains the following transitional provision:

> '(2) Where the winding up of a company commences before the amending Ordinance comes into operation, the provisions of the principal Ordinance [that is, the Bankruptcy Ordinance] as it existed before being amended by the amending Ordinance apply in respect of sections 266 and 266A of this Ordinance.'

Hence, s 266B(2) expressly provides that where a winding up commences before 1 April 1998, the new unfair preference provision does not apply. The effect, therefore, is that the old fraudulent preference provision (found in the old bankruptcy legislation) remains applicable. Section 266B(2) however does not address the situation where, for example, the winding up commenced on 1 May 1998 but the alleged preference occurred on 1 January 1998. Nevertheless, there can be no doubt that s 266B has no retrospective effect whatsoever: events taking place before 1 April 1998 continue to be governed by the old law on fraudulent preference.

Extraterritoriality: Amendment of Insolvency Rules Required

As has been noted, the new avoidance powers under the BAO are based largely on the equivalent English provisions (see ss 339 et seq of the Insolvency Act 1986). In recent years the English courts have consistently maintained that these English avoidance powers may operate extraterritorially (see *Re Paramount Airways Ltd (in admin)* [1993] Ch 223 and generally, P Smart, *Cross-Border Insolvency* (2nd Ed, 1998), pp 17-27. Note the same view is taken in England in relation to the public examination of a director of an insolvent company (see *Re Seagull Manufacturing Co Ltd* [1993] Ch 345). Having regard to the ancestry of the BAO provisions, it is very likely, if not inevitable, that the Court of First Instance would take the same approach in relation to the new Hong Kong avoidance powers. This would represent a change to the pre-April 1998 position, where avoidance powers were generally taken to be territorial in nature (see obiter in *American Express International Banking Corpn v Johnson* [1984] HKLR 372).

Obviously, in light of the realities of global business, there is every reason to expect present-day avoidance powers to be construed as extraterritorial.

It is unfortunate that insolvency practitioners do not have the benefit of the views of the Hong Kong Law Reform Commission or its Insolvency Sub-Committee on the question of the extraterritoriality of the new avoidance powers. It is quite startling to realise that, despite the obvious significance of avoidance powers in bankruptcy, no discussion of avoidance powers is found in either of the two law reform documents relating to bankruptcy. The Law Reform Commission, and its Sub-Committee on Insolvency, simply did not address avoidance powers at all in these documents. Nevertheless, the UK provisions found their way into the Bankruptcy (Amendment) Bill 1996 and from there into the BAO. These commentators are happy to see new, more powerful avoidance powers conferred upon trustees and liquidators in Hong Kong insolvencies. Our only observation is that the total non-discussion of this important topic by the appropriate law reform body is a peculiar way of conducting a law reform exercise.

It is perhaps tempting to overlook the process followed and focus on the end result. Hong Kong trustees and liquidators now have stronger avoidance powers and these powers are, it seems, extraterritorial. However, if what the draftsman was trying to achieve (as one must assume) was to confer the same avoidance jurisdiction upon a Hong Kong trustee and the Hong Kong court as is possessed by their English counterparts, then that objective has not been met. For when the substantive law was changed in England in the mid-1980s, new procedural rules were introduced in the form of the Insolvency Rules 1986. Specifically, r 12.12(3) leaves it entirely to the discretion of the court as to the manner in which any process or order of the court in insolvency proceedings is to be served on any person who is not in England. Thus, the position in England is that: (1) the Insolvency Act 1986 avoidance powers are extraterritorial in scope; and (2) a person outside the jurisdiction can be served with process by reliance upon the express wording of r 12.12 of the Insolvency Rules 1986 (for a recent illustration involving insolvent trading, see *Re Howard Holdings Inc* [1998] BCC 549 and P Smart, supra pp 26-27). However, in Hong Kong, although the new avoidance powers are copied from the UK provisions, no equivalent to r 12.12 has been introduced into either the Companies (Winding-up) Rules or the Bankruptcy Rules (even though extensive amendments were made to the Bankruptcy Rules as from 1 April 1998 (Bankruptcy (Amendment) Rules 1998 (LN 77 of 1998)). The net result is that, although the new avoidance powers are extraterritorial, most practical benefits that might have flowed from extraterritoriality have evaporated because of what was presumably an oversight in not making appropriate procedural provision in the Bankruptcy Rules and the Companies (Winding-up) Rules.

Conclusion

The *Setaffa* decision puts to rest any suggestion that reference to this sort of legislative drafting error is mere quibbling. The failure to adequately copy UK legislation creates uncertainty and invites unnecessary litigation. To avoid similar confusion as to the operation of the new avoidance powers, it would be helpful if the Government Printer were to include copies of both the old and new provisions in the next edition of the inserts for the Bankruptcy and Companies Ordinances. Finally, it is also important that amendments be made to the subsidiary legislation as soon as possible to enable trustees and liquidators to benefit from the extraterritoriality of their new avoidance powers.

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新破產清盤法：陷阱與漏洞

Philip Smart 及 Charles D Booth 認為，香港新破產清盤法之擬制不佳，以致產生了很多爭議點

從事公司法與破產清盤法的律師們會注意到，以往經常出現因立法草擬水準之不佳以致《公司條例》（第 32 章）的修訂欠妥。類似問題最近再次出現，特別在 *Re Setaffa Investments Ltd* [1998] 2 HKLRD 236（主審法官為高等法院原訟法庭法官郭美超）一案中尤為明顯。一如以往，*Setaffa* 案揭示的問題，其出現的原因，是草擬者把聯合王國法例可以說是擄字過紙時，卻沒有徹底把該些法例完全抄過來。正如郭美超法官指出（見第246頁）：「鑒於香港法例乃仿效聯合王國法例，草擬者這樣的疏忽，很難說是首次出現。」本文之論旨有三：（一）說明 *Setaffa* 案的判決；（二）提出新破產清盤法中曾出現類似問題的其他地方；及（三）讓律師們留意到有關最近被融入破產清盤法的新的廢止權力的境外法律效力在實務上的困難。

Setaffa 案與清盤後的利息

《1996 年破產（修訂）條例》（1996 年第 76 號條例）（以下簡稱《破產法修訂條例》）對香港的破產清盤法作了修訂。該條例自本年 4 月 1 日生效（見 1998 年第 158 號法律公告）。《破產法修訂條例》處理的項目之一，是有關破產情況下債務的利息。另一方面，在有清償能力下清盤時的債務利息，已透過自1997 年 2 月 10 日生效的《1997 年公司（修訂）條例》（1997 年第 3 號條例）（以下簡稱《公司法修訂條例》）作了改革而已

增訂於《公司條例》。《公司法修訂條例》把新的第 264A 條增訂在《公司條例》。第 264A 條規範的事項之一，是規定有清償能力之公司，在清盤後所欠下的債項的利息處理方式。第 (1) 款規定，公司（並非是無力償債公司）的「在清盤中獲證明的債項之後所剩餘的任何盈餘」：

> 「在用於任何其他目的之前，須用於支付該等債項尚未清償的期間內該等債項的利息 … (b) 如清盤屬自動清盤，則該期間自開始清盤 … 的日期起計。」

第 264A 條顯然適用於在 1997 年 2 月 10 日後開始的清盤案件。但 *Setaffa* 案提出的問題，是該條文是否亦適用於在上述日期前開始的清盤案件。

在 *Setaffa* 案中，有關的清盤早在 1983 年已開始，但直至第 264A 條生效時，仍有一筆可觀的金額未被分配。案中論點之一，為第 264A 條可被引伸至適用於在 1997 年 2 月 10 日之後進行的分配，從而令該條文具追溯效力。這論點看似不太可能，但仍可被提出，原因是縱使第264A(2) 條幾乎是一字不漏地從聯合王國《1986 年破產清盤法令》第 189 條抄過來，但草擬者卻未有抄進有關的過渡性條文。《1986 年破產清盤法令》附表 11第 4 (1) 段的過渡性條文，作出了以下的規定：

> 「就任何於指定日期前已開始（或被視為已開始）的清盤而言，新的法律將不適用，而舊有法律將繼續適用 …」

《公司法修訂條例》顯然應帶有類似的過渡性條文。這些條文事實上未有出現，雖然郭美超法官認為是「純粹歸因於一時遺漏」（見第 246 頁），但情況卻導致了應是不必要的訴訟的產生。在 *Setaffa*案中，法院考慮案情後，拒絕接納第 264A條具任何追溯效力的論點，原因是，在未有明確文字或其他證據以清楚顯示追溯效力的情況下，第 264A 條只適用於在 1997 年 2 月 10 日後開始的清盤案件。

過渡問題及廢止權力

與《公司法修訂條例》不同的是，《破產法修訂條例》第 99 條包括了過渡性條文，它實際上規定了，對於在《破產法修訂條例》生效日期（即 1998 年 4 月 1 日）前已開始的破產案件而言，「舊有法律」將繼續適用（除了一些有關解除破產的重要例外情況）。故此，就破產案受託人的廢止權力而言，假設某破產案於 1998 年 3 月 1 日開始，若受託人欲廢止破產人於 1998 年 1 月 1 日所作的付款，則舊有的欺詐優惠法律將適用於這情況。換句話說，正如 *Setaffa* 案，新法律並無追溯力。但假設破產於 1998 年 4 月 1 日後開始（這即是說《破產法修訂條例》第 99 條不適用），而欲以廢止的交易是於該日*前*進行，情況會是如何呢？這裡的陷阱，是假設新法例適用於這情況，因為個案於 1998 年 4 月 1 日開始。

破產個案中的新的廢止權力並無追溯力，而舊有條文將繼續適用於在 1998 年 4 月 1 日前發生的事件及交易

聯合王國《1986 年破產清盤法令》特別處理這個問題，方法是加進有關廢止權力的過渡性條文（見該法令附表 11 第 17段）。該條文規定，一宗在指定日期前進行的交易，只在該宗交易可根據舊有條例被廢止的情況下，該宗交易才可根據新條例被廢止。這做法的好處，是它既把焦點放在新條文上，但同時防止了不公平的情況，原因是它禁止新條文被用於根據舊有法律不能被廢止的交易之上。

但香港的法律草擬者亦沒有抄進上述第 17 段。結果是，正如我們從 *Setaffa* 案看到，修訂條例中並沒有明確的適用條文。但根據基本原則，當缺乏明確條文或清晰的指引時，新的廢止權力不能被視為適用於在 1998 年 4 月 1 日前進行的交易，否則一宗在進行期間是有效及毫無瑕疵的交易隨後可能會變為可予廢止。若新的廢止權力不適用（正如上文提出），那麼舊有法律是否繼續適用於此等交易呢？有鑒於《釋義及通則條例》（第 1 章）第 23 條，答案是肯定的。這就是說，雖然舊有的廢止條文已被《破產法修訂條例》廢除，但該些條文必繼續適用於在 1998 年 4 月 1 日前出現的交易，縱使有關的破產程序於該日後才開始。

總的來說，律師們應注意到，破產個案中的新的廢止權力並無追溯力，而舊有條文將繼續適用於在 1998 年 4 月 1 日前發生的事件及交易，縱使有關破產於該日後才開始。故此，律師們最好繼續保存著舊有的法例條文。

《公司條例》下的不公平優惠

《破產法修訂條例》不但引進了破產案中新的廢止權力，而且為《公司條例》加進了新的不公平優惠的條文。第 266B 條包括了以下的過渡性條文：

> 「(2) 凡任何公司在修訂條例實施前開始清盤，則就本條例第 266 或 266A 條而言，以在未為修訂條例修訂前的狀況為準的主體條例〔即《破產條例》〕條文適用。」

因此，第266B(2) 條明確規定，當清盤於 1998 年 4 月 1 日前開始時，新的不公平優惠條文並不適用。因此，舊有的破產法例中包含的欺詐優惠條文仍繼續適用。但第 266B(2) 條並未有處理某些情況，例如清盤於 1998 年 5 月 1 日開始但所指稱的優惠於 1998 年 1 月 1 日發生。縱是如此，毫無疑問的是第 266B 條全無追溯效力，而於 1998 年 4 月 1 日前發生的事件仍繼續由舊有的欺詐優惠法律所管轄。

境外法律效力：《清盤規則》須作修訂

正如上文提及，《破產法修訂條例》下的新的廢止權力，基本上是仿效相同的英國法例條文（見《1986 年破產清盤法令》第 339 條起）。近年來，英國法院均恆常地堅稱該些英國的廢止權力具有境外法律效力（見 *Re Paramount Airways Ltd (in admin)* [1993] Ch 223 一案；及 P Smart 著《跨境破產清盤》（第二版，1998 年）第 17 至 27 頁。要注意的是，英國對於有關公開訊問無力償債公司董事的法律，抱著了相同的觀點：見 *Re Seagull Manufacturing Co Ltd* [1993] Ch 345。）。考慮到《破產法修訂條例》的來源，香港原訟法庭對於新的廢止權力亦很可能（若非勢必）採取相同的態度及立場。這與 1998 年 4 月前的情況（即一般認為廢止權力的法權限於香港境內：見 *American Express International Banking Corp v Johnson* [1984] HKLR 372 一案的附帶意見）相比較，顯示了極大的轉變。明顯的是，在現時經營全球業務的現實環境下，我們是有著充分理由期望廢止權力被解釋為具有境外法律效力。

遺憾的是，從事破產清盤法的律師們不能得到香港法律改革委員會或其下的破產清盤附屬委員會就新的廢止權力的境外法律效力這問題所發表的意見。縱使廢止權力在破產法中佔著重要地位，但有關破產法的兩份法律改革文件均未有對該項目作任何討論，這確讓人極感驚訝。事實上，在上述文件中，

法律改革委員會及其破產清盤附屬委員會對廢止權力竟隻字不提。另一方面，《1996 年破產（修訂）條例草案》以至於《破產法修訂條例》中均包括了聯合王國法例的條文。香港的破產受託人及清盤人能被賦予更新、更有效的廢止權力，對此我們當然感到高興。我們唯一的意見是，有關的法律改革組織在推行改革時對此重要項目竟然完全不作討論，這是比較奇怪的。

有關的附屬法例必須儘快被修訂，使破產受託人及清盤人可真正從新的廢止權力的境外法律效力中獲益

著重產品而不顧過程的做法，也許是誘人的。表面上，香港的破產受託人及清盤人現在擁有更強大的廢止權力，而這些權力似乎亦具有境外法律效力。然而，若果（我們亦須作如此假設）草擬者希望達到的目標是把相等於英國的破產受託人及清盤人所擁有的廢止權賦予香港的破產受託人及清盤人的話，那麼草擬者並未達到該目標。原因是，當英國的實體法律於八十年代中期作出改變時，一套新的程序規則（即《1986 年破產清盤規則》）亦被引入。當中，第 12.12(3) 條規則特別賦予法院絕對酌情權，以決定把破產清盤案程序中的任何法律程序文件或法庭命令送達身在英國境外人士的方式。因此，英國的情況是：（一）《1986 年破產清盤法令》下的廢止權力具境外法律效力；及（二）有關人士可根據《1986 年破產清盤規則》第 12.12 條的明確規定，把法律程序文件等送達身在司法管轄區以外的人士（見 *Re Howard Holdings Inc* [1998] BCC 549 及 P Smart 上述著作第 26 及 27 頁，上述是涉及在無力償債下營商的闡明）。另一方面，香港的新的廢止權力雖由聯合王國的法例條文抄過來，但與上述第 12.12 條規則相同的條文，卻未被引入《公司（清盤）規則》或《破產規則》（縱使《1998 年破產（修訂）規則》（1998 年第 77 號法律公告）自 1998 年 4 月 1 日對《破產規則》作出了大規模修訂）。總的結果是，雖然新的廢止權力具有境外法律效力，但由此可引伸出的實際益處，卻因為大概是忽略了在《破產規則》及《公司（清盤）規則》作出適當的程序性條文而化為烏有了。

總結

Setaffa 案的裁決，顯示了對於此類法例草擬錯誤的評論，絕非吹毛求疵。有關草擬者未有充分地把聯合王國法例抄過來，這不但產生了灰色地帶，而且更引致了不必要的訴訟。為了避免在新的廢止權力法律的運作上出現類似的混亂，政府印務局局長應考慮在《破產條例》及《公司條例》下一期的插頁中同時包括新舊兩款條文。最後，有關的附屬法例必須儘快被修訂，使破產受託人及清盤人可真正從新的廢止權力的境外法律效力中獲益。

Philip Smart 及 Charles D Booth
均在香港大學教授破產清盤法