Corporate Rescue: This Year, Next Year ...

Philip Smart and Charles Booth outline those issues that they believe need to be addressed before the government seeks to re-introduce to LegCo a new Part IVB of the Companies Ordinance dealing with corporate rescue

The need for the enactment of a statutory corporate rescue mechanism has long been debated in Hong Kong insolvency law circles. That debate came into sharp focus in January this year upon the gazetting of the Companies (Amendment) Bill 2000. The Bill envisages, inter alia, a new Part IVB ('Provisional Supervision and Voluntary Arrangements') for the Companies Ordinance (Cap 32). Part IVB contains some 33 (often intricate) sections broadly designed along the lines of the October 1996 recommendations of the Law Reform Commission of Hong Kong (the Law Reform Commission) in its Report on Corporate Rescue and Insolvent Trading (the Report).

Despite near universal recognition that an effective corporate rescue mechanism is needed in Hong Kong, the provisional supervision regime as proposed has encountered serious criticism, with the result that it now appears that Part IVB will be cut from the current legislative programme and held over until after the LegCo elections. The purpose of this article is not to review the background to, or the content of, Part IVB (for such a review, see Bannister, 'Staying Alive in Hong Kong: A Comparative Review' (2000) 16 Ins L&P 17), but rather to identify those issues that we believe must be addressed by the government before Part IVB is re-introduced to LegCo at some later date.

Secured Creditors: General Rights

A central part of the proposed provisional supervision regime is the moratorium: once provisional supervision has begun, creditors will be unable to enforce their rights against the company by the usual means (eg civil actions, distress, winding-up proceedings, etc). A narrowly defined category of secured creditor – known as a 'major creditor' – is by s 168ZQ to have a veto over the continuation of any provisional supervision. Section 168ZQ and the veto are discussed further below, but this part of the analysis deals with the general rights of secured creditors, in particular, where the veto power has not arisen or has not been exercised by a major creditor.

The position in the United Kingdom and Australia (as well as in the United States) is that the rights of secured creditors are given extensive protection in a corporate rescue. In these three jurisdictions, no rescue proposal that substantially cuts into the rights of a secured creditor can be forced upon that creditor without its consent (with the exception that in the United States, a 'cramdown' procedure may be used, pursuant to which a proposal can be forced upon an objecting or impaired class of secured creditor only if it is demonstrated that the plan does not 'discriminate unfairly' and is 'fair and equitable' with respect to each such class of secured creditor).

Surprisingly, a reading of Part IVB reveals that in the Bill there is no provision that prevents creditors from passing a proposal that impairs the rights of secured creditors without securing their consent. Creditors vote as a single class and a majority in number and two-thirds in value of the creditors present in person or by proxy (and voting on the resolution) is sufficient to carry a proposal. For example, it appears that a majority of creditors who collectively hold 70% of the corporate debt could pass a proposal that all creditors (secured and unsecured alike) should release 80% of their debt and accept 20% payable by the company over three years. In the light of the level of dividend typically paid in a winding up, the sort of proposal in the above example would be quite attractive to unsecured creditors; for a properly secured creditor, it could well be a disaster.

When questions were put (by one of these authors) to the government as to whether, as in the above example, a proposal could be passed against the wishes of a secured creditor requiring all creditors to 'take a haircut', the response was simple – just such a scenario had always been intended under the proposed Part IVB. In our view, the incorporation of such a premise into provisional supervision would have revolutionary consequences for bank lending in Hong Kong. For instance, a bank might take a perfectly valid fixed or floating charge, expecting that in the event of a winding up (or following the appointment of a receiver) the bank would be able to recover most, if not all, of its debt. But under proposed Part IVB (assuming a bank's loan is not substantial enough to give the bank a veto power), anything might happen, and the bank might ultimately be forced to take a haircut on account of the voting power of the unsecured creditors. Accordingly, when taking security the bank would have had no idea what position it might be in a few years down the road, should the company go into provisional supervision. That risk would have to be factored into the costs of corporate borrowing.

The idea of secured creditors being forced by a plan to take a haircut was never suggested, let alone discussed, by the Law Reform Commission in the Report. In fact, our understanding is that the intention of the Law Reform Commission was just the opposite, in that no plan that modified or otherwise affected the rights of a secured creditor could be approved unless the secured creditor consented to the proposed modification or impairment. It is unfortunate that the Report did not fully address this point. At this stage, however, it is clear that undermining secured creditors' rights, as does the proposed Part IVB, is far too high a price to pay for the introduction of any corporate rescue mechanism. Rather, we would suggest a solution that mediates between the contrasting approaches of the Report and the Bill - the consent of a secured creditor should be required to any proposed modification or impairment of its substantive rights, except in those circumstances where it can be demonstrated to the court that the secured creditor is not being treated unfairly and the extent of its recovery would not in fact be reduced by the plan.

Secured Creditors: Veto Power

Even assuming that the Bill is modified to prevent the approval of a proposal that affects the rights of a secured creditor except with the concurrence of that creditor, there remains another - albeit less crucial – problem area in relation to secured creditors. This concerns the right given by s 168ZQ to certain secured creditors to veto the continuation of the provisional supervision.

Under the English and Australian rescue regimes, the holder of a floating charge over the whole or substantially whole of the company's assets is given a 'one time only' veto power: in effect, the floating charge holder can at the very outset opt to bring the procedure to a halt. The Law Reform Commission (Report, paras 13.7 to 13.17) suggested a similar veto power whilst (a) recommending that the veto also be extended to fixed charge holders and (b) noting that, at least in England, some lenders had begun taking a floating charge merely to obtain a veto in the event the borrower subsequently went into administration (the so-called 'light-weight' floating charge issue). Both these points have been taken up in s 168ZQ.

Section 168ZQ(1) requires the provisional supervisor within three days of the appointment to give relevant notice to each of the company's 'major creditors'. The notice requires the major creditor, within the earlier of either three days of receiving the notice or seven days of the 'relevant date' (ie the day provisional supervision commences), to inform the provisional supervisor whether the creditor agrees to the continuation of the provisional supervision. A major creditor is defined in s 168ZQ(5) as:

> '... the holder of a charge over the whole or substantially the whole of the company's property if, but only if, the claim under the charge amounts to not less than 33$^{1}/_{3}$% of the liabilities of the company immediately before the relevant date.'

The reference to 33$^{1}/_{3}$% of the total liabilities of the company may, it is suggested, at times place a near impossible administrative burden upon the provisional supervisor.

It may prove difficult in many cases to ascertain within this short period whether or not there is a major creditor as defined in s 168ZQ(5). Of course, there will be cases where it is quite plain that there are not any major creditors, but there are bound to be other cases where it is a grey area. For example, would it be possible in a BCCHK type of situation to ascertain the total liabilities of the company within three days of the appointment of a provisional supervisor? Similar difficulties will arise in cases involving a group of companies, some of which are solvent and some insolvent, where cross-guarantees have been given, and where the total liabilities of the company may not be immediately apparent. There may also be cases where the company's accounts are missing, inadequate, or even a work of fiction. Finally, even where the provisional supervisor can ascertain the liabilities, there may be a not inconsiderable cost factor – one that simply does not exist, for example, in England or Australia. The provisional supervisor would, in any event, have more constructive things to do in the early days of his or her appointment than ascertain the percentages of overall corporate debt owed to secured creditors.

Another question is: Why should the percentage be fixed at 33$^{1}/_{3}$%? This question is relevant because if a creditor holds one-third of the total debt, no proposal can in any event pass on a vote of the creditors without his or her approval. It should also not be overlooked that in reality, as not all creditors will turn up and vote at the creditors' meeting (or might turn up and abstain), it may well be possible for a creditor holding significantly less than 33$^{1}/_{3}$% of the total debt to block the ultimate approval of any proposal. It would therefore be foolhardy for a provisional supervisor to proceed with a plan if a creditor holding, let us say 20%, of the total debt were actively opposed.

It is suggested that the 33$^{1}/_{3}$% (or indeed any other percentage) requirement in s 168ZQ(5) might cause more harm than good and should be abandoned.

Workers' Wages

Whilst there is authority that 'the wages of sin is death' (Romans 6:23), there remains a question as to whether ➤

the extraordinary (if not actually sinful) way in which workers' wages are dealt with under the Bill will be the death of provisional supervision. In contrast to the position of secured creditors, which, as noted above, has been undermined, workers, in our view, are being treated far too generously. Our objections are aimed not at the treatment of workers' claims arising during the course of a provisional supervision, but rather at the treatment of their pre-existing claims.

Where a company is insolvent and a winding-up petition has been presented, workers who have not received their wages can apply to the Protection of Wages on Insolvency Fund (PWIF) for ex gratia payments. (The same is also the case in relation to severance payments, which can be quite substantial.) The Law Reform Commission originally proposed that the onset of provisional supervision should likewise trigger the operation of the PWIF (Report, para 5.42). However, concerns were expressed that unscrupulous employers might lay off employees without paying them their entitlements and then put the company into provisional supervision – thereby, so it was said, passing the burden of unpaid wages and severance payments onto the PWIF. (See the 1999 Consultation Paper at <http://www.info.gov.hk/fsb/consult/index.htm>) There was also some concern as to the potential adverse consequence on the solvency of the PWIF if there were a great number of provisional supervisions commenced after the enactment of the new procedures. A consultation exercise was conducted in 1998 and a Consultation Paper issued in February 1999, as a result of which the Bill has now been drafted (see s 168ZA(c)) in such a way that provisional supervision can only commence if the company has either (1) paid off all debts and liabilities owing to its employees under the Employment Ordinance (Cap 57) as of the relevant date or (2) has opened a trust account with a bank containing sufficient funds to pay off all such debts and liabilities: pursuant to s 168ZA(c)(iv)(A)(II) (really!), the 'exclusive purpose' of the trust account is to pay such debts and liabilities.

Whilst the PWIF and employees' groups will doubtless welcome the approach taken in the Bill, very real difficulties have been created. Firstly, and this is a point recognised in the 1999 Consultation Paper itself, where is a company – which is already in serious financial difficulty – going to find the money to pay off all its liabilities to its employees or to establish the relevant trust account? It is unlikely that banks would be keen to lend such sums to the company, knowing that the loan would go straight to the workers and would not be used in the company's trading business. (Moreover, a lender in such circumstances would not receive any sort of priority or preferential status in the provisional supervision, unlike in a liquidation where a bank has previously lent money to a company to pay its workers: see s 265(2) of the Companies Ordinance.) There is also the surely undesirable likelihood that a company contemplating provisional supervision might stop making any effort to pay its trade creditors and hoard as much cash as possible in order to get together a sufficient lump sum to pay off its employees. It is fair to say that the Bill actively encourages the company deliberately to create what in an ordinary liquidation would be considered an unfair preference. And whilst the employees may benefit, there is undoubtedly a corresponding detriment to the general body of creditors – which is, of course, why insolvency law has always found preferences objectionable as a matter of principle. The detriment would be even more objectionable in those cases where the employees being benefited happen to include directors or other 'associates' who are owed sums under their service contracts with the company.

A further matter related to the company's establishment of a trust account is that the Bill leaves it unclear as to what should happen to the funds if the provisional supervision collapses in its early stages, or the creditors ultimately reject the proposal at their meeting, and the company thereupon goes into liquidation. We cannot believe that the intention is that, for example, if the provisional supervision implodes in its first week, the employees should still be paid in full out of the trust account. The fact that it is termed a 'trust account' does not mean that the employees are beneficiaries under a classic trust: at most there would be a so-called *Quistclose* trust – a trust for a purpose – and the money should revert to the company upon the failure of the provisional supervision.

The situation is even more problematical where the employees have actually been paid off upon the company entering into provisional supervision (rather than a trust account having been established). It appears that there is no way in which these payments might be recovered, even where the provisional supervision is given up as hopeless after a day or two. The payment to the employees would not in any subsequent winding up be an unfair preference under s 266B of the Companies Ordinance, because the directors' *motive* in making the payments to the employees would have been to enable the company to enter into provisional supervision rather than to confer an advantage to the employees (see *Re MC Bacon Ltd* [1990] BCC 78).

A purely practical objection is that, in circumstances where a company has many employees, the (proposed) provisional supervisor might have to spend considerable time, before even being able to commence the provisional supervision, working out

all the debts and liabilities owed to employees and former employees (which will likely be even more time consuming than working out the amounts owed to secured creditors). As there is no limit or cap laid down in the Bill, 'all debts and liabilities' would mean precisely that. At least if a maximum amount (or amounts) were specified (as under the Protection of Wages on Insolvency Ordinance (Cap 380)), the ascertainment-of-liability exercise would be that much simpler and less costly.

Lastly, it must also be noted that the Protection of Wages on Insolvency Ordinance has a distorting effect on Hong Kong insolvency law, which provisional supervision will only make worse. Section 16 of that Ordinance defines insolvency in relation to a company as meaning the presentation of a winding up petition: it does not encompass a creditors' voluntary liquidation or receivership (or the appointment of a provisional supervisor). The position of employees in respect of unpaid wages is set out in the following table (similar disparities exist in relation to severance payments):

Type of case	**Compulsory Winding Up**	**Creditors' Voluntary Winding Up**	**Receivership**	**Provisional Supervision**
Amount	$36,000 (max) from PWIF	$8,000 (max) as preferential creditor under Companies Ordinance s 265	$8,000 (max) as preferential creditor under Companies Ordinance s 79	*All* debts under Employment Ordinance (no limit)
Time limit	no wages outside 4-month period	no wages outside 4-month period	no wages outside 4-month period	*no time limit*

(From the above table it is apparent why, at present, employees will seek to get legal aid and present a winding-up petition, even if a company is already in voluntary liquidation (see *Re Rena Gabriel HK Ltd* [1995] 2 HKC 273).

It is instructive to compare the position in England under the Employment Rights Act 1996, ss 182 to 190. Insolvency of a corporate employer is defined (as it was under the 1978 legislation, as amended) as meaning the making of a winding-up order, the passing of a resolution for voluntary liquidation, the appointment of a receiver, the making of an administration order or the approval of a company voluntary arrangement (a 'CVA') – and any of these may trigger an application for payment of an identical amount from the relevant fund. In England many corporate rescues take place within receivership and there is no incentive for the employees to seek to put the company into liquidation (in order to get more out of the statutory fund). In other words, commercial considerations will determine whether to move ahead with a rescue or restructuring and whether receivership or administration (or a CVA) is the appropriate vehicle. In Hong Kong, if the Bill is enacted, workers will develop a 'wish list' along the following lines:

- First, provisional supervision – the workers will get *everything* up front or provided for in a trust fund (without having to go through the trouble of applying to the PWIF fund for a *limited* amount).
- Second, compulsory winding up – the workers will get the moderate benefits from the PWIF fund.
- Third, receivership or creditors' voluntary winding up – the workers will get a priority under the Companies Ordinance.
- Lastly, other procedures, such as informal workouts or workouts under the joint guidelines issued by the Hong Kong Monetary Association and the Hong Kong Association of Banks (which are known as the Hong Kong Approach to Corporate Difficulties) – workers will get no guaranteed payment or priority.

We find the policy underlying the operation of the PWIF at best inconsistent. (This is particularly so when it is noted that no provision is made in the existing legislation for workers' wages should the employer be an individual who makes a proposal for an individual voluntary arrangement (an 'IVA') under the Bankruptcy Ordinance, although we acknowledge that, in practice, IVAs involving employers would be highly unusual and involve only a few workers.) In short, the PWIF is already distorting Hong Kong insolvency law, not to mention encouraging otherwise avoidable costs (by encouraging unnecessary winding up petitions), and the Bill would simply aggravate that position at the direct expense of the general body of creditors. We believe that, at a minimum, workers' unpaid claims pre-dating the commencement of a provisional supervision should be treated the same as workers' claims pre-dating the commencement of a compulsory winding up. An even better solution would be to adopt the English approach and mandate the same treatment for workers under all statutory insolvency procedures.

Building Confidence: Avoidance Powers and Directors

Although we have no supporting empirical data, it appears to us that ➤

there is a general lack of confidence amongst creditors in the proposed provisional supervision regime. It must not be forgotten that many people and companies have been hurt in the recent recession and there may be something of an anti-debtor reaction taking place – creditors are wary that somehow unscrupulous directors may be able to manipulate the proposed regime to 'get off' without paying 'their' debts. Certainly, the startling lack of success of IVAs in the last two years indicates that statutory debt restructuring mechanisms are not necessarily regarded by creditors as a panacea. (The legislation governing personal insolvency in England and Hong Kong is essentially the same, yet whereas in England for roughly every five bankruptcies there is one IVA, in Hong Kong, since the new bankruptcy law came into operation on 1 April 1998, roughly 4,900 bankruptcy orders have been made, but only seven IVAs have been approved.)

We would suggest that confidence would be greater in a system that 'fits in' with the existing insolvency regime. The way in which the Bill deals with both secured creditors and employees changes the balance of (competing) interests that has hitherto existed in Hong Kong insolvency law. The way in which the Bill approaches the directors is also, it is submitted, uninspiring.

Where a company has gone into liquidation, the liquidator is given certain additional substantive rights or procedural advantages to bring the directors to book. The Companies Ordinance contains provisions relating to unfair preferences, extortionate credit transactions, fraudulent trading and misfeasance proceedings (and transactions at an undervalue will be added in due course). The Report failed to recommend that avoidance powers should be conferred upon a provisional supervisor, with the exception of the ability (for the purposes of the s 168ZQ veto power) to avoid fixed and floating charges created by an insolvent company within 12 months of the commencement of provisional supervision, except to the extent of (1) the amount of any cash paid to the company at the time of or subsequent to the creation of, and in consideration for, the charge, and (2) interest (see Report, para 13.19.) This recommendation was incorporated into proposed s 168ZQ(4).

It is our understanding that the failure to extend unfair preferences to provisional supervision was deliberate, for the Law Reform Commission felt that the existence of avoidance powers would be a disincentive for directors deciding whether to put their company into provisional supervision; and, in addition, that it would be difficult to exercise avoidance powers within the time periods contemplated for provisional supervision. Three observations may be made in regard to this omission. First, the presence of avoidance powers would not be a disincentive as far as honest and upright directors are concerned; a disincentive would only be present for directors whose conduct would not bear careful scrutiny. (It is perhaps unnecessary to ask whether this latter group of directors is deserving of such consideration on the part of the Law Reform Commission.) Second, even if the application of unfair preference powers could not be completed during a provisional supervision, the mere ability to exercise such powers would change the relative bargaining strengths of the parties. Third, whilst the absence of avoidance powers might be an incentive for directors, it cannot help build confidence in creditors who are afraid of unscrupulous directors.

Although it is arguable that leaving avoidance powers outside the provisional supervision regime will streamline the process and promote a more efficient administration by the provisional supervisor, several points can be made in rebuttal. First, if the facts do not raise any suggestion of impropriety – as will be the case in the overwhelming majority of instances – then the mere presence of avoidance powers will be neither here nor there, as there will be nothing to pursue. The absence of avoidance powers will really be relevant to saving costs where the facts are downright suspicious. Second, although there are no avoidance powers (with the limited exception noted above in regard to charges), the Bill does require (by an amendment to the existing s 168I) the provisional supervisor (just like a liquidator) to report any unfit conduct to the Official Receiver for the purpose of directors' disqualification proceedings – so clearly, the provisional supervisor cannot simply imitate Lord Nelson when it comes, for example, to a director who has conferred a preference upon an associate or committed a breach of fiduciary duty. Lastly, and most importantly, the provisional supervisor will have to tell the creditors what they might expect to recover under the rescue plan and, in comparison, what they might expect in a normal liquidation – and in a liquidation, avoidance powers will apply. The point is well put in the following passage by an English banker:

> '... creditors would want very specific assurances that any monies which have been unfairly disbursed by the company will be recovered by the supervisor for the general body of unsecured creditors. Certainly the creditors will not agree to preferences, undervalues, etc. being forgotten when such transactions could be vigorously attacked by a liquidator in a winding up situation.' (Eales, *Insolvency: A Practical Legal Handbook for Managers* (1996) at p 113)

Conclusion

We believe that relatively few successful rescues will take place under any statutory rescue regime that might be introduced in Hong Kong. The major advantage of having such a regime on the books would be to encourage, if not force, reluctant creditors to come to a negotiated settlement. At present, under either informal workouts or under the Hong Kong Approach to Corporate Difficulties, even where most creditors support a restructuring plan, one or two 'difficult' creditors can seriously hamper or even destroy a rescue. Moreover, although the Hong Kong Approach does provide for the adoption of a standstill, it does not include a moratorium that is binding on all creditors. A major advantage that would result from the enactment of provisional supervision is that an obstinate creditor will have the ground cut from under his or her feet if the company can be placed into provisional supervision – for not only may that creditor's objections be defeated on a vote, but also, once provisional supervision has commenced, normal creditors' remedies will no longer be available.

Some might therefore argue that the details of the provisional supervision regime proposed in the recent Companies (Amendment) Bill do not really matter that much, that any statutory regime, whatever its possible shortcomings and however little it might be used in fact, is better than none. Although it would be tempting to agree, we cannot do so for the following reasons:

- Secured creditors' rights should not be undermined to the extent apparently envisaged by the Bill.
- For a rescue regime to prove useful, creditors must have sufficient trust in it, and establishing creditor confidence should take priority over the comfort level of directors.
- As a rule, a rescue regime should not significantly alter the balance of interests that prevails elsewhere in insolvency law.

When, as seems likely, the government reconsiders the provisional supervision regime sometime later this year (or next year), we would hope that these three points will be borne in mind and that any new bill will, at a minimum, include revisions to the provisions regarding secured creditors, workers' wages and avoidance powers. The possibility that a corporate rescue mechanism will be introduced into Hong Kong law this year has evaporated. Hopefully, the effort next year will bear fruit – if not, one is left with 'sometime' and (heaven forbid) 'never'.

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臨時監管問題公司的制度本身有何問題？

政府已替《公司條例》草擬新的第 IVB 部，建議設立一套挽救公司制度。政府把草案重新提交立法會審議前，應先正視和解決哪些問題？Philip Smart 與布卓利加以剖析

有一個問題，多年來都備受從事本地清盤法律業務的律師和其他人士爭論，這就是香港是否有需要設立一個法定的挽救公司機制。隨著政府憲報於本年 1 月刊登《2000 年公司（修訂）條例草案》（以下簡稱《草案》），上述爭論亦趨白熱化。《草案》提出的建議之一是替《公司條例》（第 32 章）增添第 IVB 部，這部分題為「臨時監管及自願償債安排」，內容由三十三項頗為複雜的條文組成，它們大致上依循了香港法律改革委員會（以下簡稱「法改會」）早於 1996 年 10 月所發表的《關於挽救公司及在無力償債情況下營商的報告》（以下簡稱《報告》）和當中的種種建議。

縱使香港各界均認同有需要設立有效的公司挽救機制，但《草案》所建議的臨時監管制度卻受到猛烈抨擊，故此，上述第 IVB 部的審議看來會押後到新一屆立法會誕生後才進行。關於第 IVB 部的背景和內容，讀者可參閱 Bannister 著「在香港繼續生存：一個比較性的評檢」(2000) 16 Ins L&P 17 一文；本文則旨在帶出政府將來重新把第 IVB 部呈交立法會審議前務須正視的一些問題。

有保證債權人的一般權利

建議中的臨時監管制度的一個主體部分是「暫止期」(moratorium)，意思是，一旦開始臨時監管，債權人將不能透過慣常的方法（例如民事訴訟、扣押財物和清盤程序等）執行他們針對公司的權利。根據上述第 IVB 部下的第 168ZQ 條，一類特定的有保證債權人 — 名為「主要債權人」 — 有權否決臨時監管程序的進行。下文將對此作進一步探討，但本部分的著眼點是有保證債權人的一般權利，特別是當否決權未有產生或當主要債權人未有行使否決權的時候。

在英國、澳洲和美國，在挽救公司的過程中，有保證債權人的權益都獲得廣泛保障。此外，在這三個國家，沒有人可以在未經某名有保證債權人的同意下把某一套嚴重損害該債權人權益的挽救方案強加諸該債權人身上；但在美國，根據另一套程序，即使有保證債權人對某挽救方法表示反對，若能證明該方案沒有「不公平地歧視」該些債權人並且對他們「公正和公平」，則該方案仍可被強加諸他們身上。

令人驚訝的是《草案》或建議中的第 IVB 部都沒有條文禁止債權人在未得到有保證債權人的同意下通過任何損害該些債權人的權利的方案。債權人作為單一類別投票；而倘若某方案得到親自或有代表出席投票的債權人在人數上的過半數票贊成，而贊成的債權人的債項總值多於所有親自或有代表出席投票的債權人的債項總值的三分之二，則該方案 ➤

便會獲得通過。舉例說，根據一個挽救方案，公司的所有債權人（不論是有保證還是無保證債權人）須寬免其債所持債項的百分之八十，並接受公司在三年內償還其餘百分之二十的債項。該方案只要得到一共持有公司負債的百分之七十的大部分債權人贊成，便應可獲通過。然而，考慮到公司清盤期間通常所派發的紅利的水平，這樣的方案固然會受到無保證債權人歡迎；但對於有保證債權人來說，它便與災難無異。

本文其中一名筆者曾經要求政府解釋《草案》是否如上述例子般容許債權人在違反有保證債權人的意願下通過各種方案（例如要求所有債權人自動削減其債權）。政府直接了當地回答說《草案》第 IVB 部正正設想了上述情況。筆者認為，把這點納入臨時監管制度，對香港的銀行借貸業務會帶來革命性的影響。舉例說，某銀行可接受有效的固定或浮動押記，滿以為公司即使清盤（或委任了接管人），銀行將仍能討回大部分（若非全部）欠款。但倘若第 IVB 部通過成法，假設銀行的貸款額不足以令它有否決權，則任何事情都可以發生，而銀行最終可能要屈服於無保證債權人的投票權下，不得不削減債權。換句話說，銀行接受保證時，根本不會知道借款的公司一旦被臨時監管會發生什麼事情。這種風險，將成為決定公司借貸成本的主要因素之一。

法改會在《報告》內沒有討論有保證債權人被迫接受削減債權方案的概念；事實上，《報告》根本沒有提及該概念。依筆者理解，法改會的意願甚至與該概念剛好相反，即是說，除非得到受影響的有保證債權人同意，否則不得通過或批准任何更改或影響該有保證債權人的權益的方案。《報告》沒有徹底探討這點，實屬不幸。從現時的情形來看，設立挽救公司機制時若然同時引入《草案》第 IVB 部和減損有保證債權人的權益，便是付出太大代價。筆者認為，一個較好的做法，是在《報告》和《草案》這兩端之間找出折衷的解決方法 — 凡任何方案將更改或損害有保證債權人的實質權益，該方案應得到該有保證債權人的同意，但若能向法院證明該方案不會不公平地對待該有保證債權人，亦不會收窄該有保證債權人的追討範圍，則不受上述限制。

有保證債權人的否決權

即使《草案》得到修改，禁止在未獲有保證債權人的同意下批准任何影響該有保證債權人的權益的方案，《草案》仍存在著另一個問題，縱使其性質不及上文所述的問題嚴重。該問題涉及第 168ZQ 條對某些有保證債權人所賦予的否決繼續臨時監管的權力。

在英國和澳洲的挽救公司制度下，任何以公司所有或實質上全部資產作押記的浮動押記的持有人，都獲賦予「只可行使一次」的否決權。實際上，該押記持有人一開始便可行使否決權，令整個臨時監管程序停頓。法改會在《報告》第 13.7 至 13.17 段中建議引入性質相若的否決權，並且：（一）建議固定押記持有人亦應享有該否決權；及（二）留意到，至少在英國，一些借款人已開始接受押記，其目的純粹是在貸款人受監管時取得否決權（這便是所謂「輕量」浮動押記的問題）。第 168ZQ 條同時處理了以上兩點。

第 168ZQ(1) 條要求公司的臨時監管人在獲委任後三日內向公司每名「主要債權人」發出有關通知，要求主要債權人在接獲通知後的三日內或在有關日期（即臨時監管展開之日）後的七日內（兩者以較前者為準）告知臨時監管人主要債權人是否同意繼續臨時監管程序。根據第 168ZQ(5) 條，「主要債權人」被定義為：

> 「… 以〔有關〕公司全部財產或實質上全部財產作押記的押記的持有人，但該押記之下的申索款額必須是最少佔公司在緊接有關日期之前的債務款額的 $33^{1}/3\%$ 的。」

筆者認為，「債務款額的 $33^{1}/3\%$」的規定，在某些情況下將對臨時監管人造成極為沉重的行政負擔。

要在如此短暫的期間確實是否存在著第 168ZQ(5) 條所指的主要債權人，往往是相當困難的。誠然，在很多情況下，公司顯然沒有任何主要債權人，但有些情況必會產生「灰色地帶」。舉例說，在類似早前香港商業信貸銀行事件的情形下，是否有可能在委任臨時監管人後三日內確定公司的債務總額？若某個案涉及一組公司，當中只有一部分無力償債，而所有公司都曾作出交相保證的話，要確定每家公司的債務總額也是殊不容易的。此外，在某些情況下，公司的帳目可能已經不知所蹤，又或不完整甚至是偽造的。再者，即使臨時監管人可以確定公司的債務款額，也可能存在著可大可小的成本問題，但這個問題在英國和澳洲根本不存在。不管如何，臨時監管人獲委任後的初期，除了確定公司欠下有保證債權人的債務款額百分比之外，還要履行其他更重要、更有建設性的工作。

另一個問題是，為何要把有關的百分比定為 $33^{1}/3\%$？這個問題的重要性在於，若某債權人持有公司債務總額的三分之一，則任何方案若不獲該債權人的贊成，都應不會獲得通過。此外，我們不能忽視，實際上並非所有債權人都會出席債權人會議，即使出席，也可能投棄權票。故此，即使某債權人的權益遠少於公司債務總額的三分之一，該債權人也可以有能力阻止任何方案獲得通過。因此，假如某個方案遭到持有公司債務總額的某個百分比（例如百分之二十）的債權人反對，則倘若臨時監管人仍要實行該方案，便是愚不可及。

筆者認為在第 168ZQ(5) 條內作出 $33^{1}/3\%$（以至任何其他百分比）的規定是利多於弊，應予以廢除。

僱員的工資

《羅馬書》第 6 章第 23 節說：「罪的工價乃是死」。《草案》處理有關公司的僱員工資的方法雖不是「罪」，但也可說是非比尋常，這是否也會構成臨時監管制度的致命傷？正如上文所述，在《草案》下有保證債權人被處於不利位置；反之，《草案》待僱員則有過於寬厚之嫌。筆者所關注的並不是臨時監管過程中出現的僱員申索，而是他們的先前申索。

當公司無力償債並已提交清盤呈請時，未獲發工資的僱員可向破產欠薪保障基金（以下簡稱「欠薪基金」）申請特惠款項。（未獲給予遣散費的情況也是一樣，而遣散費所涉及的金額可以相當龐大。）法改會原先建議，臨時監管一旦展開，欠薪基金也應適用（見《報告》第 5.42 段）。然而，曾有人關注到，一些無良的僱主可能先裁去僱員，並且不向他們支付其應得的賠償和款項，然後令公司受到臨時監管，這做法變相把支付欠薪和遣散費的責任轉嫁到欠薪基金身上。（詳見 1999 年 2 月的《諮詢文件》，載於以下網址：

<http:// www.info.gov.hk/fsb/consult/index.htm>。）此外，有人質疑，一旦《草案》通過成法，若臨時監管個案劇增，欠薪基金會否有能力向所有申請人作出補償？有見及此，政府於 1998 年展開諮詢工作，並於 1999 年 2 月發表《諮詢文件》，結果是，根據《草案》所建議的第 168ZA(c) 條，在以下其中一種情況下，才可展開臨時監管程序：（一）有關公司已支付所有在有關日期之前憑藉《僱傭條例》（第 57 章）而欠下其僱員的債項及債務；或（二）有關公司已在銀行開設信託戶口，並存有足夠款項以支付所有該等債項及債務（根據第 168ZA(c)(iv)(A)(II) 條，該戶口須「專用於支付該等債項和債務」）。

《草案》的建議固然受到欠薪基金和勞工團體的歡迎，但同時也製造了一定的問題和困難。首先，正如上述《諮詢文件》也有提及，倘若某公司本身已陷入嚴重的財政困境，試問它又怎能有足夠金錢支付欠下其僱員的債務或成立所需的信託戶口？即使公司向銀行求助，若然銀行知道所借出的費用是用以支付欠薪等債務而不是用在公司業務上，銀行料不會願意向公司伸出援手。（此外，在這種情況下，貸款人在臨時監管過程中不會享有任何優先地位，這與一般的清盤情況不同：見《公司條例》第 265(2) 條。）第二，一些公司為了籌措足夠金錢以支付欠薪等債務，可以會對其在業務上的債務置之不理。我們甚至可以說，《草案》在某程度上鼓勵公司作出那些在一般清盤程序中被視為不公平優待的安排。公司僱員得到補償的同時，其他一般債權人的權益亦會受到損害 — 這當然解釋了為何破產法律向來都反對優先安排的概念。若然受惠的僱員包括公司的董事或其他「有聯繫人士」，而公司根據該些人士的服務合約已欠下他們款項的話，他們所得的好處（和其他債權人相應蒙受的損害）使更形不能接受了。

另一個關於公司開設信託戶口的問題是，《草案》未有說明，假如臨時監管過程展開後不久便告終，或有關方案最終不獲債權人通過而公司接而被清盤的話，信託戶口內的款項將會怎樣。筆者不相信在這些情況下僱員仍可從信託戶口取得所有補償。不錯，該戶口稱為「信託戶口」，但這不代表僱員是傳統信託下的受益人；極其量我們只可以說該戶口屬於所謂 *Quistclose* 信託（即為某用途而成立的信託），臨時監管過程一旦告終，信託下的款項應復歸予公司手中。

假如公司沒有開設信託戶口，但在開始接受臨時監管時其僱員已獲支付款項，情況便會更加複雜。即使臨時監管程序進行了一至兩日後便告終，僱員已獲取的款項看來也沒有方法可予以討回。此外，若公司繼而進行清盤，該些款項不會構成《公司條例》第 266B 條所指的不公平優待，因為公司董事向僱員付款背後的動機是讓公司能夠接受臨時監管，而不是給予僱員任何利益（見 *Re MC Bacon Ltd* [1990] BCC 78 一案）。

純粹從實際角度去看，倘若有關公司僱員人數眾多，臨時監管人（或建議中的臨時監管人）在展開臨時監管程序前可能要花時間確定公司欠下其僱員和前僱員的所有債項和債務，而這項工作所需的時間很可能比確定公司欠下債權人款額所需的還要多。要注意，《草案》並沒有對「所有〔…〕債項及債務」設定任何上限。若《草案》至少能像《破產欠薪保障條例》（第 380 章）一樣設定某些上限，確定債務的工作相信不會那麼費時和昂貴。

我們亦要留意，《破產欠薪保障條例》對香港清盤法律造成了歪曲性的影響，而《草案》建議設立的臨時監管制度只會令情況惡化。根據《破產欠薪保障條例》第 16 條，「公司無力償債」指提交清盤呈請，並不包括債權人自動清盤或接管（或委任臨時監管人）。下表列出了各種程序下的僱員欠薪補償情況（就遣散費而言也存在著類似的差異）：

	強制清盤	債權人自動清盤	接管	臨時監管
付款額	最高為三萬六千元，由欠薪基金支付	最高為八千元，僱員為優先債權人（見《公司條例》第 265 條）	最高為八千元，僱員為優先債權人（見《公司條例》第 79 條）	所有根據《僱傭條例》的債項和債務（不設上限）
時間限制	四個月以外的欠薪不獲支付	四個月以外的欠薪不獲支付	四個月以外的欠薪不獲支付	沒有時間限制

（上述圖表亦解釋了為何在現時，即使公司已進行自動清盤，不少僱員仍尋求法律援助以提出強制清盤呈請：見 *Re Rena Gabriel HK Ltd* [1995] 2 HKC 273 一案。）

我們若參看英國的情況，可能會得到一些啟示。根據《1996 年僱傭權益法令》第 182 至 190 條，「法團僱主無力償債」被定義為頒發清盤令、通過自動清盤決議、委任接管人以及頒下行政管理命令或公司自願償債安排獲得批准，而僱員在上述任何一種情況下都可向有關基金申請一筆相等於有關債務的款項。在英國，不少挽救公司工作都是在接管的情況下進行，而鑒於沒有法律條文容許僱員從法定基金獲得更多賠償，因此僱員大多無意尋求把公司清盤。換句話說，是否挽救或重組公司還是接管或管理公司（或進行自願償債安排），基本上是一個商業決定。反之，在香港，《草案》一旦通過成法，僱員大多會希望循以下途徑索取賠償：

- 首先是利用臨時監管制度，因為僱員可得到全數賠償，而毋須向欠薪基金申請一筆有限的款項；
- 其次是尋求把公司強制清盤，這樣，僱員可從欠薪基金得到不過不失的權益；
- 再其次是採取接管或債權人自動清盤程序，這樣，僱員根據《公司條例》仍可享有優先權；
- 最後一著是使用其他程序，例如根據香港金融業總會與香港銀行公會攜手發出的指引（稱為「香港處理法團困難的做法」）之下的非正式程序，但在這情況下，沒有人會保證僱員得到任何補償或享有任何優先權。

筆者認為，欠薪基金背後的基本政策並不貫徹一致，特別是當現行法例沒有對那些提出自願償債安排的個人僱主的僱員欠薪作出任何規定時為然（縱使筆者明白到個人自願償債安排實際上相當罕見，即使出現，所牽涉的僱員數目也不會太多）。簡言之，欠薪基金已對香港的清盤法律造成歪曲性的影響，亦促使人們提出不必要 ➤

的清盤呈請，令他們招致無謂的開支；而《草案》會令情況惡化，更會直接損害一般債權人的權益。筆者認為，僱員在臨時監管程序展開前的欠薪申索，應與僱員在強制清盤展開前的申索獲得相同的對待。一個更佳的解決方法是跟隨英國的做法，規定僱員在所有清盤程序下一律得到相同的待遇。

建立信心：廢止權與公司董事

縱使沒有實質數據加以支持，但筆者覺得債權人對建議中的臨時監管制度普遍缺乏信心。我們不要忘記，不少個人和公司都受到不久前的金融風暴打擊，而目前不少人可能抱著某種「反債務人」心理，擔心無良的公司董事會利用臨時監管制度把自己的償債責任清除得一乾二淨。過去兩年來，個人自願償債安排出乎意料地未能收到預期效果，這顯示了法定的債務重組機制在債權人眼中不一定是靈丹妙藥。（英國和香港就個人無力償債的法例大同小異，但數字顯示，在英國，大約每五宗破產個案中便有一項個人自願償債安排；反之，在香港，自從新的破產法於1998年4月1日生效以來，至今法院已頒判約四千九百項破產令，但獲批准的個人自願償債安排卻只有七項。）

筆者認為，若建議中的制度能與現行的清盤制度「和諧共處」，將會贏得債權人更大的信心和支持。現時《草案》處理有保證債權人和僱員的方式，與現存的清盤法律下各方的利益和平衡背道而馳；而《草案》處理公司董事的方法也無助於增強債權人對建議中制度的信心。

倘若公司進行清盤程序，清盤人將獲賦予某些額外的實質權利或程序上的優勢，以對付無良的公司董事。《公司條例》包含了條文處理不公平優待、敲詐性的信貸交易、欺詐營商及不法行為的法律程序等事宜，預計於短期內還會加入條文以處理以低於某價值進行的交易。法改會在《報告》內未有建議向臨時監管人賦予廢止權，而只在第13.19段建議就《草案》第168ZQ條的否決權而言賦予權力，容許廢止任何由無力償債公司自臨時監管展開之日起計十二個月內所作出的固定押記或浮動押記，但不包括：（一）在該項押記設定之時或之後支付予公司作為該項押記的代價的現金款項；及（二）利息。該項建議已被納入《草案》第168ZQ(4)條。

據筆者了解，法改會是刻意不建議把不公平優待方面的廢止權伸展到臨時監管制度的，理由是該廢止權可能會使那些打算令公司接受臨時監管的董事們卻步；此外，要在臨時監管期內行使廢止權是殊不容易的。筆者對此有以下看法。首先，若董事行事持正、光明磊落，他/她理應不會被廢止權嚇退。（事實上，行事有問題的董事們也不值得我們的同情。）第二，即使要在臨時監管期內行使廢止權可能困難，但單是這種權力的存在，已足以改變各方的相對「議價能力」。第三，即使缺乏廢止權對董事來說可能是一種「鼓勵」，它也不會協助建立債權人的信心，因為他們對於無良董事的憂慮仍然存在。

我們可以說，不把廢止權伸展到臨時監管制度的做法，將有助精簡監管程序和提高臨時監管人的管理效率。然而，以下各點亦可用以駁斥這種說法：

一、在絕大部分的個案中，案情都不會令人懷疑各方行為是否正當。這樣，是否存在著廢止權可說是無關痛癢的。但若案情確令人生疑，廢止權的存在與否將直接影響所招致的費用。

二、正如上文所述，除了第168ZQ(4)條的規定外，《草案》並無賦予廢止權。然而，《草案》亦建議修訂現行的《公司條例》第168I條，容許臨時監管人像清盤人般向破產管理署署長舉報任何不適當的行為，而這些資料將被用在取消董事資格的研訊程序當中。故此，若出現董事優待有聯繫人士或違反受信責任的情況，臨時監管人顯然不能坐視不理。

三、最重要的是，臨時監管人將要告知債權人他們在挽救公司方案下可期望得到的補償以及他們在正常清盤程序下可期望得到的補償，以作比較。在清盤程序中，廢止權將會適用。正如一位英國銀行家曾經指出：

> 「…　債權人將需要得到非常確實的保證，即監管人將為公司的整體債權人討回公司曾經不公平地付出的任何金錢。若然優待、低價交易等行為在清盤情況下可受到清盤人嚴厲責難，債權人無疑也不會容許該等交易和行為被拋諸腦後。」（見 Eales 著 *Insolvency: A Practical Legal Handbook for Managers*（1996年）第113頁）

結語

筆者預期，即使香港引入法定的公司挽救機制，成功的挽救行動也將為數不多。但把這種制度寫進法例內也不無好處，最大的好處是鼓勵（若不是迫使）債權人商議折衷的解決辦法。現時，在「香港處理法團困難的方法」下進行的非正式過程，即使大部分債權人支持某重組方案，只要任何難於應付的債權人提出反對，整個方案仍會受到影響甚或要告吹。此外，縱使「香港處理法團困難的方法」有為僵持不下的情況作出規定，但它沒有提供任何對所有債權人具約束力的暫止期。制定臨時監管條文的一個重大好處，是一旦公司接受監管，任何固執的債權人都會被處於劣勢 — 他/她的反對不但會在投票時被否決，而且當監管程序展開後，他/她也不會再可以尋求正常的債權人補救。

因此，一種頗具吸引力的說法是，我們毋須過份理會建議中的臨時監管制度的詳細內容，而不管該法定制度有多大的漏洞和多少的實際用途，它的存在也是聊勝於無。然而，基於下列原因，我們不能同意這種說法：

一、有保證債權人的權益，不應如《草案》所訂明般被減損；

二、若要某挽救制度發揮作用，債權人便先要對該制度有信心；而建立這種信心，應優先於迎合公司董事的喜好和可容忍程度；

三、原則上，挽救制度不應令現行清盤法律下各方權益的平衡出現重大改變。

政府很有可能於本年稍後時間或明年重新審議《草案》所建議的臨時監管制度。筆者盼望政府到時會顧及以上三點，以及《草案》內關於有保證債權人、僱員薪金和廢止權的條文得到修訂。在本年內引入臨時監管制度的已成不可能，筆者期盼明年會有成果，而不是再度把事件一再拖延甚至令它無疾而終。

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