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 (e.g. 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.

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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 ‘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 a company contemplation of a provisional supervision — thereby, so it was said, passing the burden of unpaid wages and severance payments onto the PWIF. (The same is also the case in relation to severance payments, which can be quite substantial.) 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.

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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 quasi-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 when 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 preferen 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 employ (time cost) credits laid on liabilities. At least the Provisional Ordinance asserts that the companies would be treated far more generously. 
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):

<table>
<thead>
<tr>
<th>Type of case</th>
<th>Compulsory Winding Up</th>
<th>Creditors’ Voluntary Winding Up</th>
<th>Receivership</th>
<th>Provisional Supervision</th>
</tr>
</thead>
<tbody>
<tr>
<td>Amount</td>
<td>$36,000 (max) from PWIF</td>
<td>$9,000 (max) as preferential creditor under Companies Ordinance s 285</td>
<td>$9,000 (max) as preferential creditor under Companies Ordinance s 79</td>
<td>All debts under Employment Ordinance (no limit)</td>
</tr>
<tr>
<td>Time limit</td>
<td>no wages outside 4-month period</td>
<td>no wages outside 4-month period</td>
<td>no wages outside 4-month period</td>
<td>no time limit</td>
</tr>
</tbody>
</table>

(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.
- 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 168) 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, undervalue, 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.
- 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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便會獲得通過。舉例來說，根據一個挽救
方案，公司所有債權人（不論是有保
證還是無保證債權人）須棄寬免於所持
債權的百分之八十，並接受公司在三年
內償還其它百分之二十的債權。該方案
只要得到一共有公司所有值的百分之七
十的大部分債權人贊成，便可獲通過
。然而，考慮到公司清算期間通常所
造成的財務的水平的狀況，這樣的方案應
漸漸受到無保證債權人的反對；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释
《草案》是否有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催減其債
權）。政府最終承認的《草案》第
IV 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，對香港銀行
債務業務會產生革命的影響。舉例說，
某銀行可能會有效的延期或浮動聘，滿
以為公司即使倒閉（或委任了接管人），
銀行仍能收回大部分（非全部）欠款。
但倘若第 IV 部能緩過成法，設假銀行
的貨款額不足以令它有否決權，則任何事
情都可能發生，而銀行最終可能要屈服於
無保證債權人推倒權下，不得不仍催減
債權。換言之，銀行接受保釋後，根本不
會知道借債的公司一旦被臨時監管會發生
什麼事情。這種風險，或將成為決定公司債
資成本的主要因素之一。

法改會在《報告》內沒有討論有保證債
權人被接納削減債權方案的意義；事實上，
《報告》根本沒有提及該概念。依筆
者理解，法改會的意願甚至於該概念相
反，即是說，除非得到債權人所保證
債權人的同意，否則通過或批准任何更
改或影響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。
從現時的形勢看來，設假挽救公司機制時
若然同時引入《草案》第 IV 部和減免有
保證債權人的權益，便會產生太大問題。
筆者認為，一個較好的做法，是在《報
告》和《草案》這兩端找出折衷解決
的方法：一凡任何方案將更改到有保證債
權人的實質權益，該方案應得到有保
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其他有保證債權人，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》得到通過，禁止在未獲有保
證債權人的同意下就任何影響該有保證
債權人的權益的方案，《草案》仍存在著
另一個問題，即使有資質及上文所述的
問題嚴重。該問題涉及第 168ZQ 條對某些
有保證債權人所供的否決權延續臨時監管
的權力。

在香港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抵押的浮
動聘的持有人，都獲賦予「只可行使一
次」的否決權。實際上，該抵押持有人一
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 137 至 137.17
段中建議引入性質相同的否決權，並且，
（一）建議固定抵押持有人亦應享有該否
決權；及（二）留意到，至少在英國，一
些銀行已開始接受抵押，其目的甚至是
在貸款人受監管時取得否決權（這便是所
謂「鮮貨」浮動聘的問題）。第 168ZQ
條同時處理了以上兩點。

第 168ZQ(1) 條要求公司臨時監管人
在獲委任後三日內向公司每名「主要債
權人」通通知悉，要求主要債權人在接
獲通知的三日內或在有關日期（即臨時
監管展開之日）後的七日內（兩者較前
者為準）通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：
」「…（有關）公司全部財產或實
質上全部財產作抵押的浮動聘的持
有，但該抵押持有人的申請額度必須
是公司在接續有關日期之前的債
務款額的 13%以內的。」

筆者認為，「債務款額的 33
%」的規定是在某些情況下對臨時監管人造成
極為沉重的行政負荷。

要在如此短的時期確診是否存有第
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
然是「灰於地帶」。舉例來說，假設早前
香港商業住宅銀行事件的情形，是否有
可能在委任臨時監管人後三日內確認某
公司的債務總額？若某貸款涉及一間公司，當
中只有一部分無力償債，而有公司曾公
作出交相保証的強，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總額，也有可能
存在著可大可小的成本問題，但這個問題
在香港和澳洲根本不存在。不管如何，臨
時監管人獲委任後的初期，除了確定公司
欠有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，為何要把它有百分之百
作為 33.3%？這個問題的的重要性，在於若
有債權人持有公司債務總額的三分之一，
則任何方案校不獲該債權人的贊成，便會
不可能獲通過。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。因此，
即使債權人的權益遠遙於公司債務總額
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
如百分之三十一）的債權人反對，則需事臨
時監管人仍要執行該方案，便是無可不
及。

筆者認為在第 168ZQ(5) 條內作
出的 33.3%（以至任何低於百分比的）規定
是利於弊，應予以廢除。

僱員的工資

《羅馬書》第 6 章第 23 節說：「罪的工資
乃是死。」《羅馬》處理有關公司的僱員
工資的解決似乎是「罪」，但也可被非
常簡單，這是否會構成臨時監管制度的
致命傷呢？如上述所描述，在《草案》下有
保證債權人被處於不利位置；反之，《草
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索，而是他們的先介申索。

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法團 Corporate.Practice

當時可能的問題

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（第 168A(3) 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所負之（編修條例）（第 57 章）而欠下其僱員的僱傭費及債務；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該等僱債項及債務（根據第 168A(5)(A)(B) 條），該戶口須「專用於支付該等僱債及債務」。

《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《諮詢文件》所提及，倘若某公司本身已陷入嚴重的財政困境，豈不是否能依足夠金額支付欠下其僱員的僱傭費或成員所需的信託戶口？即使公司向銀行求助，若銀行知道信託戶口的費用是用以支付欠薪等債務而不可以用作信託業務，便不會向公司提出接手。此外，在這種情況下，欠薪基金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：《公司條例》（第 266B(2) 條）第二，一些公司為了籌措足夠金錢以支付僱傭費及債務，可能會對其在業務上的債務置之不理。我們甚至可以假設，在《草案》在某程度上鼓勵公司作出這些一般清盤程序中即為不被允許的安排，僱員稱得債權的同時，其他僱傭費的債權人亦將會受到損害。這當然解釋了為何破產法律當局不反對優先安排的觀念。若然接受的僱員包括公司的董事或其他「有關人士」，而公司根據該些人士的服務合約已欠下他們款項的話，他們所得的益處（其他僱傭費相應受的損失）便更形不能接受了。

另一個關於公司開設信託戶口的問題，是《草案》未有說明，假如對臨時監管程序展開後不久便終止，或有關方案最终不獲僱員接受而由公司直接被清盤的話，信託戶口的款項將會怎樣？筆者不相信在這些情況下僱員仍可從信託戶口取得任何償還。相反，該戶口被為「信託戶口」，毫無代表僱員利益的僱員；

極其我們只好只能認同所謂 Quisitclose 債信（即為某用途而成立的信託），臨時監管程序一旦告終，信託下的款項應歸還予公司手中。

假如公司沒有開設信託戶口，但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段時間後便終止，僱員已獲取的款項看來沒有任何方法可予以討回。此外，若公司繼續進行清盤，該款項不會構成《公司條例》第 266B 條所指的不公公平，因為公司董事於僱員付款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

純粹從實際角度去看，假若有關公司僱員人數眾多，臨時監管人（或建議中的臨時監督人）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僱喁的僱傭費及債務，而這項工作所需的時間很可能比確定公司欠下僱傭費款項所需的還要多。要注意，《草案》並沒有對「某（或）僱傭費及債務」設定任何上限。若《草案》至少能將《破產及清盤條例》（第 380 章）有關設定某些上限，確定僱傭費的工件相信不會那麼費時和費錢。

我們亦不應留意，《破產及清盤條例》對香港清盤法律達成了扭曲性的影響，而《草案》建議建立的臨時監管制度只會令情況惡化。根據《破產及清盤條例》第 16 條，「公司無力償債」指交清盤呈請，並不包括僱傭費自動清盤或接管（或委任臨時監管人）。下表列出了各種程序下的僱員欠債償還情況（在「散盡財費」也存在著類似的差異）：

<table>
<thead>
<tr>
<th>債務類型</th>
<th>僱員欠債償還情況</th>
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我們若參看英國的情況，可能會得到一些啟示。根據《1966 年保障僱員計劃》第 182 至 190 條，「法團僱員無力償債」被定義為頒發清盤令，透過自動清盤決議，委任接管人以及領取支付命令或公司自願償還安排來獲得批准。假如僱員透過上述任何一種情況下亦可向有關基金申請一筆相等於有關債務的款項。在美國，不少挽救公司工作的任務是在接管的狀況下進行，而難以有財務或信託職員從法定基金獲得更多資助，因此僱員大多無意要求公司清盤。換句話說，是否挽救或重組公司還是被接管或管理公司（或進行自願償還安排），基本上是一個商業決定，反之，在香港，《草案》一旦通過成法，僱員大多會希望隨著以下程序要求賠償：

- 首先是利用臨時監管制度，因為僱員可得到一定資助，而須向欠薪基金申請一筆有限的款項；
- 其次是尋求公司強制清盤，這樣，僱員或可從欠薪基金得到當前的資助；
- 再其次是採取接管或僱傭費人自動清盤程序，這樣，僱員根據《公司條例》仍可享有優先權；
- 最後亦是使用其他程序，例如根據香港金融業總會與香港銀行公會聯署發出的指引（稱為「香港處理破盤困難的解法」）中的非正式程序，但這樣情況下，沒有人會絕望僱員得到任何補償或享有任何優先權。

筆者認為，欠薪基金背後的政策目標並非貶低，特別是當現行法律沒有對那些提出自願償還申請的個人僱主的僱員欠債作出任何規定時為然（使筆者明白到

（上表數據取自《公司條例》第 182 至 190 條，「法團僱員無力償債」被定義為頒發清盤令，透過自動清盤決議，委任接管人以及領取支付命令或公司自願償還安排來獲得批准）。

個人自願償還安排實際上相當罕見，即使出現，所涉及的僱員數目亦不會太多。簡而言之，欠薪基金已對香港的清盤法律造成扭曲性之影響，亦促使人們提出不必要的

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的清償呈請，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，擬議在臨時監管程序展開前的換股安排，應與債權人在強制清盤程序開始的申索獲得相同的對待。

一個合理的解決方法是根據英國的做法，規定債務人在所有清盤程序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，但筆者認為債權人對於建議中的臨時監管制度普遍缺乏信心。

我們不可忘記，現時《草案》和《公司條例》僅有部分條文規定提供償債保障，而現時的清盤法律規定銀行和債權人不受保障。在這情況下，債權人可能更難接受這種安排。

建立信心：廢止權與公司董事

筆者認為，若建議中的制度能與現行的清盤制度同等數值，將會獲得債權人的更大信心和支持。現時《草案》建議有保障債權人和債權人的權利，與現行的清盤制度有許多不同，而《草案》處理公司董事的權利則無助於增強債權人對建議中的制度的信心。

當屬公司進行清盤程序，債權人將獲賦予某些優先的實質權利或程序上的優勢，以對付無能的公司董事。《公司條例》包含了條文處理不公平債權、非詐的債權交易、欺詐營業及不法行為的法律程序等事宜。現時《草案》僅建議提供有限的保障，而《草案》處理公司董事的權利無助於增強債權人對建議中的制度的信心。

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