

15th May, 2014

Mr Patrick Ho, JP
Deputy Secretary for Financial Services and the Treasury (Financial Services)
Financial Services and Treasury Bureau
HKSAR Government
15/F., Queensway Government Offices
66 Queensway
Hong Kong

Dear Mr Ho,

Framework of Proposals - Corporate Rescue Procedure and Insolvent Trading

We are pleased to submit further views on the framework of proposals that government has put forward for the introduction of a statutory corporate rescue procedure and insolvent trading provisions in Hong Kong. Our comments are in response to the details as set forth in the discussion materials circulated for a meeting with joint chambers you hosted earlier on 30th April, 2014.

Corporate Rescue Procedure

- *Issue 1 - General Approach; Issue 22 - Personal liabilities of PS and indemnity for debts of provisional supervision*
 1. The role of the Provisional Supervisor ("PS") should be considered carefully.
 2. Turnaround and rescue is a process fraught with challenges and difficulties. Under the proposed framework, a greater level of reliance is placed on the integrity of the PS, who is vested with wide ranging powers. Although the PS may seek the direction of the Court, s/he is not compelled to do so and is not subject to the supervision and scrutiny of the Court in the same way as a liquidator/receiver (as officers of the Court). Further, whilst it is currently envisaged that regulation of the PS would be achieved through their respective licensing authorities, these bodies must be consulted to determine whether there are sufficient resources to deal with any increase in regulatory activities and there are adequate sanctions available to address misconduct.
 3. The proposed framework also introduces elements of personal liability on the PS which may affect the ability to attract suitable candidates for the role or alter the way in which the PS discharges his/her duties. Although the PS may be entitled to be indemnified out of the company's property, in situations where the business and affairs of the company are complex and convoluted or the asset base and liabilities of the company are high, it may be difficult to attract suitable candidates for the position without the candidate's firm agreeing to first also indemnify him/her against any resultant liability. This personal liability may also contravene risk management policies of a firm.

Personal liability may also affect the way in which the PS discharges his/her duties as the PS may be more inclined to defer to the Court's guidance as opposed to exercising his/her own discretion or cause his/her to adopt a more conservative approach to the administrative process. The extent that guidance is sought may negate the benefits of this informal procedure due to additional costs or other encumbrances.

- *Issue 2 - Statutory objective of CRP*

4. With respect to item 2.1, we would suggest revising the proposed description of the CRP's intent to read as follows: "The objective of CRP is to maximize the chance of existence of the company or as much as possible its business as a going concern, and if this is not attainable, to achieve a better return for the creditors of the company than in case of an immediate winding-up".
5. It can be argued that in a healthy economy, companies that are no longer viable despite turnaround attempts should be allowed to fail. Prolonging the life of companies that are not viable only compounds and defers problems to the future.

- *Issue 4 - Companies to which CRP may apply*

6. Currently certain financial institutions are exempted from the proposed CRP. Consideration should also be given to whether certain companies that are integral to the economy or public infrastructure (e.g. transport, utilities and telecommunications) be excluded from the proposed CRP given that they may benefit more from a formal and structured insolvency process.

- *Issue 15 - Moratorium on proceedings and other legal process during provisional supervision*

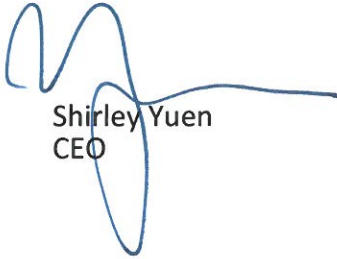
7. The exception of the moratorium for certain outstanding employee entitlements/arrears may render the CRP untenable for labour intensive businesses as any employee may frustrate the CRP by petitioning the Court for the winding-up of the company. To mitigate this, insertion of a compromise clause could be considered to remove this exemption subject to a predefined majority of employees agreeing to do so.

Insolvent Trading

8. The proposed framework must maintain a fine balance. On the one hand, holding directors personally liable goes against the doctrines of separate corporate personality and limited liability whilst on the other there is the belief that appropriate measures should be put in place to punish/deter directors for instances where continued trading will exacerbate the company's insolvent position (this is a particularly attractive proposition if doing so will increase the realization's available to the company's creditors).
9. Putting this framework into practice may be difficult, however. Similar provisions exist in the UK where commentators have often highlighted that such proceedings are rarely pursued or have succeed. Where assets of the insolvent company are limited, the insolvency practitioner will rarely bring such claims against directors. In addition, the tests in the UK for wrongful and fraudulent trading are often difficult to satisfy and accordingly, the small number of cases are also compounded by a low percentage of successful cases. The proposed Hong Kong framework should take note and address these underlying concerns.

We are grateful for the opportunity to provide input and hope you will find our comments useful.

Yours sincerely,

A handwritten signature in blue ink, consisting of a series of loops and a long horizontal stroke extending to the right.

Shirley Yuen
CEO