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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 see the Review — Staying Alive in Hong Kong: A Comparative Review (2000) 16 Ins & P 17), but rather to identify those issues that we believe must be addressed by the government before Part IVB is reintroduced 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 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 inconceivable 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/1sb/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 deliberating 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 if the creditors ultimately reject the proposal at their meeting, and the company therefore 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 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 employ (which time could be critical) laid out dc liabilities. At least amount Protect Ordinarily ascertainment and would costously.

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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 168l) the provisional supervisor (just like a liquidator) to report any unfruitful 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, undervaluations, 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 restructing 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 creditor 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 practice in fact, is better than none. Although it would be tempting to agree, we cannot do so for the following reasons:

- Secure 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 prevail 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？

政府已修《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，應先正視和解決這些問題？

Philip Smart 與布卓利加以剖析

有個問題，多年來遭爭論或爭論的主要，是這有沒有必要設立一個法定的挽救公司機制。隨著政府方於本年 1 月刊發《2000 年公司（修訂）條例草案》（以上簡稱《草案》），上述爭論亦趨成熟。《草案》提出的意见之一是替《公司條例專（第 32 章）增加第 IVB 部。此部分為「暫時監管及自願價值安排」，內容有三項類似於相類的條文組成，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》）和當中的各種建議。

繼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 部的審議當刻至万象新一番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：一個比較性的評論」（2000）16 Ins L&P 17 一文，本文作者為指出政府將來重新把第 IVB 部定立法會審議前須正視的一些問題。

有保障債權人的一般權利

建議中的臨時監管制度的一個主要部分是「暫時期」（moratorium），意思是，一旦開始臨時監管，債權人將不能通過慣常的方法（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 部的第 1682Q 則，一類特殊的有保障債權人 —— 一名為「主要債權人」、一有權否決臨時監管程序的進行。本文將對此作進一步探討，但本部分的著眼點是有保障債權人的權利，特別是當緊接決策未有產生或當主要債權人未行使否決權的時候。

在英國、澳洲和美國，在挽救公司的過程中，有保障債權人的權益都受到一般保護。此外，在這三個國家，沒有人可以在未接某有保障債權人的同意下把一套重要债务償債人權益的挽救方案強加給債權人身上；但在美國，根據另一套程序，即使有保障債權人對某一挽救方案表示反對，若能證明該方案沒有「不公平地歧視」該些債權人並且他們「公正和公平」，則該方案仍可被強加給他們身上。

令人驚訝的是《草案》在草擬中的第 IVB 部都沒有條文禁止債權人在未得到有保障債權人的同意下通過任何損害他個債權人權益的方案。債權人作為惟一特定投票；而債權某些方案得到親自或有代表出席投票的債權人在數數上的過半數票贊成，而贊成的債權人的債權總值多於所有親自投票出代表出席投票的債權人的債權總值的三分之二，則該方案

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便會獲得通過。顧問何，根據一個拯救方案，公司的所有債權人（不論是有擔保債務人或無擔保債權人）需先付清其所持債項的百分之八十，並接受公司在三年內償還餘下百分之二十的債項。該方案只要得到公司所有股東和債權人的債項的百分之七十的債權人的贊成，便應可獲通過。然而，考慮到公司在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債權人的歡迎；但對於有擔保的債權人來說，它實在是災難。本文件中一名人士曾有要求政府解決《裁定》是否如上述例子般容許債權人在沒有擔保債權人的同意下通過各種方案（例如，要求所有債權人自動削減債項）。政府當局則指該《裁定》第17條是正視了上述情況。筆者認為，這代表納入臨時監管制度，對香港銀行的借貸業務帶來革命性的影響。案例，某些銀行和可接受有效的固定或浮動抵押，以作為公司抵押清償（或委任了接管人）或銀行將仍會對大部分（或全數）欠款。但倘若第17條不能通過，假設銀行的貸款額不足以使它有消條款，則任何債務型都可以發生，而銀行最終可能要承擔於無處理債權人的投訴權下，不削減債權項。換句話說，銀行接受清盤時，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。

改法會在《報告》內沒有討論到有擔保債權人被接受到削減債項方案的意念；事實上，《報告》根本沒有提到過這個問題。依筆者理解，當改法會的意願應當與其他概念相反。即是說，除非受到影響的有擔保債權人同意，否則不能通過或批准任何削減或影響有擔保債權人的債項的方案。《報告》沒有徹底探討這點，直至唔止。從現時的情況來看，設計讓公司機制時若然同時容許《課程》第17條和削減有擔保債權人的權力，便是本月太大代價。筆者認為，一個較好的做法，是在《報告》和《課程》這兩篇之間找出折中的解決方法，凡任何方案只要能削減或影響有擔保債權人的資質權益，該方案應當得到有擔保債權人的同意，但若能使法院證實該方案不會不公平地對待有擔保債權人，亦不會收窄有擔保債權人的權力範圍，便不受上述限制。

有保障債權人的否決權

在英國和澳洲的拯救方案下，任何公司所有或實際上全部資產被僱員的浮動抵押的持有者，都獲賦予「只可行一次」的否決權。實際上，該抵押持有人一開始便有行使否決權，令整個臨時監管程序停頓。法改會在《報告》第13到17段中建議引入性質相同的否決權，並建議（一）建議一項否決權持有人亦應享有該否決權；及（二）留意到至少在英國、香港可接受有效的固定或浮動抵押，而這種抵押是以銀行受監管時取得浮動權（此等所謂「煙草」浮動抵押的問題）。第1682Q條應時處理了以上兩個。

第1682Q(1)條要求公司的臨時監管人於獲委任後三日內向公司所有「主要債項」發出通知，要求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（兩者中較前為準）告知臨時監管人主要債項人是否同意繼續臨時監管程序。根據第1682Q(5)條，「主要債項」被定義為：

「…（一）公司財政部或實質上由財政部作業的浮動抵押的人，但該抵押記下的申訴額額必須是至少佔公司資產淨值之數字的債務款額的{33/3%}。」

筆者認為，「債務款額的{33/3%}」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。

要在如此短暫的時間內審查是否有存在第1682Q(5)條所指的主要債項人，往往是相當然難的。誠然，在很多情況下，公司和債權人沒有任何主要債權人，但有時情況亦會發生「灰地帶」。舉例言之，在類似早期香港商貨銀行事件的情形下，是否有可能在委任臨時監管人後三日內確定公司有債務款額？若某些債權涉及一組公司，當中只有一部分無力償債，而所有公司均曾作出相應證實的，有法律責任確定所有債項總額是不合理的。亦在某些情況下，公司的營運可能已經不知所措，又或不完整甚至是違約的。再者，即使臨時監管人可以確定公司的債務款額，當中公司亦可能再有大規模的成本問題，而這個問題在緊急和澳洲根本不存在。不管如何，當臨時監管人履職後的初期，除了確定公司未下有債權人的債務款額之外，亦要考慮其他重要更甚有建設性的工作。

另一個問題是，為何要把有關的百分比定為{33/3}？這個問題的重要性如在，若某債權人持有公司債務總額的三分之一，則任何方案若不獲得債權人的贊成，就不會獲得通過。然，我們不能忽視，在實際上，並非所有債權人都會出席債權人會議，即使出席，也許也不能投票。因此，即使債務人的權益遠少於公司債務總額的三分之一，該債權人也可以有足夠權制任何方案獲得通過。因此，若一個個案遭到持有公司債務總額的某個百分比（例如{33/3}）的債權人反對，則債權人臨時監管人仍要實行該方案，便是不可扣不及。筆者認為在第1682Q(5)條內作出{33/3}（以至任何其他百分比）的規定是利多於弊，殷應廢除。

僱員的工資

《勞動法》第6章第23節稱：「勞工的工資乃係是也。《勞工》處理有關公司的僱員工資以及支付問題應當不是『罪』，但亦可以說是『罪』，這事實當然會成為臨時監管制度的致命。正如上述各所，在《課程》下有保障債權人被處於不利位置；反之，《報告》所述條件則較為合理。筆者所關注的並不是臨時監管過程所出現的僱傭申訴，而是他們所提出的申請。當公司無力償債但已呈請盤查明時，僱員工資可向政府就欠薪保障基金（以下簡稱「補償基金」）申請無償補償。備件若干，或者僱員工資可向政府就欠薪保障基金（以下簡稱「補償基金」）申請無償補償。備件若干，或者僱員工資可向政府就欠薪保障基金（以下簡稱「補償基金」）申請。”
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據筆者了解，法改會是刻意不建議把不公不當的承納的股票權重新安排到當時監管制度的，理由是該發改會可能會把那些打算今公司接受當時監管的董／事會步。此外，要在當時監管期間內行使股票權是殊不容易的。筆者對此有以下看法：首先，若董事行職持正、光明磊落，他／她理應不會被廢止權異服。（第二，行事有問題的董事們也不會值得我們的同情。（第三，即使在當時監管期內行使股票權可能困難，但應是這種權利的存在，足以改變各方的對內，第三，即使缺乏廢止權對董事來說可以是一種『鼓』。它也不會協助建立權執者的信心，因為他們對於無良董／事的態度仍然存在。我們可以說，不少慣常理解到當時監管制度的，將有助於監督制度和提高當時監管人的執行效率。然而，以下各項亦可用以駁斥這種看法：

一、在絕大部分的個案中，案情不會令人在懷疑各方行為是否正常。這種，是影響執行廢止權可以是無關痛癢。但若案情屬令人懷疑，廢止權的存在將會必至影響其所採行的費用。

二、正如所描述，除了第168ZQ(4)條的規定外，《草案》亦無賦予廢止權。然而，《草案》亦建議修訂現行的《公司條例》第168ZQ(4)條，容許當時監管人像現時監管人一樣監管表面上的在合理和平衡的基礎上；而《草案》處理公眾董事的行法亦無觸及增加職權於當時監管人中建制度的中性。

倘若公司進行清盤程序，現時人將能附予以某些條件的實質權利或程序上的內，對於無良的事健。《公司條例》包合了條文設置不公正優待、著重訴訟的行交易、訴訟程序及不法行為的控制程序等事宜。預計於近期內還將加入條文以處理以低於某價格進行的交易。法改會在《報告》內有建議向當時監管人賦予廢止權，而只在第13.19段建議將《草案》第168ZQ(4)條的否決權而言賦予暴力，廢止廢止權而無力債權人可當時監管官署之日立計下幾個月內作出的固定續期或浮動續期。但不包括：（一）在該項押記附件之時之以前之收到公司作為該項押記的代款的現金款項；及（二）利息。該項建議應被納入《草案》第168ZQ(4)條。