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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 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 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 to 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 supervisor.

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/lscb/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 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 employment time or the at credit laid out liabilities. At least ascertainment of workers would be costly.

...
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 generally granted 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 miscellaneous 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 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, 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 reconceives 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’.

Philip Smart
Charles Butterworth
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臨時監管問題公司的制度
本身有何問題？

政府已建議《公司條例》草案新增第 I VB 部，提案設立一套拯救公司制度。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

有個問題，多年來都備受爭議的公司程序。根據法律法典務師及其他人士評論，這就是香港是否需要設立一個法定的挽救公司機制。隨著政府草案至今年 1 月刊登《2000 年公司（修訂）條例草案》（簡稱《草案》），立法會將首次審議。章程的草案提出的第一方案是《公司條例》第三 1B 章草案第 I VB 部，這部分題為「臨時監管及自主價值安排」，內容由三項部分組成，內容包括以下的法律條文組成：它們大致上與香港立法局的《〈立法議員〉草案》於 1996 年 10 月所表《關於挽救公司及在無力償債情況下營商的報告》（簡稱《報告》）和當中所提出的建議案的建議案。在中央香港及美國，在挽救公司的過程中，有解決債權人的權益問題，亦獲得廣泛保障。此外，在這三個國家，沒有人可以在未曾所有人有解決債權人的同意下把其一定價值的債款數額於挽救方案強加於該債權人身上。但在美國，根據另一套程序，即使有債權人對某挽救方案表示反對，亦能證明該方案沒有「不公平和歧視」這些債權人，並且對他們「公正和公平」，則損害方仍可被強加於債權人身上。

令人驚訝的是，《草案》草案的主要部分是「暫時期」（moratorium），意味是，一旦開始臨時監管，債權人將不斷通過償債的方法（例如民事訴訟、扣押貨物及債務過程等）執行他們所面對公司的權利。根據草案第 I VB 部第 16 條第 2 條，一類特定的債權人——名為「主要債權人」——有權否決臨時監管程序的進行。法案將對此作進一步探討，但本部分的著眼點是有關確保債權人的一般權利，特別是當否決權未有產生或未對主要債權人未有行使否決權的時候。

在英國及澳洲及美國，根據挽救公司的過程中，有解決債權人的權益問題，亦獲得廣泛保障。此外，在這三個國家，沒有人可以在未曾所有人有解決債權人的同意下把其一定價值的債款數額於挽救方案強加於該債權人身上。但在美國，根據另一套程序，即使有債權人對某挽救方案表示反對，亦能證明該方案沒有「不公平和歧視」這些債權人，並且對他們「公正和公平」，則損害方仍可被強加於債權人身上。
有保證債權人之否決權

即使《草案》未納入審議，禁止未獲有保
證債權人之同意即對該案件抵押權之設定、變動或轉讓
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在英國和澳洲的撤銷公司制度下，任何
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極其是我們只可以說該戶口關於所謂Quistclose信託（即為管用轉而成立的信託），當時監管程序一旦告終，信託下的款項應歸還於該戶口。

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。即便臨時監管程序進行了一至兩月後便告終，僱員已獲取的款項看來也沒有方法可予以回納。此外，若公司繼續進行清理，該些款項不會成為《公司條例》第266B條所指的不當收益。因為了公司董事向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 一案。

純粹從實際角度去看，倘若有關公司僱員數眾多、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僱員和前僱員的債項或債務，使這項工作的時間很可能比確定公司欠下僱員款項所需的還要多。要留意，《草案》並沒有對所有僱員的債項或債務設定任何上限。若《草案》至少能延續《香港清盤保障條例》（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，《香港清盤保障條例》對香港清盤制度造成了一定的影響，而《草案》建議設立的臨時監管制度只會令情況惡化。根據《香港清盤保障條例》第16條，《公司無力償債》一章規定清盤申請人（或委任臨時監管人）必須在所有債權人同意清盤或接管（或委任臨時監管人）的情形下才可申請。若試圖表列出了各種債務的僱員欠款補償情況（即該案撤回費用）也存在著類似的差異。

我們若參看英國的情況，可能會得到一些啟示。根據《1966年銀行業無力償債條例》第182至183條，《法院勸導無力償債》條款規定為法院勸導無力償債和債權人控制公司性質安排得盤。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，不少挽救公司工作的法號是在接管的情況下進行，而鑑於法律條文容許僱員從法定基金獲得更多補償，因此僱員大多無意尋求公司清盤。換句話說，是否挽救或促成公司運用接管或管理公司（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，僱員大多會希望最少限度取得補償。

• 首先是利用臨時監管制度，因為僱員可得到全數償債，而毋須向欠薪基金申請一筆有限的補償。
• 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少的補償。
• 再其次是進行自願償債安排，這樣，僱員根據《公司條例》仍可享有優先權。

筆者認為，欠薪基金背後的基本政策並不矛盾，特別是當現行法例沒有對那些提出自願償債安排的僱員權益的僱員欠款自願安排有任何規定時為然（但筆者明白到
的有關條文，令他們招致無謂的衝突。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
監管程序展開前的抗議申訴，應與僱員在
強制清盤開始前的申訴獲得相同的對待。
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不得與同
等的對待。

建立信心：廢止權與公司董事

廢止權沒有實質數量加以支持，但筆者認為債
權人對建議中的臨時監管制度普遍缺乏信
心。我們不能忘記，不少債權人和公司董事受
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債權人的償債責
任清償得乾乾淨淨。過去十年，個人自願償
債安排似乎 meaningful地未能收到預期效果，這
顯示了當前的債權安排方式和債權人在眼
中不一定是藥龍妙藥。《英國和香港就個人無力
價值的法律大同小異，但數字顯示，在英
國，大約每五年就有營業破產案中便有一項個人自
願償債安排；反之，香港自從推行破產
法於1998年4月1日生效以來，至今法院已
頒布約九百項破產令，但獲批准的個人
自願償債安排卻只有七項。}

筆者認為，若建立中的制度能與現行的
清盤制度（「和諧共處」）將會獲得債權人
更大的信心和支援。現時《草案》處理有
保障債權人和債權人的方式，與現行的清盤
法律下各方的利益和平衡途徑相調；而
《草案》處理公司董事和債權人的方法也無助於增
強債權人對建議中制度的信

倘若公司進行清盤程序，債權人將獲賦
予某些特別的權利或程序上的優
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的受；威脅的信貸
交易，假設董事及不適當的法律程序等
事宜，預計於短期內仍會有大量爭議騰
起以至某些債券進行的交易。假設修改
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的權利以維護債權人的權益和保障原則
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