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特許秘書

The Hong Kong Institute of Chartered Secretaries

Submission:

Introduction of a Statutory Corporate Rescue Procedure
("CRP") and Insolvent Trading Provisions

30 April 2018

By Email Only: billyau@fstb.gov.hk/sandyli@fstb.gov.hk

Financial Services Branch
Financial Services and the Treasury Bureau
Government of the Hong Kong SAR
15/F, Queensway Government Offices
66 Queensway
Hong Kong

Attn: Mr Billy Au/Miss Sandy Li

Dear Sirs

Re: Introduction of a Statutory Corporate Rescue Procedure ("CRP") and Insolvent Trading Provisions

About HKICS

The Hong Kong Institute of Chartered Secretaries (HKICS) is an independent professional institute representing Chartered Secretaries as governance professionals in Hong Kong and Mainland China with over 5,800 members and 3,200 students. HKICS originates from The Institute of Chartered Secretaries and Administrators (ICSA) in the United Kingdom with 9 divisions and over 30,000 members and 10,000 students internationally. HKICS is also a Founder Member of Corporate Secretaries International Association Limited (CSIA), an international organisation comprising 14 national member organisations to promote good governance globally.

HKICS's Overall Support

We refer to the consultation paper (CP) of the Financial Services and the Treasury Bureau of April 2018 on the Introduction of a Statutory Corporate Rescue Procedure (CRP) and Insolvent Trading Provisions.

HKICS welcomes and expresses its overall support for the introduction of CRP which is prevalent amongst leading financial centres including the US and UK. CRP is an expected mechanism to seek to resolve and to give a new lease of life for companies in financial difficulties for the benefit of all relevant stakeholders

concerned including secured creditors, employees and trade creditors. Given that the interests of stakeholders may not align, there will be a need for the proposed CRP rules under the CP to represent a compromise solution for CRP to work. We submit that the CRP proposed under the CP does appear to provide a suitable framework for a compromise solution for forging consensus.

Comments on Latest Proposals

In connection with the CRP we have collated the following Member views on the latest CRP proposal under the CP for your consideration:

- There is no issue with the proposed consent being required of the major secured creditor (MSC) as to commencement but not the choice of the provisional supervisor (PS).
- There is an issue as to subsequent chargees being proposed to be treated as MSC and their consent being required for commencement of provisional supervision. This is because this approach could mean that subsequent charge could seek to extract value prior to providing consent. Therefore, we have reservations on the proposal requiring subsequent chargee consent by deeming them to be MSC under CP paragraph 2.
- An important related issue is the policy intention under CP paragraph 9(g) which states that the exercise of third party property rights under the CRP is subject to specified restrictions. We have Member views that it should be clarified whether such restrictions will be limited to properties situated in Hong Kong *and* in respect of which charges have been created under Part 8 of the Companies Ordinance (Cap. 622). If such restrictions will also apply to properties situated outside Hong Kong (e.g. Mainland China and overseas) (including aircraft or vessels physically outside Hong Kong) or charges created outside Hong Kong, a provision for extraterritorial jurisdiction will be required.
- The position of not requiring secured creditor consent under CP paragraph 3 is acceptable. This is subject to the right of the Court, on application of the secured creditor to end the SP in accordance with CP paragraph 23(b).
- It is unclear whether a bank's or other set-off rights can be exercised under CP paragraph 9 which are rights that operate by law. The position needs to be clarified.
- We note that the major issue relating to employee's rights would be dealt with by a phased approach while preserving the right of employees to seek arrears of wages and other entitlements where there is failure to pay as set out under CP paragraph 10 and CP paragraph 17.

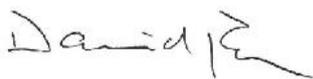
- We agree that court sanctions should be required for registered non-Hong Kong companies (RNHKCs) given that the Court may need to consider issues of judicial comity and other practical issues. We have no concern that MSC consent being required as with Hong Kong companies.

We also have Member views as to an important timing issue. In line with the provision under CP paragraph 8 which requires the PS to come up with a rescue plan within 45 business days, it is important for the PS to be able to obtain information as to the financial position of the company as soon as practicable. As such, the provision under CP paragraph 11 should be changed from 28 days to 14 days and any person who is required to provide financial information may *only* seek an extension of 7 days.

We will consult our Members on any further and final proposals for CRP. We again express our overall support for the adoption of CRP as proposed under the CP which will benefit the reputation of Hong Kong as a leading financial centre.

Should you have any questions, please feel free to contact Samantha Suen FCIS FCS(PE), Chief Executive, HKICS or Mohan Datwani FCIS FCS(PE), Senior Director, and Head of Technical and Research, HKICS at 2881 6177 or research@hkics.org.hk.

Yours faithfully,



David Fu FCIS FCS(PE)

President

The Hong Kong Institute of Chartered Secretaries