Meeting between the Official Receiver and representatives of the HKICPA's Restructuring and Insolvency Faculty Executive Committee

Date : 24 July 2017 (Monday)

Time : 10:30 a.m.

Venue : 10/F Meeting Room, Official Receiver's Office, Queensway Government Offices, High Block, 66 Queensway

HKICPA representatives

1. Mr Mat Ng, RIFEC Chairman
2. Mr Terry Kan, RIFEC Deputy Chairman
3. Mr Peter Tisman, Director, Advocacy & Practice Development
4. Ms Elena Chai, Associate Director, Advocacy & Practice Development

ORO representatives

1. Ms Phyllis McKenna, Official Receiver
2. Ms Ophelia Lok, Assistant Official Receiver (Legal Services)1
3. Mr Martin Wong, Assistant Official Receiver (Legal Services)2
4. Mr Ronald Fu, Assistant Official Receiver (Case Management)
5. Mr Jason Chu, Chief Treasury Accountant (Financial Services)
6. Mr Michael Cheung, Chief Insolvency Officer (Compliance & Regulatory)

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1. Feedback on revised winding up provisions under the Companies (Winding Up and Miscellaneous Provisions) Ordinance ("CWUMPO")

(a) Disclosure statement

In relation to section 262C of CWUMPO, a disclosure statement needs to be filed before an insolvency practitioner ("IP") may take an appointment as provisional liquidator ("PL") or liquidator. As this is a new approach to eligibility and a new statutory requirement, would the Official Receiver's Office ("ORO") consider issuing guidance or templates to clarify the expectation in terms of documentation and procedures?

As the disclosure statement was a statutory requirement, it was a matter of law for the courts. ORO had no plans to produce a "one size fits all" template or issue a technical circular on the matter. On the question of gazetting the statement, if ORO received a disclosure statement before the meeting of creditors and contributories, they would publish it. It was noted that while IPs would send the statement to creditors and contributories, they would not necessarily publish it.

(b) Period between meetings of contributories and creditors

The 14-day gap allowed between the meetings of contributories and creditors seems, in practice, to pre-empt possible changes of the liquidator. As the PL would already have begun work during the period, there could be practical issues in switching liquidators. It has also been suggested that the new provision could effectively become a way of by-passing section 228A, without running the same risk of being in breach of CWUMPO.

While it was understood that the 14-day gap was the maximum duration between meetings, the Restructuring and Insolvency Faculty Executive Committee representatives ("RIFEC") considered that the gap could create practical difficulties. The OR indicated that this was now part of the law. While the ORO did not have much direct involvement in creditors' voluntary winding up cases, the RIFEC's concerns were noted and, depending upon how the new arrangements operated in practice, the issue could be re-examined during future reviews of insolvency law.

2. Contact for urgent appointment of provisional liquidators

Could a designated contact point be made available in the event of urgent applications for the appointment of PLs. At present, urgent applications have to be faxed to a general line, which can make it difficult to reach the relevant officer and have the application processed expeditiously.

According to ORO Circular 4/2017, in event of urgent applications for appointment of PLs under section 193 of CWUMPO, insolvency practitioners ("IPs") should contact the Assistant Official Receiver (Legal Services)1 to notify the ORO as soon as the decision to make an application was taken. The relevant contact details and required documents were outlined in the circular.

3. Notice for determination hearing

There may be stakeholders who are interested to attend the determination hearing. However, there are instances where stakeholders find it difficult to prepare for and attend the hearing as they tend to be given short notice of the hearing.

It is understood that the ORO would generally alert stakeholders of the hearing, upon the submission of documents to the court, following the meetings of the creditors and contributories. As such, in cases where the OR is appointed as PL, could the ORO provide a longer notice period when issuing the notice to the stakeholders.

Once the ORO received Notice of Hearing from the court, they would notify relevant parties as soon as practicable. In general, there should sufficient notice before the hearing. The OR would remind ORO staff about this and, if problems were encountered in practice, IPs could alert the ORO.

4. Issues relating to the Panel A scheme

(a) *Threshold for allocating cases to Panel A*

It is noted that among the cases included on the Panel A scheme, there are some where, in practice, the realisable assets are significantly lower than the $200,000 threshold. For example, the anticipated level of assets may have been determined by referring to the amount of paid-up capital, which is different from assets; or by reference to audit reports from several years earlier. How to determine the anticipated level of assets in the content of the Panel A Scheme?

The RIFEC felt that, in recent times, more cases with realisable assets of less than HK$200,000 were being referred to the Panel A scheme. The OR explained that, the asset threshold was the main criterion and the department could only make a best estimate. Furthermore, in considering what were non-summary cases ORO took the view that public interest cases and cases involving subsidiaries of listed companies or incorporated owners would also be considered appropriate for the scheme, as it was still likely that in such cases the assets could exceed HK$200,000. The Institute considered that paid-up capital should not be used as a specific criterion and suggested that it would be helpful if the criteria could be made known and the Institute were able to comment on

them. The OR indicated that the scheme rules would be reviewed in due course and this would be taken into consideration. The RIFEC was of the view that possible spin-off benefits of being listed as a Panel A registered firm or IP should not be a relevant factor, as the scheme was set up to fulfil a specific purpose and firms and IPs should not be encouraged to treat it as a marketing tool.

(b) Procedure for contributories/ creditors meetings

RIFEC is aware of cases where the first meetings of contributories and creditors were held together and the creditors and shareholders each nominated a liquidator before the meetings. Nevertheless, at the meetings, the chairman asked for votes on three different nominations, i.e., the creditors' nomination, the shareholders' nomination and also a firm from the Panel A roster. Practitioners would like to understand why a Panel A firm would be invited in situations where the creditors and contributories have already put forward nominations.

In the situation where several creditors' meetings involving Panel A firms take place on the same day, we should like to clarify how case allocations are made where a Panel A firm is conflicted out in the case for which it has been nominated. As the next case would already have been scheduled to be allocated on the same day, involving the nomination of another Panel A firm, what would be the position of the first firm? Would it lose its place on the roster, as it could not be nominated in the next case, while another panel firm might end up with more than one case?

As regards the second part of the question, ORO explained that the roster system was organised based on rounds. For example, if there were five firms on a "pending" list in round 1 and a firm on the list was allocated a job, it would be removed from the list for the remainder of that round. If, for some reason, a pending firm was not successfully assigned a case, it would be put back to the same position on the list and would not lose its place for the next allocation in that particular round. This would give every firm an equal opportunity to be allocated job in each round.

RIFEC mentioned a case where, although eventually the outcome was as expected, the creditors and contributories held a meeting together and there was a nomination from each, as well as a third nomination of a Panel A firm from the ORO. The OR agreed that this was not the normal procedure. RIFEC was asked to provide more information about the case.

[Post-meeting Note: *After investigation of the particular case involved, the case officer was reminded to follow the usual practice*.]

(c) Procedure for appointment of provisional liquidators

RIFEC has been made aware of a non-summary court winding-up case, in which the petitioner identified a nominee to be PL under section 193. However, the nominee was notified by the petitioner's solicitor that the

ORO would object to the appointment on the basis that the nominee was not from a firm on the Panel A Scheme. As the membership of the Panel A Scheme should not be a condition for appointment as a PL, this is of concern. We should like to seek confirmation from the ORO that Panel A membership is not a consideration in such cases.

The OR explained that the membership of the Panel A scheme was not a condition for appointment. However, in general, the ORO would need to ascertain whether the nominees were fit and proper persons to take up the appointment and might request more information about the nominee. If the nominee was an appointment taker of a Panel A firm, that would generally be sufficient (unless there was a conflict of interest); if not, further enquiries might need to be conducted. It was noted that the firm in question said that they had been turned down for two cases and had not been approached by the ORO about their qualifications. It was suggested that there might have been a communication problem. If more information could be provided, the ORO could look into the matter.

(d) Definition of "full time" under Panel A

It is understood that in recent ORO tenders, the department requires firms to have a certain number of "full-time" employees. "Full time employee" is defined as "an employee who works 44 or more working hours in a week".

Given that most firms nowadays work a five-day week and that working hours, excluding the lunch break, may be only around 35 hours (i.e., 40 hours, or slightly more, including lunch), technically, it may be difficult for many firms to meet the requirement in the tender documents. We would like to request the OR to consider reviewing this definition.

Consideration was being given to changing the definition of "full time employee" for the next Panel T tender and reducing the stipulated minimum working hours to, perhaps, 35 per week. Currently, there was no similar definition for Panel A work, so this could be discussed further. Possibly the same basis could be adopted.

5. <u>Fee advice from PL</u>

Generally, where the PL's fee advice is outstanding, liquidators are faced with some practical difficulties. In the absence of the fee advice, the liquidator would normally estimate the fee and make a provision for it, which may not always be sufficient to cover the actual fees. For example, there have been occasions where the actual fee was around double the provision, and this could result in the liquidator having to pay the additional fees themselves. The situation could also be more complicated in cases where dividends have already been paid out or are due.

Could the process for issuing the fee advice by the ORO could be reviewed and, if possible, accelerated?

The OR understood the concern and had allocated more resources to clear the backlog of cases with outstanding PL fees for the OR.

6. Forms for section 203 and section 93 accounts

The forms on completing section 203 of CWUMPO (Audit of Liquidator's Accounts), and section 93 of the Bankruptcy Ordinance (Audit of Trustee's Accounts), date back to the 1990s. Are there are any plans to update these forms?

The ORO would consider reviewing the forms, and if appropriate, consult the Institute.

[Post-meeting Note: *The ORO subsequently performed a review of the forms and considered that they were clear and as far as the ORO was concerned were well understood by stakeholders and did not need to be revised. If the feedback from practitioners is otherwise, however, ORO may reconsider.*]

7. Time taken for completion of audit post-liquidation

As an ORO audit is required at the end of the liquidation before a liquidator may seek release and conclude a case, we should like to ask whether it would be possible for the ORO to complete the process within a reasonable and definite time frame. We are aware of some cases where the ORO's audit has not been completed for several years.

The ORO took note of the RIFEC's concerns regarding completion of the end-of-liquidation audits. ORO noted that every release application, required completion of a section 205 report by ORO but not necessarily an audit. Whether or not an audit was required on the accounts submitted in a liquidation case depended on a number of criteria. For those cases where a release application had been filed and an audit was required, ORO audit team would accord high priority, to ensure that the audit was completed within a reasonable time. If enquiries had to be made to the liquidator however, the time taken for completion of the audit might be longer. It was not appropriate to set a definite time frame for all audit cases, but ORO regularly reviewed such cases to ensure timely completion, especially where a release application was involved.

8. Dispensation of the Committee of Inspection ("COI")

In a recent court judgement (Companies Winding Up No. 146 of 2013 Joy Rich Development Limited), it was concluded that liquidators have the right to apply to fill a vacancy on the COI, whereas the power to dispense with it rests with the OR. However, we are aware of a case where the OR's assistance to dispense with the COI has been requested and a response is still pending after two months. How should such cases be followed up?

It was not an uncommon scenario for COI members, towards the end of a winding up case, to lose interest in the case and become difficult to reach or even unreachable, especially after all the assets had been distributed. This posed practical problems, e.g., COI members would not sign the audit certificate. The existing legal options, such as removing members who failed to show up for several meetings, or getting COI members to resign, holding a creditors' meeting, etc., would not resolve the issue of how to deal with outstanding audit certificates from the time the COI was in place. The OR had doubts about the supposed power of the OR to dispense with a COI and would in any case be reluctant to process such applications. The RIFEC asked whether the procedure could be amended, so that, for example, if the audit certificate were sent to COI members a certain number of times and they did not respond, it would be deemed to be approved; or whether, if the circumstances were properly documented, the ORO would consider completing the section 205 audit. The OR suggested re-considering this issue among others when there was a suitable opportunity for legislative amendments in future.

9. Value of insolvency practitioners' bonds

There appears to be some ambiguity surrounding the required amount of an IP's bond, which has usually been determined with reference to the statement of affairs. For example, the required bond value may not have been adjusted to reflect the monies that have been realised and deposited in the Companies Liquidation Account ("CLA"). In one case involving a shareholder dispute, the required value of the bond was based on the gross distribution instead of the net distribution. There also seem to be delays in some cases in arriving at the final value of bonds, even in straightforward cases, where adjustments do not seem to be required.

It was noted that where assets were below a certain level, professional indemnity insurance was accepted instead of a bond. Where assets exceeded $2 million, a bond of 10% of the value of the assets was required, with a limit of $5 million per case. The RIFEC asked for greater flexibility given that the funds were anyway required to be deposited in the CLA controlled by the OR. They pointed out that firms would have limits imposed by the bond issuers of, perhaps, $10 million in total, which could easily be used up. The OR noted that a consultation on bonding arrangements had been conducted in the United Kingdom the previous year. Given that the findings of the consultation could also be relevant to the situation in Hong Kong, it was suggested that the matter be revisited once the results of the United Kingdom consultation were known.

[Post-meeting Note: *As yet there are no conclusions from the UK consultation and ORO will keep the matter in view.*]

10. Opening bank accounts

The onerous procedures surrounding the opening of bank accounts can create practical problems for IPs and the administration of windings up. We would like

to ask whether the ORO could consider allowing more flexibility in terms of the banks at which accounts can be held and monies deposited.

Recently, IPs had encountered problems with opening bank accounts in both bankruptcy and liquidation cases. For batches of bankruptcy cases tendered out by the ORO, IPs reported that they had problems if they tried to open accounts in batches of, e.g., 5 -10 cases. For liquidations, while banks would not directly decline to open accounts, over the past few months, some banks had started charging up to $10,000 for each account opened. Minimum balance requirements could also be problem for small bankruptcy cases. The Institute asked whether an alternative arrangement could be considered, e.g., allowing a firm to open a separate client account for all "Panel T" cases under its name. The firm could maintain monthly reconciliations and reflect these in the section 203 accounts for each case. While it was understood that there might be a problem to consolidate bankruptcy accounts due to the requirements of section 91(1) of the Bankruptcy Ordinance, there was no similar legal impediment for company liquidations. The ORO would consider looking into whether this would be permissible under the law. The Institute could consider raising it with the Monetary Authority. The Institute was invited to collect more feedback from IPs and provide additional information to the ORO on the problems regarding bank accounts and OR would consider raising the issue with Financial Services and the Treasury Bureau.

[Post-meeting Note: *The OR notes that section 202(3) of Cap. 32 prohibits a liquidator of a company which is being wound up by the court from paying any sum received by him as liquidator into his private banking account.*]

11. Litigation funding

In cases receiving litigation funding, funds are received from creditors or third parties to pay for the legal costs and liquidators' fees and disbursements incurred in and arising out of the causes of action and the legal proceedings. As litigation funding is becoming more common, the RIFEC would like to clarify how the funds received should be handled. In general, only recoveries from the pursuit of the causes of action and legal proceedings would be deposited into the CLA. As funds received from ligation funding are not monies recovered or realised by the company, prima facie, they do not need to be deposited in CLA and should not be subject to ad valorem charges.

It is suggested that the funds should be deposited into a special bank account maintained by the liquidators and recorded as "Other receipts", in the summary of account under section 203. Subject to the funding agreement, the liquidators can transfer such funds to a client account of the solicitors for the liquidators, as legal costs on account and/or as funds on account for the payment of taxed costs, including the liquidators' fees and disbursements. RIFEC would like to seek OR's views on the suggested treatment.

RIFEC explained that, currently, individual insolvency officers seemed to take a different view on whether and how litigation funding should be reflected in the accounts. The OR agreed that, in principle, funds paid directly from a third party litigation funder did not need to be recorded in the section 203 accounts. If there were more specifics on particular cases, the matter could be further discussed with the ORO.

12. Provisional supervision

What are the latest developments in relation to proposed legislation on provisional supervision?

The plan was to introduce a bill on provisional supervision into the Legislative Council in 2018/19. The latest proposal was to include non-Hong Kong-incorporated companies within its scope.

13. HKICPA update on Restructuring and Insolvency Faculty / Other insolvency-related projects

RIFEC provided an update on the RIF and its membership, work and activities, including organising monthly lunch seminars, its projects, such as updating the Insolvency Guidance Notes; the Institute's insolvency education programmes, and external representation, including on the board of INSOL International and the Subcommittee on Companies and Insolvency Matters of the judiciary's Civil Court Users' Committee.

14. Any Other Business

The OR briefed the Institute on the Private Columbaria Bill, which could impose onerous obligations, with criminal liabilities, on persons taking possession of private columbaria, including liquidators. If notice was given to the Director of Food and Environmental Hygiene within seven days, the Food and Environmental Hygiene Department could take over the required procedures. While the notice period was short, it would be extended for a transitional period. The director would be writing to relevant professional bodies. The licensing authority would be set up within the next six months. OR invited the Institute to encourage its members to attend briefings on the ordinance to be conducted by Food and Environmental Hygiene Department.

HKICPA, Restructuring and Insolvency Faculty
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