

BY FAX AND BY POST
(2869 6794)

Our Ref.: C/COG(H)(6C), M3067

8 May 2000

Ms. Leung Siu-kum,
Clerk to Bills Committee on
Companies (Amendment) Bill 2000,
Legislative Council,
Legislative Council Building,
8 Jackson Road,
Central, Hong Kong.

Dear Ms. Leung,

Companies (Amendment) Bill 2000

Further to my letter to you of 24 March 2000 on the above Bill, I undertook to let you know if any additional points emerged when the Society's Council considered the Bill and the comments on it from our Insolvency Practitioners Committee.

--- I attach herewith a few supplementary points on the Bill. You will note that Part A contains proposals for minor changes to provisions that are not currently dealt with in the Bill. We believe that the opportunity should be taken to correct these errors in cross-references.

Yours sincerely,

PETER TISMAN
DEPUTY DIRECTOR
(PROFESSIONAL PRACTICES)
HONG KONG SOCIETY OF ACCOUNTANTS

PMT/ay
Encl.

c.c. Mr. Eric Li

Hong Kong Society of Accountants

Supplementary Points to Submission of 24 March 2000 on the Companies (Amendment) Bill 2000

A. General Provisions of the Companies Ordinance

Section 140 (Resignation of auditor)

It appears that when subsection (2) was amended in 1995, corresponding amendments were not made to subsections (3)(b), 4 and 6(b) which still refer to the former subsection (2)(b) instead of subsection 2(a)(ii) (see attachment). This needs to be amended.

Eleventh Schedule (Accounts of Certain Private Companies under s141D)

Paragraph 5 of the Eleventh Schedule states: "There shall be shown under a separate heading the aggregate amount of any outstanding loans made under the authority of provisos (b) and (c) to section 48(1)". However, the provisos to s48 were repealed in amendments made to the Ordinance in 1991. Similar provisions now appear as s47C(4)(a), (b) and (c). This reference in the Eleventh Schedule needs to be amended accordingly.

B. Corporate Rescue Provisions

New section 168ZD

Where the provisional supervision is ended and the appointment of a provisional liquidator previously terminated under s168ZD(11) is deemed not to have been terminated and the related winding up proceedings are deemed not to have been stayed, it is not clear now the provisional supervisor's indemnity for contracts entered into by him during the provisional supervision will rank in the winding up of the company, or whether he is entitled to retain control over assets of the company in order to satisfy any such liabilities.

New section 168ZQ

Under s168ZQ a major secured creditor can signal his disagreement with the provisional supervisor preparing a proposal. This will effectively end the rescue attempt. However, the major creditor need give no justification for his decision. It is arguable that major a creditor should have to satisfy the court that opting out would increase the likelihood of his collecting a greater proportion of his secured debts.

It is noted that there is no general provision on unfair preferences. However, if the creditors decide that provision supervision should be ended in favour of a liquidation, consideration should be given to deeming the company to have been in liquidation from the date of the appointment of the provisional supervisor for the purpose of calculating the period relating to voidable dispositions. This should help to discourage provisional supervision from being used as a delaying tactic.

New section 168ZS

As regards classes of creditors whose rights are modified or otherwise affected, there should be a mechanism for ensuring that any objecting creditors in a class will not receive less than they would if the company were to be wound up. There could also be a mechanism to enable a plan to be approved over the objection of a class of creditors. In the United States, for example, a "cramdown" provision requires that a plan does not discriminate unfairly and is fair and equitable with respect to each class of claims or interests that is impaired under, and has not accepted, the plan. Court involvement and / or ratification would be necessary to ensure that objecting creditors are being treated fairly.