



CHAPTER

# 3

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# RESTRUCTURING AND INSOLVENCY IN HONG KONG

In Hong Kong, the statutory framework for regulating the affairs of insolvent companies is found in the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) (the “**C(WUMP)O**”) and the Companies (Winding Up) Rules (Cap. 32H). The C(WUMP)O also cross-refers to and incorporates certain provisions of the Bankruptcy Ordinance (Cap. 6).

This chapter provides a broad overview of the restructuring and insolvency regime in Hong Kong, including (i) the options available for companies in financial distress, (ii) the key considerations of which stakeholders should be aware in an insolvency scenario, (iii) pre-insolvency transactions that are liable to be set aside, (iv) the existing approach to cross-border insolvencies under Hong Kong law, and (v) the current status of proposed legislative reforms.

## I. What Options are there for Companies in Financial Distress?

### A. Option 1: Restructuring without a winding-up

Currently, there is no formal corporate rescue procedure under Hong Kong law. Pursuing workouts or schemes of arrangement are the two main ways by which a Hong Kong company in financial distress may restructure its debts without going through a winding-up.

## 1. Informal workout

A workout comprises contractual arrangements between a debtor company and its creditors. Being an out-of-court process, a workout process can be done at any point in time, even concurrently with a scheme of arrangement. It is up to the parties to agree on an acceptable arrangement between themselves.

The terms of a workout plan are therefore highly flexible and may include the amendment and extension of a company's debts or the restructuring of its entire capital structure. Creditors may opt for a consensual workout where the likelihood and/or rate of recovery are higher than if the company were wound up.

## 2. Scheme of arrangement

A scheme of arrangement is a court-sanctioned compromise/arrangement between a company and all its creditors (or a class of them), that is given statutory effect to bind all such creditors, even though not all of them have consented to the arrangement. The scheme procedure can be utilised by companies already in liquidation as well as those that are not.

The scheme procedure involves a three-step process. *First*, there is a first court hearing when the court decides whether to grant leave for the scheme proponent to convene meeting(s) of creditors. *Second*, meeting(s) of the company's creditors (or classes of its creditors) are convened and held to vote on the proposed scheme. Under Hong Kong law, a majority (that is, over 50%) in number, representing at least 75% in value, of creditors present and voting at a creditors' meeting, must vote in favour of the proposed scheme in order for it to be approved at the meeting. Where there are multiple classes of creditors whose debts would be compromised pursuant to the

scheme, the scheme must be approved by all classes. *Finally*, once approved by the creditors' meeting(s), the proposed scheme will be submitted to the court for final approval. At that second court hearing, the court will scrutinize compliance with the procedural requirements prescribed by statute and the fairness of the arrangement proposed between the company and its creditors.

Initiation of a scheme process does not activate any moratorium on creditors' actions. This is why creditors' schemes are sometimes coupled with a provisional liquidation, such that companies can take advantage of the statutory moratorium applicable to a provisional liquidation.

Even where the company in question is not a Hong Kong company, a scheme may still be sanctioned by the court so long as there is a "sufficient connection" between the foreign company and Hong Kong.

## B. Option 2: Winding-up

Under Hong Kong law, a winding-up, also known as liquidation, can be categorised into three types – members' voluntary liquidation ("**MVL**"), creditors' voluntary winding-up ("**CVL**") and compulsory winding-up by the courts.

A provisional liquidator may also be appointed to protect the assets of a company at any time after the presentation of a petition for the company's winding-up and before the date on which a winding-up order is made. The appointment of a provisional liquidator triggers an automatic stay on legal actions or proceedings against the company subject to the leave of the court. This does not affect the rights of the secured creditors to enforce their security. The court may exercise its discretion to appoint a provisional liquidator if it is satisfied that there is good *prima facie* case for the winding-up order and that the company's

assets are in jeopardy. Whilst the powers of a provisional liquidator may include exploring a restructuring of the company; in Hong Kong, a provisional liquidator cannot be appointed solely for this purpose.

### **1. Where the company is solvent: members' voluntary winding-up**

Directors of a solvent but defunct company may initiate an MVL of the company, by (a) signing a certificate of solvency which declares that the company will be able to pay its debts in full within 12 months after commencement of the winding-up and (b) convening a meeting of the company's shareholders to consider resolutions for the winding-up of the company and for the appointment of a liquidator.

A director who signs a Certificate of Solvency without reasonable grounds is liable to a fine and/or imprisonment (and the absence of reasonable grounds is presumed if it subsequently turns out that creditors cannot be paid in full within 12 months).

Once the company's affairs have been fully wound up, the liquidator will draw up an account of the MVL and call a final meeting of shareholders. The company will be formally dissolved 3 months after the date on which the liquidator's final statement of account and the return of the final meeting are registered with the Companies' Registry.

### **2. Where the company is insolvent: CVL and compulsory winding-up**

There are two types of insolvent winding-up – CVL and compulsory winding-up. Though "insolvency" is not expressly defined under Hong Kong law, the test for insolvency is whether a company in a winding-up petition is unable to pay its debts. Under section 178(1) of the

C(WUMP)O, a company is deemed to be unable to pay its debts if (a) it fails (for a period of three weeks) to pay, secure or compound for (to the reasonable satisfaction of the creditor) a sum equal to or exceeding HK\$10,000 which is then due and which has been the subject of a statutory demand; (b) it fails to satisfy (in whole or in part) an execution or other processes issued on a judgment, decree or order of any court in favour of a creditor; or (c) if it is proved to the satisfaction of the court that the company is unable to pay its debts, taking into account the prospective and contingent liabilities of the company.

#### **a. Creditors' voluntary winding-up**

A CVL is usually initiated by the directors who have determined that the company is insolvent and unable to carry on trading. The directors will resolve that a winding-up is necessary and call a meeting of shareholders, at which a special resolution to wind up the company, and a resolution nominating a liquidator, will be voted on. At around the same time, the company will call a meeting of creditors (which must be held within 14 days after the shareholders' meeting), at which, creditors may (amongst other things) nominate their own liquidator and vote to establish a committee of inspection to supervise the conduct of the liquidation.

During a CVL, the powers of directors are suspended, and the liquidator may exercise powers in relation to the company, as prescribed by the C(WUMP)O. There is no automatic stay on proceedings or creditors' actions in a CVL, but the liquidator or any contributory or creditor may apply to the court for directions or other orders.

The liquidator will, to the extent possible, realise all of the company's assets and distribute the proceeds to creditors in

accordance with the statutory priorities set out in the C(WUMPO). As soon as the company's affairs are fully wound up, the liquidator will call a final general meeting of the company and make the requisite filings with the Companies Registry to dissolve the company.

Section 228A of the C(WUMPO) prescribes a special procedure by which directors may commence a winding-up, without first having to hold a meeting of shareholders. This procedure is only available if it is not reasonably practical for the winding-up of the company to commence under another section of the C(WUMPO). In practice, the procedure is rarely deployed.

#### **b. Compulsory winding-up**

A compulsory winding-up may be instigated by the debtor company, shareholders, liquidators and, most commonly, creditors whose statutory demand has not been paid or satisfied within 21 days of it being served. It is commenced by presentation of a winding-up petition to the court.

Once the court is satisfied that one of the grounds set out in section 177(1) of the C(WUMPO) is made out (including where the company is unable to pay its debts), it may make a winding-up order against the company. The court may have regard to the wishes of creditors and what is just and equitable.

During a compulsory liquidation, there is an automatic stay on all proceedings and creditors' actions against the company, unless the court grants leave for such proceedings to commence or continue. Again, directors' powers will be suspended and the court-supervised liquidator will be tasked with realising and recovering the company's assets, investigating the company's affairs, adjudicating creditors'

claims and making distributions to creditors out of the liquidation estate. Once the company is fully wound up, the liquidator will apply to the court for a release and for dissolution of the company.

## **II. Stakeholders' Roles and Considerations in a Liquidation**

### **A. Directors and officers**

It is important for directors and officers of a financially distressed company to be aware of their obligations in an insolvency scenario, as failure to comply with such obligations could result in civil or even criminal liabilities.

A director owe duties to the company, which apply regardless of the company's solvency position. These include, amongst others, the duty to act honestly and in good faith in the interests of the company as a whole; but when a company is nearing insolvency, the interests of the company as a whole will encompass the interests of the company's creditors. Directors and officers must also adhere to their fiduciary duties. Should a director or officer commit a breach of any such of duties, a subsequently appointed liquidator may bring actions against them on behalf of the company.

In addition, directors and officers may be subject to civil and criminal penalties and/or disqualification orders if they are found liable for falsification of company books, failure to keep proper books of account, or fraudulent trading. However, as a practical matter, actions for fraudulent trading are rarely prosecuted in Hong Kong, given the difficulty in establishing the requisite intention to defraud.

There is currently no provision for insolvent trading under Hong Kong law. In other words, directors will not be personally liable for the debts incurred by the company whilst it is insolvent, even if the company subsequently goes into liquidation and

there are insufficient assets to pay all creditors in full. However, if a company makes a payment out of capital in respect of the redemption or buy-back of any of its own shares from a shareholder, and a winding-up of the company is commenced within one year after that payment, the directors who signed the solvency statement in relation to the payment out of capital could be jointly and severally liable with the recipient-shareholder to contribute to the assets of the company.

## B. Shareholders

Shareholders often stand to lose the most in a liquidation scenario, receiving nil or very little return on their shares. In addition, shareholders may also face claw-back risks in respect of shares redeemed or bought back within a year before the commencement of a winding-up, any unlawful dividends received whilst the company is insolvent and any other benefits or property received from the company as part of a transaction at an undervalue or a fraudulent conveyance (discussed in Section III below).

Once a winding-up petition is filed, any subsequent transfer of shares in the company or alteration in the status of its members is void, unless the court otherwise orders.

## C. Creditors

Creditors, when assessing their various options vis-à-vis an insolvent or potentially insolvent company - including petitioning for the company's winding-up, enforcement of their security and/or the restructuring of the company's debts, should understand the risks and opportunities associated with those options and their likely recovery in each scenario.

At a high level, considerations relevant to creditors in a liquidation scenario include the following:

### i) Priority of payment

Generally speaking, the priority of payments in the winding-up of a company in Hong Kong is as follows:-

1.	Secured creditors vis-à-vis secured assets (save that, where the Company's unsecured assets are insufficient to meet the preferential debts listed in s.265(1) of the C(WUMP)O, the Company's floating charge assets will be applied first in satisfaction of those preferential debts <i>before</i> being paid to the floating charge holders)
2.	Expenses of the winding-up (including the liquidators' remuneration)
3.	Preferential debts as defined in s.265(1) of the C(WUMP)O, including: <ul style="list-style-type: none"> <li>• Employee entitlements (subject to limits)</li> <li>• Government debts</li> </ul>
4.	Unsecured creditors (on a <i>pari passu</i> basis)
5.	Interests of debts (for the period after the company went into liquidation)
6.	Subordinated creditors (such as members in respect of debts due from the company to them in their capacity as members)
7.	Members of the company generally

### ii) Stays and moratorium

In a compulsory winding-up, court proceedings and legal actions against the company are stayed, subject to the court granting leave for their commencement or continuation. Instead, unsecured claims against the company are replaced by creditors' entitlements to prove in the winding-up and to receive distribution of dividends out of the company's estate.

Notwithstanding that, the liquidation of a debtor-company will not prevent a secured creditor from enforcing its security.

### iii) Claw-back risks

Once a winding-up petition is filed against a company, any disposition of the company's property, including things in action, is void, unless the court otherwise orders.

In addition, creditors who had received payments, grants of security (in particular, floating charges) and/or transfers of assets from an insolvent company could face claw-back risks in respect of such transactions in the event that the company subsequently goes into liquidation. The different categories of voidable transactions are described further in Section III below.

#### *iv) Prospect of restructuring*

Whilst a restructuring may be implemented in the context of a provisional liquidation or even a formal liquidation, and some creditors may choose to use a winding-up petition to pressure an insolvent company into progressing a restructuring, creditors should bear in mind that:

- the commencement of a winding-up petition (even if subsequently withdrawn) could potentially have adverse impacts on the prospects of a successful restructuring – for instance, it might trigger defaults/termination of other indebtedness or material contracts; and
- under Hong Kong law (as it currently stands), a provisional liquidator cannot be appointed to a company solely for the purpose of a corporate rescue.

#### *v) Available assets and potential recovery*

The likely return to creditors in a liquidation will depend heavily on: the available assets of the company; the ease with, and the amount of, which those assets could be actually recovered and realised; out of those assets, the proportion which that represents secured assets (that will be used exclusively to meet secured liabilities); the availability of liquidators' recovery actions and the likelihood and time required to prosecute those claims and achieve actual recoveries.

#### *vi) Outstanding liabilities*

The total quantum of provable claims against the company that will share, on a *pari passu* basis,

in the distribution of available assets is equally important to the likely return to creditors.

#### *vii) Likely delay*

Creditors should also bear in mind that there is typically a long delay between the commencement of a winding-up and the actual distribution of a dividend (including interim dividends) to creditors. The delay may be caused by difficulties faced by the liquidator in recovering and realising assets and/or complexities (including court proceedings) in connection with the adjudication of claims.

### **III. Setting Aside Pre-Insolvency Transactions**

As discussed in Section II above, once a liquidator is appointed to a company, he may bring recovery actions to avoid antecedent transactions and obtain compensation from the parties involved. The key categories of voidable transactions are summarised below.

#### **A. Transactions at an undervalue**

On hearing an application by a liquidator, the court may set aside a transaction at an undervalue - that is, a gift by the company or a transfer of assets for no consideration or for significantly less consideration than what the company is receiving, if (i) the transaction was entered into within five years of commencement of the winding-up and (ii) the company was insolvent at the time of the transaction or became insolvent as a consequence of such transaction.

On setting aside the transaction, the court may make such orders as it sees fit for restoring the position to what it would have been, had the company not entered into that transaction, including but not limited to ordering that property or money be returned to the company or one or more of the other orders described in section 266C of the C(WUMP)O.

The court must not make orders unwinding a transaction at an undervalue, if it is satisfied that the company entered into the transaction in good faith and for the purpose of carrying on its business and there were reasonable grounds at the time for believing that the transaction would benefit the company.

### **B. Unfair preferences**

A company gives an unfair preference to a creditor if it does anything that puts the creditor in a position which, in the event of an insolvent liquidation, will be better than the position such creditor would have been in if that thing had not been done. There must be a desire on the part of the company to produce the preferential effect; and this desire is presumed where the preferred person is an associate of the company. To set aside an unfair preference, it must have occurred within six months prior to the commencement of the liquidation (or two years prior if the transaction was with an associate), and the company must have been insolvent at the time of the transaction or become insolvent as a consequence.

As with transactions at an undervalue, the court may make any order as it sees fit to restore the position to what it would have been had the company not given the unfair preference.

### **C. Floating charges**

If a floating charge is created within 12 months of the commencement of a winding-up (or 24 months where the floating charge is granted in favour of someone connected to the company), it is invalid except to the extent of the value of the consideration paid or supplied to the company at the same time or after the creation of the charge, plus interest thereon at the rate specified in the charge or at 12% per annum (whichever is the lesser).

In addition, in order for a floating charge created in favour of an unconnected person to be invalidated, it must have been created at a time when the

company was insolvent or the company must have become insolvent as a result of creation of the charge.

### **D. Fraudulent trading**

In relation to a company that is being wound-up, where a person is knowingly a party to the carrying on of the company's business with intent to defraud creditors or for any fraudulent purpose, the court may declare that person to be personally responsible for all or any of the debts or other liabilities of the company. Criminal penalty (consisting of a fine or imprisonment) and/or a disqualification order (in respect of directors) may also apply.

### **E. Extortionate Credit Transaction**

Where a company has entered into a transaction by which it was provided with credit (for instance, a loan transaction) within three years prior to the beginning of its liquidation, the liquidator may challenge that transaction as an extortionate credit transaction if, having regard to the risk accepted by the person providing the credit, either (i) the terms of it were such as to require grossly exorbitant payments to be made in respect of the provision of credit; or (ii) it otherwise grossly contravenes ordinary principles of fair dealing. The court may set aside an extortionate credit transaction in whole or in part, vary the terms of the transaction or require the lender to refund payments it received or surrender its security.

## **IV. Cross-Border Insolvency Cases**

Hong Kong is uniquely positioned between the PRC and other offshore jurisdictions, and most insolvency cases in Hong Kong involve cross-border elements. A classic example is where a holding company incorporated in an offshore jurisdiction (such as the BVI, Bermuda or the Cayman Islands) would be listed on the Hong Kong Stock Exchange and would have shareholding in

one or more PRC subsidiaries. The Hong Kong-listed holding company itself would hold little or no physical assets; but may issue bonds (which may be governed by English or New York law) or take loans from banks. The funds so raised would flow down from the holding company to the PRC subsidiaries that would, in turn, hold physical assets in China and operate the actual business. If the holding company becomes unable to pay its debts, complex cross-border insolvency issues will arise. Set out below is a summary of some of those issues and the Hong Kong court's current approach to them.

### A. Winding-up foreign companies in Hong Kong

A company incorporated outside of Hong Kong may be wound-up by a Hong Kong court under section 327 of the C(WUMP)O if, amongst other things, it is unable to pay its debts or if the court is of the opinion that it is just and equitable that the company be wound-up.

In addition, the courts, as a matter of discretion, have generally required three requirements to be satisfied before winding-up a foreign company. Those requirements are that: (i) the company has sufficient connections with Hong Kong (which typically comprises the presence of assets in the jurisdiction); (ii) there is a reasonable possibility that the winding-up order would benefit those applying for it; and (iii) the Hong Kong court is able to exercise jurisdiction over one or more persons in the distribution of the company's assets. In exceptional circumstances where the connection with Hong Kong is so strong and the benefits of a winding-up to creditors are so substantial, a winding-up order may be made even though the third criterion might not be satisfied.

### B. Recognition of and assistance to foreign proceedings

To date, Hong Kong has not enacted the UNCITRAL Model Law on Cross-Border Insolvency. As a result, foreign insolvency practitioners must

resort to the Hong Kong court's common law jurisdiction for the recognition of, and assistance to, foreign insolvency proceedings. Typically, a foreign insolvency practitioner would apply to the foreign court (that is, the court of the jurisdiction in which the insolvency proceeding was commenced) for a letter of request addressed to the Hong Kong court, requesting that assistance be granted to him (for example, to protect assets located in Hong Kong). Having obtained that letter of request, he would apply to the Hong Kong court for the requisite relief.

The Hong Kong court has taken a fairly generous view of its power to assist foreign insolvency proceedings, including provisional liquidations commenced offshore solely for the purpose of restructuring<sup>1</sup>. However, that power remains limited by common law and equitable principles, and the relief that the court may grant is limited to those which would be available to a liquidator under Hong Kong's insolvency law.<sup>2</sup>

As between Hong Kong and the PRC, the *Arrangement of Reciprocal Recognition and Enforcement of Civil and Commercial Matters by the Courts of the Mainland and of the HKSAR* is currently in place. However, that arrangement specifically excludes from its coverage judgments in bankruptcy/insolvency cases. Notwithstanding that, the Hong Kong court has broad powers under common law to recognise and assist PRC bankruptcy cases; and recently (in fact, on two separate occasions), it has made recognition orders and granted assistance sought by Mainland liquidators.<sup>3</sup>

### C. Cross-border schemes of arrangement

Where cross-border elements are involved in a scheme of arrangement, the court will consider whether there is sufficient connection between the

<sup>1</sup> *Re Z-Obee Holdings Ltd* [2018] 1 HKLRD 165.

<sup>2</sup> *The Joint Administrators of African Minerals Ltd (in administration) v Madison Pacific Trust Ltd* [2015] HKCU 875.

<sup>3</sup> *Re CEFC Shanghai International Group Limited* [2020] HKCFI 167; *Re Shenzhen Everich Supply Chain Co Ltd* [2020] HKCFI 965.

scheme and Hong Kong, and whether the scheme is effective in other relevant jurisdictions, because it would not be a proper exercise of the discretion to sanction a scheme that serves no purpose.<sup>4</sup> Relevant to that second consideration is the rule in *Gibbs*, which provides that a discharge of a debt is not effective unless it is in accordance with the law governing the debt. In that regard, the Hong Kong court has generally followed the rule in *Gibbs*, but has made certain exceptions to it - for example, where the foreign creditor(s) had submitted to the Hong Kong court's jurisdiction.<sup>5</sup>

Separately, it has become an established practice for Hong Kong-listed companies incorporated offshore to use parallel schemes of arrangement (approved by courts both in Hong Kong and in the offshore jurisdiction) to restructure their debts. This is to ensure that the scheme creditors do not disrupt the smooth operation of the scheme by taking hostile action against the company in either jurisdictions. However, the courts have criticised this practice of parallel schemes as

being an outmoded way of conducting cross-border restructuring, and have called for better international coordination to enable a substantive recognition of foreign schemes of arrangement in offshore jurisdictions.<sup>6</sup>

## V. Legislative Reforms

There have been constant calls over the last 20 years (including explicit remarks made by the judiciary in recent judgments) for the introduction of a statutory corporate rescue procedure and insolvency trading provisions in Hong Kong and for the enactment of the UNCITRAL Model Law on Cross-Border Insolvency. The Financial Services and the Treasury Bureau is understood to be preparing an amendment bill which may be introduced to the Legislative Council in late 2020. However, it remains to be seen when those much-needed legislative reforms will actually be implemented.

<sup>4</sup> *Da Yu Financial Holdings Limited* [2019] HKCFI 2531.

<sup>5</sup> *China Lumena New Materials Corp (in provisional liquidation)* [2020] HKCFI 338.

<sup>6</sup> *Re Da Yu Financial Holdings Limited* [2019] HKCFI 2531.

### About Latham & Watkins

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