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1 Overview

1.1 Where would you place your jurisdiction on the spectrum of debtor- to creditor-friendly jurisdictions?

Hong Kong is a very creditor-friendly jurisdiction. The Hong Kong Courts may exercise their discretion in winding up local and foreign companies, and appointing liquidators, or provisional liquidators, for such companies in Hong Kong. A debtor company may restructure its debts by adopting a scheme of arrangement, but it must first obtain approval from the Hong Kong Courts and its creditors for the proposed scheme.

1.2 Does the legislative framework in your jurisdiction allow for informal work-outs, as well as formal restructuring and insolvency proceedings, and to what extent are each of these used in practice?

The Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) ("**CWUMPO**"), the Companies Ordinance (Cap. 622) ("**CO**"), and other subsidiary legislation provide the legislative framework for restructuring and insolvency proceedings in Hong Kong.

Formal restructuring and insolvency proceedings in Hong Kong include:

(1) compulsory liquidation by creditors;
(2) appointment of receivers over the shares of a company;
(3) members' voluntary liquidation;
(4) creditors' voluntary liquidation;
(5) scheme of arrangement; and
(6) striking off and deregistration.

In practice, the companies' restructuring would always be conducted through informal procedures. For instance, companies may engage lawyers and accountants to assist in devising, implementing and monitoring restructuring plans.

2 Key Issues to Consider When the Company is in Financial Difficulties

2.1 What duties and potential liabilities should the directors/managers have regard to when managing a company in financial difficulties? Is there a specific point at which a company must enter a restructuring or insolvency process?

Directors of a company owe statutory and fiduciary duties to act in the interests of the company and its shareholders. However, when the company is insolvent, the interests of the company are in reality the interests of the creditors, as it is the creditors' money that is at risk. Therefore, when the directors know or ought to know that the company is insolvent or bordering on insolvency, or that an insolvent liquidation or administration is probable, they must take into account the interests of the creditors. In other words, the directors have a duty to consider whether there is any reasonable prospect of the company avoiding going into insolvent liquidation. If there is no viable restructuring proposal that is supported by a majority of the company's creditors, it would be incumbent upon the directors to take steps to put the company into liquidation so as to bring into operation the statutory scheme of winding up its affairs and assets. If the directors act in breach of such duties, they may be ordered to compensate the company for any loss or damage that has been suffered as a result of those breaches, or repay, restore or account for the money or property appropriated or acquired. In the recent case of *Re Carnival Group International Holdings Ltd* [2022] HKCFI 2668, the Court held the current executive directors and independent non-executive directors of the company personally liable for the petitioner's costs of, and occasioned by, the company's opposition to the petition from the time when the restructuring of the company had proved to be fruitless.

Under section 275 of CWUMPO, directors may also be personally liable if they were knowingly involved in carrying on any company business with the intent of defrauding its creditors, defrauding the creditors of any other person, or for any other fraudulent purpose. The Court may make an order that the directors be personally liable for all or any of the company's debts and liabilities, without any limitation of liability. The directors may also be criminally liable and may be fined and imprisoned for such fraudulent conduct.

Further, the Court may make a disqualification order against directors on the grounds of: (i) conviction of certain indictable offences under section 168E of CWUMPO; (ii) certain breaches of CO and CWUMPO under section 168F of CWUMPO; (iii) fraudulent trading or other fraud in winding up under sections 168G and 168L of CWUMPO; and (iv) conduct of directors rendering them unfit to manage companies under sections 68H and 168J of CWUMPO.

2.2 Which other stakeholders may influence the company's situation? Are there any restrictions on the action that they can take against the company? For example, are there any special rules or regimes which apply to particular types of unsecured creditor (such as landlords, employees or creditors with retention of title arrangements) applicable to the laws of your jurisdiction? Are moratoria and stays on enforcement available?

Stakeholders

A creditor may commence winding-up proceedings and will have the right to nominate and vote on the appointment of

liquidators of the company. In some cases, creditors with larger debts may be appointed as members of the committee of inspection of the company to assist and supervise the liquidators in administering the affairs of the company. The appointment of liquidators and members of the committee of inspection will need to be approved by the Court.

As for a creditors' voluntary liquidation, the liquidators nominated by the creditors usually prevail over the liquidators appointed by the shareholders.

Unsecured creditors are ranked the lowest amongst all creditors and will share the assets of the company equally with other unsecured creditors if their debts are proved by submitting a proof of debt to the liquidators of the company for deliberation.

Whilst employees are generally treated as unsecured creditors of the company, section 265 of CWUMPO gives priority to certain claims of employees, including claims for overdue wages, in which case the employees would be considered preferential creditors.

Creditors with lien would have the right to hold the assets of the company, but they would generally need to obtain approval from the Court to sell the assets.

The Official Receiver's Office is the governmental body in Hong Kong providing insolvency management services and has an important role in winding-up proceedings. The Official Receiver conducts a preliminary investigation of the companies subject to winding-up petitions and is often appointed as the provisional liquidator upon the grant of a winding-up order.

Moratoria or stay of enforcement

In Hong Kong, there is no statutory provision on moratoria or stays on enforcement. There is no inherent jurisdiction for the Court to create a regime allowing the judgment debtor or an insolvent company to obtain a moratorium on its debts.

Although a company may apply for the adjournment of winding-up petition hearings pending the outcome of the restructuring, the Court may not allow this to happen unless the company is able to show fruitful progress of the restructuring.

A Hong Kong company or its liquidator could only seek an order restraining enforcement of a secured debt in limited circumstances, including where (1) the proposed enforcement would improperly prejudice the equity of redemption, or (2) the company, after having failed to meet its payment obligations, had become able to do so and thus it would be inequitable to allow enforcement of the security.

The Hong Kong Court has also expressed doubts over whether a foreign moratorium is eligible for common-law recognition in Hong Kong. The common law principle that requires the Hong Kong Court to assist foreign liquidators does not extend to empower the Court to grant an order restraining enforcement of security to aid the administration of foreign companies.

2.3 In what circumstances are transactions entered into by a company in financial difficulties at risk of challenge? What remedies are available?

Transactions at an undervalue

A transaction at an undervalue is either a gift or a transaction entered into for a consideration, the value of which is significantly less than the value of the consideration provided by the company. Any such transaction that took place five years before the commencement of winding-up may be set aside by the liquidators.

Unfair preference

An unfair preference occurs where the company repays a creditor when the company was insolvent or became insolvent as a result of the repayment, thereby putting the creditor in a better position than it would otherwise have been when the company went into liquidation. Any such repayment that took place six months (or two years in cases where the creditor preferred is connected to the company, such as its directors or employees) before the commencement of the winding-up may be set aside by the liquidators.

Post-petition disposal of assets and creation of attachments

If a company is compulsorily wound up by the Court, according to sections 182 and 183 of CWUMPO, any disposition of the property of the company including the transfer of shares or an alteration in the status of the members of the company, and any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding-up, is considered void unless the Court orders otherwise.

Creation of floating charges

A floating charge may be declared invalid if it is created within 12 months before the commencement of winding up. The period is extended to two years if the charge-holder is connected with the company.

Extortionate credit transactions

The Court may set aside any extortionate credit transactions that the company entered into three years before the commencement of the winding-up. A transaction is considered extortionate if grossly exorbitant payments were made for the provision of credit or if the transaction grossly contravenes the ordinary principles of fair dealing.

3 Restructuring Options

3.1 Is it possible to implement an informal work-out in your jurisdiction?

Yes, and in fact most restructurings in Hong Kong are conducted through informal workouts.

3.2 What informal rescue procedures are available in your jurisdiction to restructure the liabilities of distressed companies?

In Hong Kong, distressed companies may restructure their debts through informal rescue procedures such as debt-to-equity swaps, which converts debts owed to the creditors into the company's share capital, and finding "white knights" to invest in the company for restructuring.

3.3 Are debt-for-equity swaps and pre-packaged sales possible? In the case of a pre-packaged sale, are there any restrictions on the involvement of connected persons?

Debt-to-equity swaps may be adopted in Hong Kong as part of the restructuring of a company, which may be sanctioned by the Court as a scheme of arrangement. However, unlike many other jurisdictions, there is no legal framework for pre-packaged sales in Hong Kong. In particular, the Hong Kong Court in the case of *Re Legend International Resorts Ltd* [2006] 2 HKLRD 192 held that the appointment of provisional liquidators is not permissible if their sole function is to carry out restructuring. The Hong Kong Court held that provisional liquidators must be appointed "for the purposes of winding up" and not avoid winding up, and

that restructuring "is an alternative to a winding-up". Therefore, in Hong Kong, it is not permissible to appoint administrators or provisional liquidators for the purpose of pre-packaged sales for the company.

3.4 To what extent can creditors and/or shareholders block such procedures or threaten action (including enforcement of security) to seek an advantage? Do your procedures allow you to cram-down dissenting stakeholders? Can you cram-down dissenting classes of stakeholder?

Creditors and/or shareholders have a significant say in informal workouts because of the contractual arrangements between the creditors/shareholders and the company. If a creditor refuses to agree with a restructuring proposal, the restructuring cannot be carried out. Therefore, there are limited avenues for companies to cram-down dissenting stakeholders. The only way to cram-down dissenting stakeholders is to seek the Court's sanction for a scheme of arrangement because it does not require the agreement of all shareholders or creditors of the company, and a majority representing 75% in value along with approval from the Court will be sufficient.

In November 1999, the Hong Kong Association of Banks and the Hong Kong Monetary Authority jointly issued the "Hong Kong Approach to Corporate Difficulties" (the "**HKMA Guideline**"), which laid down clear guidelines on how authorised institutions should deal with corporate borrowers who are in financial difficulties where the borrower is dealing with multiple banks. The HKMA Guideline emphasises that lenders should endeavour to enable borrowers to survive unless there is no reasonable possibility that the borrowers are viable. However, the HKMA Guideline is non-statutory in nature, and it is not widely followed in practice.

3.5 What are the criteria for entry into each restructuring procedure?

There are no specific criteria for companies to carry out restructuring. Nevertheless, a company should obtain support from a majority of its creditors for its restructuring proposal, otherwise a creditor may block the restructuring proposal by issuing a winding-up petition against the company.

3.6 Who manages each process? Is there any court involvement?

Restructuring is managed by the management and the creditors of the company. The Court is not involved in arranging and monitoring the progress of restructuring.

However, a company may opt for undergoing a scheme of arrangement under which the Court's approval is required. A scheme of arrangement allows the management of the company to remain in place while restructuring its relationship with its shareholders and/or creditors. To promulgate a scheme, the company will have to first apply to the Court for an order pursuant to section 670(1) of CO, to call meetings of the respective classes of shareholders or creditors. Once the Court makes an order that the meetings of the respective classes of shareholders or creditors be convened, notice of the date and time of these meetings will be advertised. A scheme requires approval by a majority representing 75% in value of the shareholders or creditors who vote at the meeting. If the scheme is approved, a petition for sanction will be issued and the Court will conduct a hearing to consider whether or not to approve the scheme. The scheme will be implemented upon obtaining sanction from the Court.

The advantage of a scheme of arrangement over an informal workout is that it does not require the agreement of all shareholders or creditors of the company, and the Court-sanctioned scheme will be binding on the company and the creditors, or class of creditors, with whom the arrangement is proposed to be entered into.

3.7 What impact does each restructuring procedure have on existing contracts? Are the parties obliged to perform outstanding obligations? What protections are there for those who are forced to perform their outstanding obligations? Will termination and set-off provisions be upheld?

The impact of a restructuring procedure on existing contracts depends on the terms of the restructuring plan and the terms of the contracts. If the contracts include clauses stating that restructuring, or changes in the management or company structure, may constitute events of default, then parties may be relieved from the performance of their obligations under the contracts. It is also common for loan documents to include restructuring as an event of default that will give the lender the right to accelerate loan repayment and enforce security.

There is no statutory protection for those who must continue to perform their outstanding obligations under the contracts. Termination and set-off provisions in the contracts will be upheld unless they contradict with the terms of the restructuring plan.

3.8 How is each restructuring process funded? Is any protection given to rescue financing?

An informal workout can be funded through injection of funds by shareholders or directors, or by obtaining loans from creditors and financial institutions. There are also instances where "white knights" invest in the company for restructuring.

However, there is no statutory protection given to rescue financing because restructuring is a compromise between the company and its shareholders and creditors.

4 Insolvency Procedures

4.1 What is/are the key insolvency procedure(s) available to wind up a company?

The key insolvency procedures available to wind up a company in Hong Kong are as follows:

(1) Compulsory liquidation by creditors.
(2) Members' voluntary liquidation.
(3) Creditors' voluntary liquidation.

4.2 On what grounds can a company be placed into each winding up procedure?

Compulsory liquidation by creditors

A company can be wound up by the Court on the following grounds under section 177 of CWUMPO:

(1) the company has by special resolution resolved that it will be wound up by the Court;
(2) the company does not commence its business within a year from its incorporation, or suspends its business for a whole year;

(3) the company has no members;
(4) the company is unable to pay its debts;
(5) an event occurs where the articles provide that the company is to be dissolved; or
(6) the Court is of the opinion that it is just and equitable that the company be wound up.

Member's voluntary liquidation

Where a company is solvent, members may wind up a company by way of a members' voluntary liquidation. Directors of the company must issue a certificate of solvency stating that: (i) they have made a full enquiry into the company's affairs; and (ii) they have formed the opinion that the company will be able to pay its debts in full within 12 months from the commencement of the winding-up. The shareholders must then pass a special resolution to wind up the company in a general meeting.

Creditor's voluntary liquidation

A creditors' voluntary liquidation is a voluntary winding-up by a company where no certificate of solvency has been issued by its directors (i.e. the company is insolvent but it is not wound up by the Court).

4.3 Who manages each winding up process? Is there any court involvement?

For a compulsory liquidation, the Court is involved as the petitioner presents a winding up petition against a company with the Court and seeks the Court to grant a winding up order against the company. If the Court orders that the company be wound up after hearing the petition, the affairs of the company will be managed by the provisional liquidator, the Official Receiver, or the liquidator(s) appointed subsequently.

A member's voluntary liquidation is managed by the directors of the company until the liquidators are appointed. In the period between the passing of the shareholders' special resolution to wind up the company and the appointment of the liquidator, the directors may not exercise their powers unless they obtain sanction from the Court.

As for creditor's voluntary liquidation, the liquidators will manage the winding-up process; but the creditors will have a significant influence on the process, as the liquidators are appointed by the creditors.

The Court is not involved for either type of voluntary liquidation processes.

4.4 How are the creditors and/or shareholders able to influence each winding up process? Are there any restrictions on the action that they can take (including the enforcement of security)?

In a compulsory liquidation, the petitioning creditor will have a significant influence on the winding-up process because the procedure is led by the petitioning creditor. The Court will also consider the stance of other creditors who support or oppose the winding-up petition. After the company is wound up, creditors will have the right to nominate and vote on the liquidators of the company. In some cases, creditors with larger debts may be appointed as members of the committee of inspection of the company to assist and supervise the liquidators in administering the affairs of the company.

In cases of creditor's voluntary liquidation, creditors will have a significant influence on the winding-up process, whereas in a members' voluntary liquidation, shareholders will have more control over the winding-up process.

Secured creditors can enforce their own security being charged in their favour. However, if the security created is a floating charge, preferential debts such as sums owed by the company to its employees and the Hong Kong government must be paid before the floating charge-holder.

In contrast, unsecured creditors have limited rights as they are ranked the lowest amongst all creditors. Once a company is wound up, creditors must seek leave from the Court to commence or proceed with legal proceedings against the company.

For a members' voluntary liquidation, a special resolution (i.e. 75% of the votes) of the members is needed to commence the liquidation process and appoint liquidators.

4.5 What impact does each winding up procedure have on existing contracts? Are the parties obliged to perform outstanding obligations? Will termination and set-off provisions be upheld?

Once a company is wound up, it is not obliged to perform any outstanding obligation on existing contracts. Parties may terminate a contract if there is an express provision to that effect. Counterparties may also submit a proof of debt and claim as a creditor of the company if applicable. If there are mutual debts between the company and its creditors/debtors before the company is wound up, such debts could be set off against each other.

As explained in the reply to question 2.3 above, it should be noted that some transactions may be challenged and set aside after a company is wound up in order to recover more assets for distribution to the company's creditors.

4.6 What is the ranking of claims in each procedure, including the costs of the procedure?

In general, assets recovered in the liquidation process are paid in the following priority:

(1) secured creditors;
(2) costs of the winding-up as set out in Rule 179 of the Companies (Winding-up) Rules (Cap. 32H), such as the taxed costs of the petition and the remuneration of the liquidators;
(3) preferential creditors;
(4) floating charge holders;
(5) unsecured creditors; and
(6) shareholders.

4.7 Is it possible for the company to be revived in the future?

Pursuant to section 209 of CWUMPO, the Court may, at any time after an order for winding up, make an order staying the proceedings permanently or for a limited time on the application of the liquidator, the Official Receiver, or any creditor or contributory. Such an order has the effect of putting the winding-up order to an end.

Further, under section 290 of CWUMPO, the Court may at any time within two years of the date of a company's dissolution declare the dissolution to have been void on an application made by the liquidator(s) of the company or by any other person who appears to the Court to be interested.

5 Tax

5.1 What are the key tax risks which might apply to a restructuring or insolvency procedure?

A company will be subject to profits tax as long as it is still in operation. Unpaid tax due and payable within 12 months before the date of the winding-up order or the date of commencement of a voluntary winding-up is a preferential debt which takes priority in distribution of the company's assets.

Stamp duty may be payable if a restructuring involves the transfer of shares in a Hong Kong company but relief for intra-group transfers is available under the Stamp Duty Ordinance (Cap. 117).

6 Employees

6.1 What is the effect of each restructuring or insolvency procedure on employees? What claims would employees have and where do they rank?

There is no impact on employees in cases of restructuring unless the employer terminates the employment contract or the employing entity changes, both of which will be a matter of contract between the employer and the employee.

In contrast, once a winding-up order is made, all of the company's employees are discharged. If the liquidators are to carry on the business of the company after the company is wound up, the liquidators may continue to engage employees.

In cases of voluntary liquidation, employees are not automatically dismissed upon winding-up.

If an employee's contract is terminated, the employee will become a preferential creditor of the company in respect of any statutory claims such as unpaid wages, severance payments, pay for accrued but unused annual leave, and wages *in lieu* of notice. Employees may apply to receive *ex gratia* payments out of the Hong Kong Protection of Wages on Insolvency Fund (the "**Fund**") if a winding-up petition has been presented against their employer. The Fund covers, for example, wages owed in respect of services rendered to an employer during the period of four months prior to the last day of service, outstanding payment of pay for annual leave and statutory holidays taken, wages *in lieu* of notice, and severance payment payable by the employer to an employee under the Employment Ordinance (Cap. 57).

7 Cross-Border Issues

7.1 Can companies incorporated elsewhere use restructuring procedures or enter into insolvency proceedings in your jurisdiction?

Yes, the Hong Kong Courts may exercise their discretion to wind up a foreign company in Hong Kong if they are satisfied that:

(1) the foreign company has a sufficient connection with Hong Kong;
(2) there is a reasonable possibility that the winding-up order would benefit those applying for it; and
(3) the Courts are able to exercise jurisdiction over one or more persons interested in the distribution of the company's assets.

7.2 Is there scope for a restructuring or insolvency process commenced elsewhere to be recognised in your jurisdiction?

The Hong Kong Courts have generally recognised insolvency proceedings commenced in the jurisdiction in which a foreign company is incorporated. A foreign liquidation will generally be recognised in Hong Kong if the following criteria is satisfied:

(1) the foreign proceedings constitute a collective insolvency process;
(2) the foreign proceedings are conducted in the jurisdiction in which the company's "centre of main interest" ("**COMI**") is located at the time the application for recognition is made; and
(3) the assistance is necessary for the administration of a foreign winding-up or the performance of the office-holder's functions and the order is consistent with the substantive law and public policy of the assisting court.

In determining the COMI of the company, the Hong Kong Courts will take into account the location in which a company conducts its management and operations, has its offices, holds its board meetings, has its bank accounts, maintains its books and records, etc. If the foreign liquidation is not taking place in the jurisdiction of the company's COMI, the foreign liquidation may not be recognised unless the assistance sought is limited in nature, i.e. it falls into one of the following two categories:

(1) if the liquidator is appointed in the place of incorporation, the application is limited to recognising a liquidator's authority to represent a company and seeking orders that are an incident of that authority, which might be described as "managerial assistance"; and
(2) if the liquidator is appointed in the place of incorporation and the circumstances do not fall within the first exception above, then recognition and limited and carefully prescribed assistance may be given as a matter of practicality.

Further, in May 2021, a cooperation mechanism was established between Mainland China and Hong Kong concerning the mutual recognition of and assistance to insolvency proceedings (the "**Cooperation Mechanism**"). It is a pilot scheme which allows Hong Kong liquidators and administrators to apply to the Mainland courts in Shanghai, Xiamen and Shenzhen for the recognition of insolvency and debt restructuring proceedings in Hong Kong. For the Hong Kong Court to grant a letter of request, besides satisfying the requirements stipulated under the Cooperation Mechanism, the liquidators must also show that the recognition and assistance sought is necessary to carry out their functions as liquidators of the company in Mainland China.

The Hong Kong Court may also recognise administrators from a non-pilot area in Mainland China under the common law regime.

7.3 Do companies incorporated in your jurisdiction restructure or enter into insolvency proceedings in other jurisdictions? Is this common practice?

It is unusual for Hong Kong companies to restructure or enter into insolvency proceedings in other jurisdictions, even though companies incorporated in Hong Kong often have assets or operations in other jurisdictions.

8 Groups

8.1 How are groups of companies treated on the insolvency of one or more members? Is there scope for co-operation between officeholders?

There is no group liquidation in Hong Kong. However, if a company is wound up in Hong Kong, liquidators may take control of the wholly owned subsidiaries of the company for the purposes of realising the assets of the company for distribution to the company's creditors.

9 The Future

9.1 What, if any, proposals exist for future changes in restructuring and insolvency rules in your jurisdiction?

In 2020, the Hong Kong government announced the plan to revive the corporate rescue bill for the introduction of, among other things, a statutory corporate rescue procedure ("**CRP**") in Hong Kong. The Companies (Corporate Rescue) Bill (the "**Bill**") was intended to be commensurate with international practice and standard. CRPs proposed in the Bill include the following:

(1) Initiation of provisional supervision: An insolvent company may appoint an independent professional third party as a provisional supervisor ("**PS**") who must be either a certified public accountant or a solicitor. During the moratorium period, the company will carry on with its business as a going concern whilst the PS will devise a rescue plan for creditors' approval at the end of the provisional supervision.

(2) Availability of statutory moratorium: There should be a statutory moratorium on civil proceedings and actions against the company and its property during the period of provisional supervision.

If the company fails to make a phased payment as set out in the Bill, the moratorium will no longer apply to the relevant employee, who can then present a winding-up petition to the Court.

Under the Bill, the proposed CRP would be applicable to local companies as well as registered non-Hong Kong companies.

However, although the Bill has been announced for more than three years, the Hong Kong government has still not yet introduced the Bill into the Legislative Council for enactment. The Hong Kong government has also not announced any update in relation to the passage of the Bill. It is hoped that the Bill will be introduced to the Legislative Council in the near future to expand the scope of corporate rescue procedures available in Hong Kong.

Eric Woo specialises in international arbitration and civil and commercial litigation, including contractual and tortious claims, commercial disputes, shareholders disputes and liquidation, cyber fraud, defamation, and restitutionary and employment disputes. He is also experienced in both wet and dry shipping matters, including charterparties, shipbuilding, shipping casualties, sale and purchase of vessels, ship arrest and release, international sale of goods, ship financing, cargo claims, bills of lading, letters of credit, marine insurance and other cross-border transport disputes.

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Currently, Eric is a fellow or panel arbitrator of a number of professional local and foreign arbitration organisations. He has also been appointed as a member or chairman in appeal tribunal panels on building-, housing- and passport-related matters, appointed as a member of the Estate Agents Authority and Board of Review (Inland Revenue Ordinance), and serves as a member in various committees of the Law Society of Hong Kong, such as arbitration, transportation and logistics and practitioners affairs.

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