Global Restructuring and Insolvency Guide - Hong Kong

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*This content was last reviewed around October 2021.*

# Initial Considerations

## Can you take security over all types of assets, including accounts receivable?

**Bankruptcy**

Security can be taken over by both immovable and movable property. Common forms of security over immovable property include legal mortgage, equitable mortgage and fixed charges. Common forms of security over movable property include mortgages, fixed charges and floating charges; in particular floating charges over accounts receivables.

**Scheme of arrangement**

Security can be taken over by both immovable and movable property. Common forms of security over immovable property include legal mortgage, equitable mortgage and fixed charges. Common forms of security over movable property include mortgages, fixed charges and floating charges; in particular floating charges over accounts receivables.

**Reorganizations, restructurings and workouts**

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## What is the nature of the insolvency process?

**Bankruptcy**

There is a distinction between personal and corporate insolvency in Hong Kong.

**Personal insolvency**

Personal insolvency is known as bankruptcy, which is governed by the Bankruptcy Ordinance (Cap. 6) (BO). There are both compulsory bankruptcy processes whereby a creditor or debtor files for a bankruptcy petition in Court under the BO. As an alternative to bankruptcy, there are individual voluntary arrangements under the BO.

**Corporate insolvency**

Corporate insolvency is typically referred to as liquidation. Under the Companies (Winding-Up and Miscellaneous Provisions) Ordinance (Cap. 32) (CWUMPO), there are three types of processes:

**Members' voluntary winding-up**: This is voluntary in nature and happens when shareholders no longer wish for the company to continue trading. The company's creditors will be paid in full on winding-up, and the remaining surplus is distributed among shareholders.

**Creditors' voluntary winding-up**: Where a company is insolvent and there is no way of avoiding liquidation, directors and shareholders can (in the absence of a creditor petitioning the court) place the company into creditors' voluntary liquidation.

**Compulsory liquidation**: This is compulsory in nature. A company is wound up upon the court's winding-up order after hearing of a petition to wind-up submitted by a shareholder or a director or a creditor of the company, or regulators (e.g., the Securities and Futures Commission).

**Scheme of arrangement**

A scheme of arrangement is not an insolvency process**.** It is a court process involving:

The company and (a) its creditors (or any class of them) and/or (b) its members (or any class of them) proposing to enter into a scheme of arrangement

The court exercising its discretion to order a meeting of the creditors or members (or a class thereof)

The court exercising its discretion to sanction the scheme, where relevant persons at the court-directed meeting have already approved the scheme

The meetings of creditors/members are out of court processes, and the company may obtain creditor/member support via restructuring support agreements. The meetings shall be held in accordance to any guidelines/orders laid out by the court, and the results of the meetings shall be reported to the court.

The court will consider the fairness of the scheme at the sanction stage, notwithstanding approval by creditors/members (as applicable).

**Reorganizations, restructurings and workouts**

This is a purely contractual agreement between the company and its creditors to reschedule the company's debts, which does not involve the court (unless a scheme of arrangement is included as part of the restructuring process); and is not, strictly speaking, an insolvency process.

There is currently no statutory corporate restructuring regime unlike certain offshore jurisdictions. Nor can provisional liquidators be appointed in Hong Kong purely for restructuring purposes (Re Legend International Resorts Ltd [2006] 2 HKLRD 192).

The appointment of provisional liquidators (e.g., to preserve assets) operates as a stay of actions and proceedings against a company in Hong Kong. There can be an intersection between reorganization, restructuring and workouts with insolvency processes. In certain cases, provisional liquidators can be given incidental powers to explore possible restructuring of debt by way of scheme of arrangement

The Hong Kong Courts may recognize the powers of foreign soft-touch provisional liquidations and grant recognition orders that require third parties to obtain leave from the Hong Kong Companies Judge before commencing "action or proceeding … against the Company or its assets or affairs, or its property within the jurisdiction of this Court", provided that a winding-up petition has not yet been commenced in Hong Kong.

## What is the solvency requirement for a company to file a case in this jurisdiction?

**Bankruptcy**

**Personal insolvency**

To determine if an individual is insolvent for bankruptcy petitions, the court determines whether the individual is "unable to pay his/her debts" as they fall due. There is a statutory presumption that a person is "unable to pay his/her debts" as they fall due when they fail to pay a statutory demand for a liquidated debt of HKD 10,000 or more within 21 days of the demand and have not applied to set aside the statutory demand.

**Corporate insolvency:**

**Members' voluntary winding-up**: The company must be solvent. No court application is filed. Various other steps will be required, including directors' resolutions and members' resolutions, and a certificate of solvency.

**Creditors' voluntary winding-up**: The company must be insolvent. To determine insolvency, both (i) cash flow and (ii) balance sheet are relevant; and (iii) there is a statutory presumption that a company is "unable to pay its debts" when it fails to pay a statutory demand within 21 days (collectively, "**Insolvency Tests**"). No court application is filed. Various other steps will be required, including directors' resolutions and members' resolutions and notices to auditors and creditors.

**Compulsory liquidation:** Inability to pay debts as they become due is a ground for compulsory liquidation. The company must be insolvent (see Insolvency Tests above).

**Scheme of arrangement**

There is no solvency requirement per se. However, in practice, the applicant to a creditors' scheme of arrangement will seek to demonstrate that the scheme is necessary to restructure the company's debts and that it is fair and beneficial to one or more classes of creditors. For instance, in a creditors scheme the applicant may try to show there is a real risk of default without the scheme and that the creditors would have a lower recovery in an insolvent liquidation scenario.

**Reorganizations, restructurings and workouts**

There is no solvency requirement. However, the answer to this question under the "Scheme of arrangement" section is repeated where the reorganization, restructuring or workout is by way of a scheme of arrangement.

## Is there a requirement to demonstrate COMI ("centre of main interests") for a company to file a case in this country?

**Bankruptcy**

**Personal insolvency**

There are requirements that the individual is " domiciled" or "ordinarily resident in Hong Kong" or that they "carried on business in Hong Kong" for a prescribed period before the bankruptcy petition is issued; or alternatively, the debtor shall be "present in Hong Kong" on the day the bankruptcy petition was presented.

**Corporate insolvency**

A Hong Kong incorporated/registered company does not need to demonstrate COMI. However, for unregistered non-Hong Kong companies, there is a requirement to show a "sufficient connection" with Hong Kong. There is a degree of similarity in the considerations for COMI and "sufficient connection" under common law.

**Scheme of arrangement**

No. However, for schemes involving unregistered non-Hong Kong companies, the court will only sanction the scheme if there is a "sufficient connection with Hong Kong," i.e., the same test applied when considering whether to wind-up companies not registered in Hong Kong. There is a degree of similarity in the considerations for COMI and "sufficient connection."

**Reorganizations, restructurings and workouts**

No.

## Is restructuring of both secured and unsecured claims possible?

**Bankruptcy**

Yes. But secured creditors can seek to enforce their security. Secure assets remain outside of the bankruptcy (personal insolvency) or liquidation (corporate insolvency) estate unless a creditor gives up their security and claims as an unsecured creditor.

**Scheme of arrangement**

Yes. But secured creditors can seek to enforce their security and it would be difficult to cramdown an unsecured creditor.

**Reorganizations, restructurings and workouts**

Yes. But secured creditors can seek to enforce their security and it would be difficult to cramdown an unsecured creditor.

## Is there a classification of creditors and shareholders?

**Bankruptcy**

**Corporate insolvency**

Yes. Separate first meetings of creditors and shareholders are respectively held for voting on the appointment of liquidators and committee of inspection in a creditors' voluntary liquidation or compulsory liquidation scenario.

**Scheme of arrangement**

Yes. Different creditors and shareholders will be separated into different classes to vote on the scheme of arrangement.

**Reorganizations, restructurings and workouts**

N/A

## Is there a requirement for voting approvals by shareholders?

**Bankruptcy**

This depends on the type of liquidation process. In a creditors' voluntary liquidation or members' voluntary liquidation process, a company in its general meeting must first pass a special resolution to place the company into voluntary liquidation.

There is no requirement for shareholders' consent to be obtained prior to compulsory liquidation by creditor petition. Where the company/its directors' petition for winding-up is based on other grounds, shareholder approval may be required depending on the circumstances.

**Scheme of arrangement**

Subject to any corporate governance requirements, shareholders' resolution would not be required prior to a company's scheme of arrangement to restructure debt (unlike a scheme of arrangement for privatization). Shareholders who are also creditors of debts being restructured would typically be entitled to vote on a scheme qua creditor.

**Reorganizations, restructurings and workouts**

Shareholders' resolution is not normally required but it may depend on the terms and nature of the reorganization, restructuring and workout.

## Is there an ability to bind minority dissenting creditors (i.e., cramdown)?

**Bankruptcy**

Yes. All members/creditors are affected by the winding-up process.

**Scheme of arrangement**

Yes. If the scheme is approved, it is binding on all creditors (or shareholders) subject to that scheme.

**Reorganizations, restructurings and workouts**

N/A

Unless the reorganization, restructuring or workout is by way of a scheme of arrangement, which binds minority dissenting creditors' whose debts form part of the scheme.

# Commencing the Process

## Who can commence?

**Bankruptcy**

Depending on the process, winding-up can be commenced by a shareholder, a creditor or the company itself. The court also has the discretion to order a company to be wound up on the application of regulators (e.g., upon application by the Secretary for Justice or by petition of the Securities and Futures Commission).

**Scheme of arrangement**

The company or any of the following may apply to the court to initiate a scheme of arrangement:

Any of its creditors (if the scheme is proposed to be entered into with the creditors)

Any of the creditors within a certain class (if the scheme is proposed to be entered into with that class of creditors)

Any of its members (if the scheme is proposed to be entered into with the members)

Any of the members within a certain class (if the scheme is proposed to be entered into with that class of members)

Provisional liquidators or liquidators of the company.

**Reorganizations, restructurings and workouts**

The company and its creditors can agree on a workout at any time. The company can commence reorganizations, restructuring and workouts as it sees fit.

## Is shareholder's consent required to commence proceeding?

**Bankruptcy**

This depends on the type of liquidation process. In a creditors' voluntary liquidation or members' voluntary liquidation process, a company in its general meeting must first pass a special resolution to place the company into voluntary liquidation.

There is no such requirement for shareholders' consent to be obtained prior to compulsory liquidation by creditor petition.

**Scheme of arrangement**

A shareholders' resolution would be required in scheme meetings for a company's scheme of arrangement with members.

**Reorganizations, restructurings and workouts**

No. But this would depend on the terms of the arrangement, reorganization, restructuring and workout depending on the circumstances, and the company's corporate governance requirements.

## Is there an ability to consolidate group estates?

**Bankruptcy**

No.

**Scheme of arrangement**

No.

**Reorganizations, restructurings and workouts**

This would depend on the terms of the arrangement.

## Is there any court involvement?

**Bankruptcy**

Throughout the administration of a company's voluntary or compulsory winding-up, the court maintains a supervisory role over liquidators and provisional liquidators. The court's approval is also required for certain matters, including the appointment of provisional liquidators and liquidators. As liquidators and provisional liquidators are officers of the court, they may seek directions from the court. Parties affected by liquidators/provisional liquidators' decisions can also apply to the court for redress (e.g., application for a validation order).

**Scheme of arrangement**

Yes. Court approval is required to convene scheme meetings and sanction schemes.

**Reorganizations, restructurings and workouts**

No. Unless the restructuring is by way of scheme of arrangement.

## Who manages the debtor?

**Bankruptcy**

In voluntary liquidations, the board of directors should cease management after the shareholders' resolution for voluntary liquidation and upon the appointment of liquidators. Unless provisional liquidators have been appointed, the management remains in control during a compulsory liquidation application until the winding-up order is granted. Once appointed, the provisional liquidators/liquidators manage the debtor.

**Scheme of arrangement**

Persons in control before the procedure is initiated (the directors, receivers or liquidators (if the company is undergoing a winding-up procedure)) retain control.

Where the company is undergoing parallel schemes of arrangement in Hong Kong and an offshore jurisdiction, provisional liquidators (or soft-touch provisional liquidators (for restructuring purposes)) may be appointed in the offshore jurisdiction and may seek recognition in Hong Kong to take full or partial control of assets and affairs of the company in Hong Kong. In soft-touch provisional liquidation (contrary to provisional liquidation), the debtor company's management can continue to manage the debtor.

**Reorganizations, restructurings and workouts**

The company's management retains control during the reorganization, workout or restructuring. Once a workout is agreed, the company will operate under the terms of its arrangement.

## What is level of disclosure of process to voting creditors?

**Bankruptcy**

In a creditors' voluntary liquidation, at the same time as summoning the shareholders' meeting, the company must give notice of a meeting of creditors via an advertisement in the Government Gazette, in one Chinese language and in one English language newspaper. The directors must also lay out a full statement of the company's affairs as well as a list of creditors (with an estimated amount of their claims) before the meeting.

In compulsory liquidation, the petitioner is obliged to give notice of the petition via an advertisement in the Government Gazette, in one Chinese language and in one English language newspaper. The grant of winding-up order and subsequent notices of the meetings of creditors and contributories (shareholders) will also be advertised. The contributories and creditors can also obtain a copy of the full statement of the company's affairs from the liquidators prior to these meetings.

**Scheme of arrangement**

After the court orders a meeting of creditors/members (as applicable) to vote on the scheme, a notice of the meeting must be advertised and sent with an explanatory statement to the relevant creditors/members, in accordance to the court order. The explanatory statement explains the effect of the scheme.

The court will consider the adequacy of the disclosure made to voting creditors when deciding whether to sanction a scheme of arrangement. The outcome of the sanction will also be advertised in accordance to the court order granted at the sanction hearing.

**Reorganizations, restructurings and workouts**

This would depend on the terms of the arrangement.

## What entities are excluded from customary insolvency or reorganisation proceedings, and what legislation applies to them?

**Bankruptcy**

**Personal insolvency**

See COMI considerations under the answer to "**Is there a requirement to demonstrate center of main interests (COMI) for a company to file a case in this jurisdiction?**" under the section "**Bankruptcy**."

**Corporate insolvency**

See COMI considerations under the answer to "**Is there a requirement to demonstrate center of main interests (COMI) for a company to file a case in this jurisdiction?**" under the section "**Bankruptcy**."

Companies incorporated in Hong Kong or incorporated elsewhere but registered under the Companies (Winding-Up and Miscellaneous Provisions) Ordinance (Cap. 32) (CWUMPO), or under the Companies Ordinance (Cap. 32) as previously in force, may be wound up voluntarily or by compulsory liquidation in Hong Kong.

Unregistered companies can only be wound up by the court, subject to establishing sufficient connection to Hong Kong. However, they cannot be wound up voluntarily under CWUMPO.

There are special provisions in the Banking Ordinance (Cap. 155) and Insurance Companies Ordinance (Cap. 41) for the winding-up of authorized and insurance institutions in Hong Kong, respectively.

Certain partnerships fall within the definition of "unregistered companies" and may be wound up as an "unregistered company" with statutory modifications.

**Scheme of arrangement**

N/A

See answer COMI considerations under the answer to "**Is there a requirement to demonstrate center of main interests (COMI) for a company to file a case in this country?**" under the section "**Scheme of arrangement**." A company needs to show it has a "sufficient connection" with Hong Kong.

**Reorganizations, restructurings and workouts**

N/A

## How long does it generally take for a creditor to commence the procedure?

**Bankruptcy**

This depends on the circumstances.

**Scheme of arrangement**

This depends on the circumstances.

**Reorganizations, restructurings and workouts**

This depends on the circumstances.

# Effect of Process

## Does debtor remain in possession with continuation of incumbent management control?

**Bankruptcy**

**Personal insolvency**

Save for reasonable amounts for living expenses, management of a bankrupt debtor's assets vests with the trustees in bankruptcy.

**Corporate insolvency**

Where provisional liquidators are appointed prior to the liquidation, upon the appointment of the provisional liquidator, the managerial and operational powers of the directors in the company will pass to the provisional liquidator.

The directors may retain a limited residual power (for example, to resist the winding-up petition) but it is not of a managerial nature. Decisions regarding the company's operation are vested in the provisional liquidator from the time of their appointment, and the directors' powers are suspended at that time.

See also the answer to "**Who manages the debtor?**" under the section "**Bankruptcy**".

**Scheme of arrangement**

Yes. But see the answer to "**Who manages the debtor?**" under the section "**Scheme of arrangement**" and "**What is the nature of the insolvency process?**" under the section "**Reorganizations, restructurings and workouts**" on offshore soft-touch provisional liquidators in the restructuring process.

**Reorganizations, restructurings and workouts**

Yes. But see the answer to "**Who manages the debtor?**" under the section "**Scheme of arrangement**" and "**What is the nature of the insolvency process?"** under the section "**Reorganizations, restructurings and workouts**" on offshore soft-touch provisional liquidators in the restructuring process.

## What is the stay/moratorium regime (if any)? Is the stay or moratorium worldwide?

**Bankruptcy**

**Corporate insolvency**

There is no moratorium for voluntary liquidations pending shareholder resolution; however, the court has the discretion to stay legal proceedings on the application of a creditor, a contributory or the liquidator.

However, where a winding-up petition has been presented, the company or any creditor or person obligated to contribute to the assets of the company may apply for a stay of proceedings before a winding-up order is made.

Leave must be obtained before any action or enforcement is commenced against a company in voluntary liquidation (i.e., after shareholder's resolution has been passed) and compulsory liquidation after the winding-up order has been granted.

There will be a stay of legal proceedings on the appointment of provisional liquidators, whereby parties will need to obtain leave before commencing action or enforcement against the company.

Any stay is limited to Hong Kong. In appropriate circumstances, non-Hong Kong companies (i.e., foreign-incorporated companies that are registered and/or have a place of business in Hong Kong) may seek to apply for provisional liquidation in their place of incorporation or recognition in another jurisdiction to obtain the benefit of a stay in another jurisdiction as well.

**Scheme of arrangement**

There is no formal moratorium. However, where a winding-up petition has been presented, the company or any creditor or person obligated to contribute to the assets of the company may apply for a stay of proceedings before a winding-up order is made. In the past, applicant parties have sought to include in the orders to convene scheme meetings orders stating that parties must seek leave to commence proceedings against a debtor company, pending sanction of the scheme.

See also the answer to "**What is the stay/moratorium regime (if any)? Is the stay or moratorium worldwide?**" under the section "**Bankruptcy**" where provisional liquidators are appointed pending a scheme of arrangement.

**Reorganizations, restructurings and workouts**

There is no moratorium. Creditors can initiate winding-up proceedings at any time. But see answer to "**Who manages the debtor?**" under the section "**Scheme of arrangement**" and "**What is the nature of the insolvency process?**" under the section "**Reorganizations, restructurings and workouts**" on offshore soft-touch provisional liquidators in the restructuring process.

## Is there a provision for debtor in possession or rescuer financing or superpriority or priming financing?

**Bankruptcy**

A debtor in liquidation can obtain additional finance, although this will be rare in practice. A liquidator can raise funds by offering securities of unsecured assets of the company. Such securities will take priority in accordance with the general rules on creditors' priority, and will not take priority over preexisting security interests without the preexisting security holder's consent.

**Scheme of arrangement**

The usual financing arrangements apply.

**Reorganizations, restructurings and workouts**

This would depend on the terms of the arrangement.

## Can procedure be used to implement a debt-to-equity swap?

**Bankruptcy**

No.

**Scheme of arrangement**

This would depend on the terms of the scheme.

**Reorganizations, restructurings and workouts**

This would depend on the terms of the arrangement.

## Are third party releases available?

**Bankruptcy**

No.

**Scheme of arrangement**

Yes.

**Reorganizations, restructurings and workouts**

This would depend on the terms of the arrangement.

## Are the proceedings recognised abroad?

**Bankruptcy**

This would depend on where recognition is sought. Liquidators/provisional liquidators have been able to seek recognition in common law jurisdictions in reliance on case law precedents.

There have been a few prior cases of ad hoc recognition of liquidators/bankruptcy administrators from the People's Republic of China (PRC) in Hong Kong Courts since 2020. However, there has been a major development in PRC and Hong Kong mutual recognition of insolvency proceedings in 2021.

On 14 May 2021, the Supreme Court of the People's Republic of China (SPC) and the Secretary for Justice of Hong Kong signed a record of meeting concerning the mutual recognition of and assistance to insolvency proceedings between the courts of the Mainland (i.e., the PRC) and the Hong Kong Special Administrative Region ("**Insolvency Mutual Recognition Framework**"). Under the Insolvency Mutual Recognition Framework, Hong Kong liquidators (including compulsory liquidations and creditors' voluntary liquidations) and provisional liquidators have, for the first time, an institutional/statutory basis to seek recognition and assistance from the PRC courts in the pilot areas of Shanghai, Shenzhen and Xiamen.

In July 2021, the Hong Kong Courts granted the first letter of request to a PRC court in a pilot area (Shenzhen) to recognize Hong Kong-appointed liquidators.

In October 2021, the Hong Kong Courts recognized the first test case under the Insolvency Mutual Recognition Framework. Notably, PRC administrators appointed by the Hainan Province Courts were granted recognition in Hong Kong, notwithstanding that Hainan Province is outside of the designated pilot areas.

**Scheme of arrangement**

This would depend on where recognition is sought.

In the past, it was customary for a debtor company that is incorporated overseas or has debts governed by foreign laws to have parallel schemes of arrangement, e.g., at the place of incorporation for non-Hong Kong companies (i.e., foreign-incorporated companies that are registered in Hong Kong), or other places where there is a real risk of adverse enforcement. Many of the Hong Kong Stock Exchange-listed companies are non-Hong Kong companies.

There have been a few cases from 2019 to 2021 where the Hong Kong Court has been critical of the necessity for costly parallel schemes, where the debts, assets and creditors of the companies in question were primarily in Hong Kong. In such instances, the Hong Kong Court (and offshore jurisdictions, e.g., Cayman Islands) has called for greater cross-border coordination, for instance, by way of recognition.

See also the answer to "**Are the proceedings recognized abroad?**" under the section "**Bankruptcy**," discussing the "**Insolvency Mutual Recognition Framework**" that may apply to a scheme of arrangement commenced by liquidators.

**Reorganizations, restructurings and workouts**

N/A

## Has the UNCITRAL Model Law been adopted?

**Bankruptcy**

No.

**Scheme of arrangement**

No.

**Reorganizations, restructurings and workouts**

No.

## Can a debtor continue to carry on business during insolvency proceedings?

**Bankruptcy**

**Personal insolvency**

The assets of the bankrupt debtor are vested in the trustee in bankruptcy, including any business which they trade as a sole proprietor.

**Members' voluntary liquidation and creditors' voluntary liquidation**

The company should cease business operations. Provisional liquidators/liquidators can only continue the company's business operations where it is necessary to benefit the liquidation.

**Compulsory liquidation**

When the winding-up order is made, the liquidator takes control of the company's property. For the liquidator to continue business operations, the approval of the court or the committee of inspection is required. The company can only continue business operations where it is necessary to benefit the liquidation.

**Scheme of arrangement**

N/A

The company can continue its business during the application for a scheme of arrangement.

**Reorganizations, restructurings and workouts**

N/A

The company can continue its business during its reorganization, restructuring and workout period.

# Other Factors

## Are there any wrongful or insolvent trading restrictions and what is the directors' liability?

**Bankruptcy**

There are currently none. However, under the proposed statutory corporate rescue procedure (CRP), which was to be introduced in the first half of 2020 to 2021 legislative year ("**CRP Bill**"), the government intended to introduce insolvent trading provisions. In the proposals, a director would incur civil liability and would be liable to pay compensation to the company if (i) the company incurs a debt, (ii) the company was insolvent at the time it incurred the debt or became insolvent as a result, and (iii) the director knew or ought to have known about the insolvency of the company. However, a statutory defense would be available to the director if (a) they took all reasonable steps to prevent the company from incurring the debt or (b) incurring the debt formed part and parcel of initiating a CRP (which has yet to be introduced into law as well).

The CRP Bill lapsed at the end of the term of office of the Legislative Council in 2021, after delays during COVID-19. It remains to be seen whether the CRP Bill will be reintroduced in the next legislative session.

**Scheme of arrangement**

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The CRP Bill lapsed at the end of the term of office of the Legislative Council in 2021, after delays during COVID-19. It remains to be seen whether the CRP Bill will be reintroduced in the next legislative session.

## What is the order of priority of claims?

**Bankruptcy**

In insolvency proceedings, the assets available to the company are usually insufficient to satisfy all creditor claims. As a result, the priority or order of ranking of different claims is of utmost importance.

In court liquidations, claims that are not secured are distributed in a statutorily prescribed order, briefly summarized as follows:

Costs and expenses properly incurred in preserving, realizing or gathering the assets of the company, including the liquidator's remuneration and disbursements

Preferential creditors (e.g., certain debts due to employees or the government)

Creditors secured by a floating charge

Ordinary unsecured creditors sharing pari passu (including any shortfall arising from secured creditors after realization of their security)

Shareholders, as dividends, if there is a surplus

Secured creditors stand outside of the above priority of payments as they are entitled to look to the proceeds of their security.

**Scheme of arrangement**

N/A

The debtor company has freedom to elect which claims are restructured and the proposed terms of payment, including order, under the scheme of arrangement. However, the court has discretion to grant or refuse the scheme considering various factors, including "fairness" to creditors.

**Reorganizations, restructurings and workouts**

N/A

The debtor company has freedom to elect which claims are restructured and negotiate the proposed terms and order of payment under its reorganization, restructuring and workout.

## Do pension liabilities have any priority over other unsecured claims?

**Bankruptcy**

There are two types of pension schemes in Hong Kong: Mandatory Provident Fund Schemes and Occupational Retirement Schemes, commonly known as MPF and ORSO Schemes, respectively.

Yes, under section 265 of the Companies  Winding-Up and Miscellaneous Provisions Ordinance (Cap. 32) (CWUMPO), there is a statutory waterfall of payments that rank in priority before unsecured claims. These payments include, among other items, certain payments to employees including contributions under the Occupational Retirement Schemes Ordinance (Cap. 426) or under the Mandatory Provident Fund Schemes Ordinance (Cap. 485).

See also the answer to "**What is the order of priority of claims?**" under the section "**Bankruptcy**" for more information on the waterfall.

**Scheme of arrangement**

There are two types of pension schemes in Hong Kong: Mandatory Provident Fund Schemes and Occupational Retirement Schemes, commonly known as MPF and ORSO Schemes, respectively. In most cases and depending on the terms of the scheme, neither would be affected by a scheme of arrangement.

**Reorganizations, restructurings and workouts**

There are two types of pension schemes in Hong Kong: Mandatory Provident Fund Schemes and Occupational Retirement Schemes , commonly known as MPF and ORSO Schemes, respectively. In most cases and depending on the terms of the reorganization, restructuring and workout, neither would be affected by reorganizations, restructurings and workouts.

## Is it possible to challenge prior transactions?

**Bankruptcy**

In all forms of liquidation, liquidators are empowered to investigate the affairs of a company and seek redress from the court where it considers that assets belonging to the company have been dissipated. If an order is made by the court, the relevant directors, company officers or creditors may be required to repay or restore the property to the company or contribute to the assets of the company, as the court considers appropriate. Below are some examples of possible offenses that liquidators may investigate:

**Unfair preference:** The liquidator may challenge creditors who have received payments from the company and may have been preferred against other creditors within six months of commencement of the liquidation. The six-month period is increased to two years in the case of associates, which is broadly defined to include, for example, transfers between the company and its directors.

**Disposition of property with intent to defraud creditors**: This is voidable at the instance of the person prejudiced by the disposition, except if the property is disposed of for valuable consideration and in good faith to any person who has not received it at the time of the disposition, notice of the intent to defraud creditors.

**Disposition after commencement of compulsory liquidation:** These dispositions or payments are void and the recipients of these funds or assets have to return the funds or assets to the liquidator unless a validation order has been made by the court.

**Fraudulent trading:** where the business is carried on with the intent to defraud creditors or for any other fraudulent purpose

**Misfeasance:** where directors have breached their fiduciary duties to the company or have misapplied or retained property of the company for their personal benefit

At present, there is no legislation in Hong Kong that prohibits insolvent trading or the incurring of a debt by a company at a time it is unable to pay its debts as they fall due. (See answer to "**Are there any wrongful or insolvent trading restrictions and what is the directors' liability?**" under the section "**Bankruptcy**".)

There is only fraudulent trading, which has a higher threshold.

Where a company has entered into unprofitable contracts, its assets include land burdened with an onerous covenant, shares, or stock in companies, or unsalable property, the liquidator may, with leave of the court, surrender or disclaim that contract or property within 12 months after the commencement of liquidation. The disclaimer is binding on the rights and interests of the company and will release the company and the property of the company from liability as far as is necessary.

**Scheme of arrangement**

N/A

Avoidance powers are only available to liquidators (i.e., on a winding-up).

**Reorganizations, restructurings and workouts**

N/A

Avoidance powers are only available to liquidators (i.e., on a winding-up).

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