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# Chapter 11

# HONG KONG

*Kingsley Ong and Jocelyn Chow*[1]

## I OVERVIEW OF RESTRUCTURING AND INSOLVENCY ACTIVITY

Hong Kong is consistently ranked as one of the top international financial centres in the world,[2] and is known to be among the world's freest economies.[3] Hong Kong prides itself on its market policy of minimum intervention in the way in which the market operates.

On 1 July 1997, Hong Kong reverted to Chinese sovereignty and became the Hong Kong Special Administrative Region (Hong Kong) of the People's Republic of China (PRC or China). The Basic Law of Hong Kong (Basic Law), which was adopted on 4 April 1990 by the National People's Congress of the PRC (NPC), is now applicable to Hong Kong.[4] The concept of *laissez faire* free market is so important in Hong Kong that it is constitutionally enshrined in the Hong Kong Basic Law.[5]

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1 Kingsley Ong is a partner and Jocelyn Chow is a trainee solicitor at Eversheds.

2 'Hong Kong joins NY, London as top finance centre', 19 September 2010, Agence France-Presse.

3 The Heritage Foundation has voted Hong Kong as the world's freest economy for the past 21 years (1995–2015).

4 The Basic Law is a national law of the PRC and is regarded as a 'mini Constitution' for Hong Kong.

5 Article 112 of Hong Kong Basic Law provides: 'No foreign exchange control policies shall be applied in the Hong Kong Special Administrative Region. The Hong Kong dollar shall be freely convertible. Markets for foreign exchange, gold, securities, futures and the like shall continue. The Government of the Hong Kong Special Administrative Region shall safeguard the free flow of capital within, into and out of the Region.' The Hong Kong Basic Law is the constitutional document of Hong Kong. It was adopted on 4 April 1990 by the Seventh NPC, and came into effect on 1 July 1997.

Article 8 of the Basic Law provides that the laws previously in force in Hong Kong (i.e., the common law, rules of equity, ordinances, subordinate legislation and customary law) shall be maintained, except for any that contravene the Basic Law, and subject to any amendment by the legislature of the Hong Kong. Under Article 160 of the Basic Law, the laws of Hong Kong in force from 30 June 1997 were adopted as the laws of Hong Kong, except for those which the Standing Committee of the NPC declared to be in contravention of the Basic Law. To give effect to this, the Hong Kong Reunification Ordinance was adopted by the Hong Kong legislature on 1 July 1997 (Ordinance No. 110 of 1997). Section 7 of this Ordinance provides that 'the laws previously in force in Hong Kong, that is the common law, rules of equity, ordinances, subsidiary legislation and customary law, which have been adopted as the laws of the Hong Kong, shall continue to apply'.

Shortly after reversion to Chinese rule, Hong Kong was severely affected by the 1997 Asian financial crisis. During the Asian financial crisis, several brokerage firms collapsed (e.g., CA Pacific Group and the Peregrine Group) resulting in significant client losses. Hong Kong, like much of Asia, also experienced extraordinary turmoil in the currency, securities and futures market, which the government attributed to hedge funds speculating against the Hong Kong dollar's link to the United States dollar. This crisis was made worse by the spread of the SARS virus in Asia in 2003, which drove many businesses into insolvency.

A decade after the Asian financial crisis, in September 2008, the global financial system experienced its first systemic crisis since the Great Depression of 1930 following the collapse of Lehman Brothers. Significant interventions by the governments around the world have so far avoided a global financial system collapse. Hong Kong was also affected;[6] however, so far the impact on Hong Kong has been relatively limited, as Hong Kong was not at the epicentre of this crisis.

## II GENERAL INTRODUCTION TO THE RESTRUCTURING AND INSOLVENCY LEGAL FRAMEWORK

In Hong Kong, the term 'bankruptcy' is limited to personal insolvency, whereas 'insolvency' and 'liquidation' apply to corporate insolvency. Personal insolvency is mainly governed by the Bankruptcy Ordinance[7] and the Bankruptcy Rules.[8] Corporate insolvency is mainly governed by the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) and the Companies (Winding-up) Rules.[9]

6 Examples include a run on the Bank of East Asia (late September 2008), panicked policyholders following the US bailout of AIG, the Lehman minibonds fallout (where retail investors in structured investment products linked to Lehman Brothers suffered significant losses) and CITIC Pacific's HK $15.5 billion foreign exchange losses on leveraged structured foreign exchange derivatives (disclosed on 20 October 2008).

7 Cap 6.

8 Cap 6A.

9 Cap 32H.

The registration of charges is now governed by the new Companies Ordinance (Cap 622), which became effective on 3 March 2014.[10]

This chapter outlines the insolvency law applicable to corporate insolvency in Hong Kong only.

### i Modes of winding up

Part V of Cap 32 sets out the circumstances in which a company may be wound up on a compulsory or voluntary basis.

***Compulsory liquidation***

Compulsory liquidation involves the company being wound up by an order of the court following the petition of an interested party. In Hong Kong, a winding-up petition may be presented on grounds under Sections 117(1) and 177(2) of Cap 32, the most usual grounds being that the company has by special resolution resolved that the company be wound up by the court (Section 117(1)(a)), and that the company is unable to pay its debts (Section 117(1)(d)).

For the purpose of winding up, a company is 'unable to pay its debts' if any of the criteria under Section 178(1) are fulfilled, including where the company fails to fulfil a statutory demand served on it within three weeks (Section 178(1)(a)) or where the company fails to satisfy a judgment debt (Section 178(1)(b)).

In Hong Kong, the Court of First Instance has the jurisdiction to wind up any company formed or registered under the Companies Ordinance (Section 176, Cap 32). Unregistered companies and foreign companies with a place of business in Hong Kong may also be wound up by the Court provided that the Court is satisfied that it has jurisdiction (see discussion in Section IV, *infra*).

***Voluntary liquidation***

Voluntary liquidation is a process by which a company and its affairs are brought to an end at the company's own instigation. A company may be wound up voluntarily on grounds set out under Section 228 of Cap 32, the most usual ground being that the shareholders of the company has passed a special resolution that the company be wound up voluntarily (Section 228(1)(b)).

*Members' voluntary winding up*

If the members' special resolution is preceded by a certificate of solvency issued by the majority of directors in accordance with Section 233 of Cap 32, certifying that the company has sufficient funds to pay its creditors in full within such period exceeding 12 months from the commencement of winding up, the winding up will be a member's voluntary winding up. In this case, provisions contained in Sections 235–239A in Cap 32 shall apply to the proceedings. Creditors will generally have no say in the liquidation process provided that their claims will be repaid in full.

10 Companies Ordinance, Section 335.

*Creditors' voluntary winding up*

If the members' special resolution is not preceded by a certificate of solvency, whether because the company is insolvent in the first place or the directors of the company have simply neglected to issue the certificate in time prior to the member's special resolution, the winding up will be a creditors' voluntary winding up. In this case, provisions contained in Sections 214–248 in Cap 32 (which, unlike the provisions applicable to members' voluntary winding up, provide for proceedings in the meeting of creditors) will apply.

*Special procedure for voluntary winding up*

In limited circumstances, voluntary winding up may also be initiated by directors of a company by way of a winding-up statement to be submitted to the Registrar of Companies upon a directors' resolution being passed by a majority of the directors of the company to the effect that:

*a* the company cannot by reason of its liabilities continue its business;

*b* the directors consider it necessary that the company be wound up and that the winding up should be commenced under the special procedure because it is not reasonably practicable for it to be commenced under another section of Cap 32; and

*c* meetings of the company and of its creditors will be summoned for a date not later than 28 days after the delivery of the winding-up statement to the Registrar of Companies.

Accordingly, to benefit from the special procedure, the directors must show cause as to why it is not reasonably practicable for liquidation to commence by way of a winding-up petition, members' voluntary winding up or creditors' voluntary winding up.

*Conversion from compulsory winding up to creditors' voluntary winding up*

Under Section 209A of Cap 32, the court may on the application of the liquidator or any creditor order a winding up to be conducted as if it were a creditors' voluntary winding up, subject to consequences set out under Section 209B. *In Re Conso Electronics (Far East) Ltd in Creditors Voluntary Liquidation*,[11] the Hong Kong Court of Appeal, having rejected the applicant's argument that matters of substance survived a Section 209A order and should therefore continue to be regulated as if the company was still in compulsory winding up, held that a Section 209A order meant that the said compulsory winding up was indeed 'for all purposes converted into a creditors' voluntary winding up'. As affirmed by the Court of First Instance subsequently in *The Express Builders Company Limited*,[12] however, the conversion should not be regarded to be a conversion *ab initio* – the creditors' voluntary liquidation regime, as converted, would not be taken to have replaced the original compulsory liquidation retrospectively as if it were a creditors' voluntary liquidation right from the start.

11 *Re Conso Electronics (Far East) Ltd in Creditors Voluntary Liquidation* [1995] 2 HKC 327.

12 *The Express Builders Company Limited* HCCW 409/2003.

**ii Effect of commencement of winding up**

***Compulsory winding up***

The deemed date of commencement of winding up by the court is determined under Section 184 of Cap 32 – generally, where the winding-up petition is preceded by a resolution passed by the company for voluntary winding up, the winding up of the company shall be deemed to have commenced at time of passing the resolution. Otherwise, the winding up of the company shall be deemed to have commenced at time of presentation of the winding-up petition.

In a compulsory winding up, any disposition of property of the company (including items at action) and any transfer of shares or alteration in the statues of the members of the company made after the commencement of the winding up shall, unless the court orders otherwise, be void (Section 182, Cap 32). Similarly, any attachment, sequestration, distress or execution put in force against the estate or effects of the company after the commencement of winding up shall also be void to all intents (Section 183, Cap 32).

***Voluntary winding up***

A voluntary winding up commenced by way of special procedure under Section 228A of Cap 32 shall be deemed to have commenced at time of delivery of the directors' statement. In all other cases, a voluntary winding up shall be deemed to commence at the time of passing of the resolution for voluntary winding up.

In the case of a voluntary winding up the company shall, from the commencement of winding up, cease to carry on its business, except insofar as is required for its beneficial winding up (Section 230, Cap 32). Similarly to a compulsory winding up, any transfer of shares (not being a transfer made to or with the sanction of the liquidator) and any alteration in the status of the members of the company made after the commencement of the winding up shall be void (Section 232, Cap 32).

***Voidable transactions***

Certain transactions entered into before the onset of insolvency may be annulled or set aside under Cap 32. For instance, a floating charge created within 12 months of the commencement of a winding up, unless it is proved that the company immediately after the creation of the charge was insolvent, will be void (except as regards the amount of any new moneys advanced by the creditor in consideration for the charge, together with interest at the lower of the contractual rate and 12 per cent) (Section 267). Unfair preferences entered into in the relevant avoidance period (to be determined under the rules of the Bankruptcy Ordinance may also be set aside under Sections 266–266B, whereas extortionate credit transactions entered into by the company within three years of the onset of insolvency may be varied or set aside. In accordance with Section 268 the liquidator may, with the leave of the court, disclaim certain onerous property held by the company, such as land burdened with onerous covenants.

The Conveyancing and Property Ordinance[13] also provides that any disposition of property made with intent to defraud creditors is avoidable at the instance of the person thereby prejudiced (Section 60).

### iii Other modes of restructuring

Unlike in the United Kingdom, the restructuring regime in Hong Kong does not provide for a formal statutory corporate rescue procedure (e.g., procedures for administration or voluntary arrangements that are otherwise available in England and Wales). Corporate rescue is therefore usually carried out on an informal basis subject to contractual arrangements among the relevant stakeholders. The Companies Ordinance, however, provides for procedures for court-sanctioned schemes of arrangements (which may be entered into by a company with its creditors or members, or both) under Part 13, Division 2, and companies amalgamation (as among group companies) under Part 13, Division 3.

### iv Role of directors

The duty of directors to exercise reasonable care, skill and diligence is codified under the Companies Ordinance. The duties of directors are otherwise governed by common law and equitable principles.

In ordinary circumstances, directors are not personally liable for the company's obligations. As an officer of a company, however, a director may be subject to potential personal liability for the company's debts under Section 166A of Cap 32 if he or she has been fraudulently preferred (within the meaning of Sections 266A–266B of Cap 32) in a security arrangement entered into by the company. Section 271 of Cap 32 sets down the potential offences of a person being a past or present officer of a company in liquidation. Directors may also be subject to potential liabilities for, *inter alia*, falsification of books (Section 272), fraud (Section 273) and fraudulent trading (Section 275).

## III RECENT LEGAL DEVELOPMENTS

### i Companies Ordinance

The new Companies Ordinance (Cap 622) became effective on 3 March 2014. While most of the provisions in the former Companies Ordinance (Cap 32) have been repealed since the new Ordinance commenced its operation, some provisions, in particular provisions in relation to insolvency and winding-up proceedings, remain effective in their current form under Cap 32. (As noted above, Cap 32 has now been renamed the Companies (Winding Up and Miscellaneous Provisions) Ordinance).

13 Cap 219.

## IV SIGNIFICANT TRANSACTIONS, KEY DEVELOPMENTS AND MOST ACTIVE INDUSTRIES

### i Lehman Brothers and MF Global insolvencies

The collapse of Lehman Brothers and MF Global remain the largest insolvencies to affect Hong Kong in recent years. Prior to Lehman Brothers' demise, traditional insolvency lawyers in Hong Kong almost never had to deal with the unwinding and liquidation of complex financial products such as securitisations, collateralised debt obligations, repos, derivatives and structured products (and related complex legal issues such as trust and cross-border conflicts of laws) on a similar scale.

The 2008 global financial crisis resulted in significant litigations across various jurisdictions, some of which had conflicting results that continue to affect Hong Kong.[14]

### ii Cross-border insolvencies with PRC elements

In Hong Kong, there is a growing amount of cross-border insolvency activity with the PRC. Hong Kong remains a pivotal gateway to China due to perceived better rule of law in Hong Kong. It is becoming increasingly common for a Hong Kong company to have operations and assets in PRC. These operations are often factories or other assets, wholly-owned subsidiaries or joint ventures with partners in other jurisdictions.

Typical difficulties when dealing with insolvencies of such companies include problems of getting control of and safeguarding the assets in a jurisdiction other than Hong Kong, and delays in the appointment of an office holder to find, safeguard and realise the assets. A further complicating factor is where there are allegations of fraud, the misuse or disappearance of assets or possible malfeasance. In such cases, some or all the parties involved may not be cooperative.[15]

14 A detailed discussion of this topic is beyond the scope of this chapter, but readers may refer to the following article, which discusses the structured finance and derivatives related aspects of this topic: Kingsley Ong, 'The ISDA Master Agreement: Insolvency Stalemate and Endgame Solutions for Hong Kong Liquidators' (2010) 40 *HKLJ* 337.

15 There have been recent helpful developments in the PRC. On 11 June 2014, in the case of *Sino-environment Technology Group Limited v. Thumb Env-Tech Group (Fujian) Co, Ltd*, the PRC Supreme People's Court found in favour of the liquidators of Sino-environment (a Singapore incorporated company), and allowed the Singapore liquidators to replace the legal representative of (and effectively take control of) Sino-environment's wholly-owned subsidiary, Thumb. However, limitations remain. For example, for the change of the company's legal representative to be effective against third parties, such change needs to be registered with the local State Administration of Industry and Commerce (AIC), which is the company registration authority in the PRC. Certain AICs may require authorisation of the outgoing legal representative before registering the change (which can be problematic if the incumbent legal representative is not cooperative).

### iii Section 327 of Cap 32

Under Section 327 of Cap 32, unregistered companies cannot be wound up voluntarily in Hong Kong. Hong Kong courts have the power to wind up unregistered companies on limited grounds as set out under Section 327(2). To persuade a Hong Kong court to exercise such power, it is necessary to satisfy the court of the following criteria:[16]

*a* the company has to have a sufficient connection with Hong Kong;

*b* there is a reasonable possibility that the winding up will benefit those applying for it; and

*c* the court must be able to exercise jurisdiction over one or more persons interested in the distribution of the company's assets.

Although it remains the case that a Hong Kong court will not exercise this power to wind up a foreign company lightly, this power has been the subject of much discussion in the Hong Kong courts in recent years.[17]

### iv Section 673 of the Companies Ordinance

More significantly, in the recent *LDK Solar* case,[18] the Hong Kong court decided that it had jurisdiction to sanction a scheme of arrangement in respect of an insolvent foreign unregistered company under Section 673 of the Companies Ordinance (Cap 622). The case involved a Cayman company where most of the claims against it were governed by Hong Kong law. The Hong Kong court recognised that debts governed by Hong Kong law could only be discharged if there is a scheme sanctioned by the Hong Kong court itself, and was therefore satisfied that the company had a sufficient connection with Hong Kong. The court's decision to exercise jurisdiction was also justified by the need to foster comity between the parallel applications for a scheme of arrangements initiated in the Cayman Grant Court and the US Bankruptcy Court, and the Hong Kong proceedings, which the court recognised to be 'inter-conditional' (such that none of them would be effective if any of them were not approved), and it was satisfied that it should give efficacy to the scheme.

16 *Re Yung Kee Holdings Ltd* [2014] 2 HKC 556.

17 For example, in the leading cases of *Re Yung Kee Holdings Ltd* (2012, 2014 and pending appeal to the Court of Final Appeal) and *Re Gottinghen Trading Limited* [2012] 3 HKLRD 453, the courts rejected the applications for 'just and equitable winding up' of foreign companies in Hong Kong.

However, in *China Medical Technologies* [2014] 2 HKLRD 997, the Court exercised its powers under Section 327 on the basis that there was alleged fraud by perpetrators with assets in Hong Kong.

In *The Joint Official Liquidators of A Company v. B and Another* [2014] HKEC 1244, the Hong Kong court exercised its power under Section 327 on an application by the Cayman liquidators of a Cayman company.

18 *LDK Solar Co., Ltd (in provisional liquidation)*, HCMP 2215/2014, 10 December 2014.

## V INTERNATIONAL

### i UNCITRAL Model Law

To remedy the complexities created by inconsistent legal approaches of different national laws in cross-border insolvencies, the United Nations Commission on International Trade Law (UNICITRAL) adopted the UNCITRAL Model Law on Cross-Border Insolvency in 1997 to harmonise and unify the laws on international trade. The Model Law focuses on four key areas of access, recognition, assistance and cooperation with the purpose of assisting countries to manage cross-border insolvency cases in an efficient, fair and cost-effective manner.

The scope of the Model Law covers requests for recognition of a foreign proceeding, whether inward-bound or outward-bound, coordination of concurrent proceedings in two or more states, and participation of foreign creditors in insolvency proceedings taking place in the enacting state (Article 1(1)).

***Approach taken by Hong Kong courts***

The Model Law is not law in its own right and has no legal force unless it is incorporated into national law. Hong Kong has not adopted the Model Law in its domestic legislation, and there are no statutory provisions empowering Hong Kong courts to render assistance to foreign courts in a cross-border insolvency matter. Under Section 327(1) of Cap 32, Hong Kong courts retain discretion to wind up a foreign company provided the three requirements (mentioned in Section IV.iii, *supra*) are met. Even where these three requirements are not met, the court has power to recognise and grant assistance to foreign insolvency proceedings under common law.[19]

In *The Joint Official Liquidators of a Company v. B & C*,[20] Harris J noted that foreign liquidators should be empowered to assert in Hong Kong whatever claims that are available to them under their jurisdiction of appointment without having to commence ancillary winding-up proceedings, provided that the foreign substantive law to be applied is broadly similar to Hong Kong insolvency law, and the specific relief that is sought is available under Hong Kong law. Hence, it can be said that Hong Kong courts adopt a pragmatic approach and may, in appropriate cases, recognise foreign liquidations and judicially sanctioned foreign corporate debt-restructuring schemes. Where creditors are located in different countries, it may encourage liquidators to agree a cross-border protocol for dealing with assets of the company and claims by creditors.

***Possibility for reform or adopting of the Model Law***

Turning to future development of the law, Harris J in *The Joint Official Liquidators* opined that Hong Kong's new insolvency legislation should include provisions dealing

19 See *The Joint Official Liquidators of a Company v. B & C* HCMP 902/2014, where Harris J cited two cases from Commonwealth jurisdictions in support, namely *In re Impex Services Worldwide Ltd* [2004] BPIR 564 (Manx High Court) and *Re Founding Partners Global Fund Ltd* [2011] Bda LR 22 (Bermudan Court).

20 [2014] HKCFI 1294.

expressly with cross-border insolvency, such as Section 426 of the UK's Insolvency Act 1986, which allows for judicial comity between the UK courts and those of relevant countries or territories as designated under UK law.

In the Consultation paper on the Winding-Up Provisions of the Companies Ordinance[21] published in 1998, although the Sub-Committee on Insolvency of the Law Reform Commission recommended the law drafter 'consider the extensive definitions that have been developed in the draft guide [i.e., the Model Law]', it noted that 'it would be premature for Hong Kong, China to adopt what is only a draft, as legislation'.

In a paper issued on 31 October 2011, while the Financial Services and the Treasury Bureau (FSTB) noted that 19 jurisdictions, including the UK, the US, Australia, New Zealand, have adopted the Model Law, it stated that adopting the Model Law 'involves complex international law issues, and likely requires a standalone piece of legislation separated from the [Companies] Bill'. While it noted the need for further research and assessment on resources before formulating a timetable, nothing further has been issued to date on this matter by the FSTB.

The Standing Committee on Company Law Reform, as advisers to the Financial Secretary on amendments to the Companies Ordinance, stated in its Twenty Eighth Annual Report (2011/2012) that the government intended to introduce the amendment bill reforming Hong Kong's insolvency law by mid-2016, in which the possible adoption of the Model Law would be considered.[22] Despite the government's initiation of a three-month public consultation[23] and the stated intention to introduce an amendment bill into the Legislative Council in 2014 or 2015,[24] no reference to cross-border insolvency issues or the possible adoption of the Model Law was made in the consultation paper published in April 2013.[25] In its consultation conclusions, the government pointed out that some jurisdictions in Asia, such as Singapore and Mainland China, adopted local legislation instead, and concluded that there were 'certain limits to the extent to which a Hong Kong court will recognise the vesting and discharging effects of a non-Hong Kong order.'[26]

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21 Consultation paper on the Winding-Up Provisions of the Companies Ordinance, dated April 1998, prepared by the Sub-committee on Insolvency of the Law Reform Commission: www.info.gov.hk/consult/windcom.htm.

22 The Twenty-Eighth Annual Report 2011/2012, Standing Committee on Company Law Reform, p. 5: www.cr.gov.hk/en/standing/docs/28anrep-e.pdf.

23 Government press release: Public to be consulted on improvement of corporate insolvency law, 16 April 2013.

24 See footnote 23.

25 Improvement of Corporate Insolvency Law, Legislative Proposals, Consultation Document, April 2013, Financial Services and the Treasury Bureau, www.gov.hk/en/residents/government/publication/consultation/docs/2013/Insolvency_Law.pdf.

26 Ibid.

## VI FUTURE DEVELOPMENTS

### i Current law on corporate rescue in Hong Kong

At present, there is no statutory moratorium available to bind creditors and protect companies from being wound up when companies seek to undergo restructuring or to find an acquirer. Corporate restructurings in Hong Kong have historically been effected only through cumbersome procedures under schemes of arrangement and appointment of provisional liquidators. Schemes of arrangement lack the ability to impose a moratorium against creditors' actions during the rescue period, and the danger-to-assets test has to be satisfied in order to have a provisional liquidator appointed.

The absence of a corporate rescue regime in Hong Kong is rather distinct compared with other developed jurisdictions. A company in financial difficulties in other developed jurisdictions can have recourse to protection provided by legislation – in England, with administration; in the US, under the Chapter 11 procedure of the US Bankruptcy Code; in Singapore, with judicial management. Even China has incorporated reorganisation and conciliation in its new Enterprises Bankruptcy Law, which came into operation in 2007.[27] In contrast, Hong Kong's insolvency law is currently based on that in England dated back to 1929.

There have been many proponents urging Hong Kong to introduce a corporate rescue regime. In a recommendation on a new approach to business failure and insolvency issued by the European Commission in 2014, the European Commission commented that 'Hong Kong's limited range of procedures means that businesses are only able to restructure at a relative late stage', and argued that Hong Kong should introduce 'insolvency frameworks to enable them [enterprises in financial difficulties] to restructure at an early stage with a view to preventing their insolvency'.[28]

### ii Reform proposals

The government has attempted to introduce a statutory corporate rescue regime, first in 2000 as part of the Companies (amendment) Bill, and in time the stand-alone Companies (Corporate Rescue) Bill in 2001 (2001 Bill), with the aim to give troubled companies more time to find white knights prepared to come to their rescue, whether by restructuring or finding a buyer, and to ensure that, during the grace period, the

27 For a further discussion on China bankruptcy law and jurisprudence, see Kingsley Ong and Mark Hsiao, 'From ISDA to NAFMII: Insolvency Stalemate and PRC Bankruptcy Jurisprudence', *Capital Markets Law Journal* (2013) 8 (1): 77–89.

28 C (2014) 1500 final, dated 12 March 2014, published by the European Commission: ec.europa.eu/justice/civil/files/c_2014_1500_en.pdf. Introducing a statutory regime on corporate rescue would not only align Hong Kong's insolvency law with other developed jurisdictions, but enhancing the possibility of successful corporate rescue would yield numerous economic benefits, such as avoiding a 'domino effect' triggered by the collapse of a single business, limiting the risk of commencing formal and expensive insolvency procedures, and preventing social problems like unemployment.

company cannot be wound up by creditors. Both proposals failed to gain the requisite support by the legislature.

Almost a decade later, in 2009, the FSTB launched a public consultation on a review of corporate the rescue procedure legislative proposals, and published a conclusion in July 2010. The key proposals include:

*a* providing for procedural requirements for initiating a 'provisional supervision' by the company, its directors or liquidators;

*b* offering a framework for moratorium that is more generous than that contained in the 2001 Bill, with a longer period and fewer exceptions;

*c* introducing a system of staggered payments for employees' outstanding entitlements so as to balance employees' financial interests and the objective of avoiding the company from being sunk under the cumulative weight of employee entitlements;

*d* raising the bar for proving insolvent trading, which will encourage directors to act on insolvency earlier; and

*e* dividing secured creditors into two categories: 'major secured creditors' and all other secured creditors.

Despite all these proposals, a bill containing the new proposed regime was not introduced into the Legislative Council by late 2010/early 2011 as planned. The new Companies Ordinance, which became effective on 3 March 2014, also does not include any corporate rescue provisions.

## Appendix 1

# ABOUT THE AUTHORS

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