Debt Restructuring: an alternative to insolvency proceedings

Debt Restructuring: an alternative to insolvency proceedings is the essential reference guide for financial institutions, legal professionals and investors. Covering 20 major jurisdictions worldwide, it provides a clear overview of the law and regulation governing debt restructuring in each one, and is structured to allow easy comparisons between jurisdictions.

- Offers a well-organised starting point for international reference
- Covers the law in 20 major jurisdictions
- Includes contributions from leading local practitioners who are experts in the field
- Uses a reader-friendly Q&A format that enables quick and easy cross-jurisdictional comparisons
- Addresses the key questions of multinational organisations
- Provides straightforward, practical commentary on each jurisdiction and the respective legal systems

**Jurisdictional comparisons**

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Editors</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgium</td>
<td>Glenn Hansen, LAGA</td>
</tr>
<tr>
<td>Canada</td>
<td>Justin R Fogarty, Jason Dutrizac &amp; Pavle Masic, Justin R Fogarty Professional Corporation</td>
</tr>
<tr>
<td>Denmark</td>
<td>Ole Borch &amp; Lars Lindencrone Petersen, Bech-Bruun</td>
</tr>
<tr>
<td>Finland</td>
<td>Pekka Jaatinen, Salla Suominen &amp; Anna-Kaisa Remes, Castrén &amp; Snellman Attorneys Ltd</td>
</tr>
<tr>
<td>France</td>
<td>Joanna Gumpelson, De Pardieu Brocas Maffei</td>
</tr>
<tr>
<td>Germany</td>
<td>Florian Gantenberg, LADM Liesegang Aymans Decker Mittelstaedt &amp; Partner Rechtsanwälte Wirtschaftsprüfer Steuerberater</td>
</tr>
<tr>
<td>Hong Kong</td>
<td>Philip Gilligan, Richard Hudson &amp; Tiffany Cheung, Deacons</td>
</tr>
<tr>
<td>Italy</td>
<td>Alessandro Varrenti &amp; Daniela Sorgato, CBA Studio Legale e Tributario</td>
</tr>
<tr>
<td>Malta</td>
<td>Nicolai Vella Falzon, Fenech &amp; Fenech Advocates</td>
</tr>
<tr>
<td>The Netherlands</td>
<td>Lucas Kortmann &amp; Niels Pannevis, RESOR N.V.</td>
</tr>
<tr>
<td>Norway</td>
<td>Jon Skjønshammer, Advokatfirmaet Selmer DA</td>
</tr>
<tr>
<td>Poland</td>
<td>Marcin Olechowski &amp; Borys D Sawicki, Sotyński Kawecki &amp; Sędzia</td>
</tr>
<tr>
<td>Portugal</td>
<td>Mafalda Barreto &amp; Carlos Soares, Gómez-Acebo &amp; Pombo (Portugal)</td>
</tr>
<tr>
<td>Romania</td>
<td>Bogdan Bibicu, Kinstellar</td>
</tr>
<tr>
<td>Singapore</td>
<td>Sim Kwan Kiat, Rajah &amp; Tann Singapore LLP</td>
</tr>
<tr>
<td>Spain</td>
<td>Fermín Garbayo &amp; Julio Pernas Ramírez, Gómez-Acebo &amp; Pombo Abogados</td>
</tr>
<tr>
<td>Sweden</td>
<td>Odd Swarting, Mathias Winge &amp; Nina Bæcklund, Setterwalls</td>
</tr>
<tr>
<td>Turkey</td>
<td>Gokben Erdem Dirican &amp; Erdem Altıla, Pekin &amp; Pekin</td>
</tr>
<tr>
<td>UK</td>
<td>Jatinder Bains, Paul Keddie &amp; Simon Beale, Macfarlanes</td>
</tr>
<tr>
<td>United States</td>
<td>J William Boone, Michael A Dunn &amp; Dorotea N Wozniak, James-Bates-Brannan-Groover-LLP</td>
</tr>
</tbody>
</table>

**General Editors:**
Ole Borch & Lars Lindencrone Petersen, Bech-Bruun
Alessandro Varrenti, CBA Studio Legale e Tributario

**Founding Editor:**
Jacques Henrot, De Pardieu Brocas Maffei
Debt Restructuring: an alternative to insolvency proceedings

Jurisdictional comparisons 2015

Founding Editor:
Jacques Henrot, De Pardieu Brocas Maffei

General Editors:
Ole Borch & Lars Lindencrone Petersen, Bech-Bruun
Alessandro Varrenti, CBA Studio Legale e Tributario

THOMSON REUTERS
Contents

Foreword  Alessandro Varrenti, CBA Studio Legale e Tributario  Lars Lindencrone Petersen & Ole Borch, Bech-Bruun  v


Belgium  Glenn Hansen, LAGA  1

Canada  Justin R Fogarty, Jason Dutrizac & Pavle Masic, Justin R Fogarty Professional Corporation  19

Denmark  Ole Borch & Lars Lindencrone Petersen, Bech-Bruun  41

Finland  Pekka Jaatinen, Salla Suominen & Anna-Kaissa Remes Castrén & Snellman Attorneys Ltd  53

France  Joanna Gumpelson, De Pardieu Brocas Maffei  71

Germany  Florian Gartenberg, LADM Liesegang Aymans Decker Mittelstaedt & Partner Rechtsanwälte Wirtschaftsprüfer Steuerberater  91

Hong Kong  Philip Gilligan, Richard Hudson & Tiffany Cheung, Deacons  109

Italy  Alessandro Varrenti & Daniela Sorgato, CBA Studio Legale e Tributario  123

Malta  Nicolai Vella Falzon, Fenech & Fenech Advocates  143

The Netherlands  Lucas Kortmann & Niels Pannevis, RESOR N.V.  159

Norway  Jon Skjørshammer, Advokatfirmaet Selmer DA  177

Poland  Marcin Olechowski & Borys D Sawicki, Softysirski Kawecki & Sziłszak  191

Portugal  Mafalda Barreto & Carlos Soares, Gómez-Acebo & Pombo (Portugal)  209

Romania  Bogdan Bibicu, Kinstellar  231

Singapore  Sim Kwan Kiat, Rajah & Tann Singapore LLP  251

Spain  Fermin Garbayo & Julio Pernas Ramirez Gómez-Acebo & Pombo Abogados  263

Sweden  Odd Swarting, Mathias Winge & Nina Baecklund, Setterwalls  299

Turkey  Gokben Erdem Dirican & Erdem Atilla, Pekin & Pekin  315

UK  Jatinder Bains, Paul Keddie & Simon Beale, Macfarlanes  327

United States  J William Boone, Michael A Dunn & Doroteya N Wozniak James-Bates-Brannan-Groover-LLP  343

Contact details  365
Debt Restructuring

Foreword

Alessandro Varrenti, CBA Studio Legale e Tributario
Lars Lindencrone Petersen & Ole Borch, Bech-Bruun

The financial crisis that started quite dramatically with the bankruptcy of Lehman Brothers in 2008 has been historic. Several other financial crises have been confined to a certain area and have been quite short lived, but the one that started in 2008 has affected all parts of the world to varying degrees and is not fully over more than eight years later. It has not only stress-tested undertakings and banks; it has also tested countries and the entire way of perceiving the financial structure.

At the outset of the financial crisis, quick fixes were desperately needed. During this phase, countries had to ensure that their banking sectors did not collapse. At the same time, undertakings in crisis had to be handled, and in this process an adjustment of the set of rules available to such situations has taken place. These sets of rules could be said to have many similarities, but if you look at the finer details quite a few differences become apparent. As an experienced specialist in the law of your own country, you have not been able to rely on your experience and judgement to figure out how a specific situation would be handled in another country.

With this in mind, Thomson Reuters asked one of the grand old men of the world of insolvency, Jacques Henrot of De Pardieu Brocas Maffei, to lead a project in which Jacques and we – Alessandro Varrenti of CBA Studio Legale e Tributario (Milan), and Lars Lindencrone Petersen and Ole Borch of Bech-Bruun (Copenhagen) – were to work together to prepare an easily accessible yet detailed presentation of the sets of rules applicable to restructuring and distressed undertakings in a number of countries.

Jacques undertook the task and was a driving force during the start-up phase, and this in spite of the fact that Jacques was quite seriously ill. Sadly, Jacques passed away in the summer of 2014 and thus before the book was ready for publication. We are dedicating this book to Jacques in honour of his huge effort with the book and a number of similar projects in the past.

We hope that the readers of the book will share our enthusiasm about the finished project and that the book may contribute to understanding and decision-making in cross-border situations where there is a need to understand at least the fundamental principles of the rules of other countries.

We would like to extend our thanks to all the contributors for their efforts on the project. The dialogues we have had with the contributors from the various countries in the course of the project have confirmed the great expertise involved as well as the high level of enthusiasm for the project. We would also like to take this opportunity to express our respect – which is perhaps done too rarely – for the legislators of the
Debt Restructuring

many countries. Restructuring legislation is quite difficult to draft as it requires decisions according to which some parties are to relinquish rights to the advantage of other parties for the sake of the bigger picture. It is the quality of such legislation which determines the possibilities of obtaining successful restructuring – and this applies to both in-court and out-of-court restructuring. Out-of-court restructuring will typically reflect the possibilities of the in-court options, as the rights holders will hardly be willing to contribute to an out-of-court solution providing them with a poorer result than an in-court process. At the same time, in-court restructuring is presumably still the very last thing you want. Professor Lawrence P King was quoted as saying that the American rules on restructuring, Chapter 11, may well be effective, but for him they are the equivalent of using a hammer to put out the fire in your hair. We believe that this book will demonstrate that it is not quite that bad, either in the US or in other countries.

1 November 2014
Jacques Henrot
1952–2014

As mentioned in the foreword, this book has been dedicated to our partner, Jacques Henrot. No better tribute could be paid to Jacques, who, until the very end of his long fight to overcome his terminal illness, remained strongly committed to ensuring the publication of what he considered to be a significant contribution to the merging into a single instrument an analysis and description of the complexities of a wide variety of policy and legal issues in the work-out and restructuring areas across many countries.

Our partner and friend Jacques passed away late this summer. Above all, Jacques was a very talented lawyer, dedicated to the long tradition of the practice of law rooted in the old cultural values of a general practitioner and combining those values with a remarkable understanding of the diversity of legal cultures and conceptual diversities between the continental legal tradition and the common law approach. Often those skills turned out to be material in bridging the gap between the different cultures prevailing in those different environments, paving the way to consensual approaches to resolving difficulties in complex matters.

He combined unequalled expertise in the property area with a unique practice in the insolvency sector and a strong understanding of the needs of the financial services industry. Moral integrity and compliance with the highest ethical standards were among his key attributes.

Jacques had a great sense of human relationships, and was most sensitive to the needs and aspirations of our younger professionals. He was a great team builder, dedicated to training his assistants and colleagues towards excellence and achievement of the highest standards in the practice of law.

In the pursuit of that goal, he has paved the way to the emergence of a younger generation to develop a practice based on those values.

Before leaving us, Jacques has passed the torch on to that new generation sharing those values to continue to develop a practice rooted in the high standards he advocated.

For those accomplishments he will be forever remembered.

Antoine Maffei
De Pardieu Brocas Maffei
1. WHAT COURT-MONITORED RESTRUCTURING PRE-INSOLVENCY PROCEEDINGS OR SCHEMES ARE DEVISED BY THE LAW OF YOUR COUNTRY TO LIMIT VALUE DESTRUCTION FOR FAILING BUSINESS ENTITIES?

Hong Kong does not have any specific statutory court-monitored restructuring mechanism. However, in the absence of a formal restructuring mechanism, pre-insolvency corporate rescue or restructuring may be achieved through:

- a scheme of arrangement carried out in accordance with the procedures set out under Part 13, Division 2 of the Companies Ordinance (Cap. 622) (CO); or
- provisional liquidation.

1.1 What is the objective of the proceeding?

**Scheme of arrangement**

A scheme of arrangement is a binding compromise or arrangement between a company and its shareholders and/or creditors (or a class of them) which, when used in an insolvency context, aims to prevent the company’s liquidation. A scheme of arrangement makes it possible for there to be a compromise or arrangement which binds all of the company’s shareholders and/or creditors (or a class them), even though there is a dissenting minority of such shareholders and/or creditors.

**Provisional liquidation**

The primary purpose of appointing a provisional liquidator is to preserve a company’s assets in the interval between presentation of the petition and the making of the winding up order.

1.2 Do all kinds of businesses qualify?

**Scheme of arrangement**

All companies liable to be wound up under the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) (CWUO) can enter into a scheme of arrangement. This includes companies incorporated in Hong Kong as well as foreign companies (although the courts will not exercise their jurisdiction to wind up foreign companies unless there is sufficient nexus with Hong Kong). There are no thresholds related to indebtedness, turnover or asset value that the company, its creditors or its members must meet. There is no court agent appointed to assist the company.
Provisional liquidation
The court may appoint a provisional liquidator to any company in respect of which a winding up petition has been presented. This includes companies incorporated in Hong Kong as well as foreign companies (although the courts will not exercise their jurisdiction to wind up foreign companies unless there is a sufficient nexus with Hong Kong).

The court may only appoint a provisional liquidator to a company after presentation of a winding up petition, but not if a winding up order has already been made.

There is also case law which holds that the courts will not appoint a provisional liquidator for the purposes of corporate rescue except where the assets of the company are in jeopardy.

1.3 What are the necessary approvals?
Scheme of arrangement
Once a proposal for a scheme of arrangement has been formulated by the company, the court’s approval to call the relevant meetings or class meetings of the company’s creditors or members is required.

The necessary approvals required at each of the relevant meetings or class meetings which are required to be held are as follows:

Privatisation or takeover schemes
For schemes of arrangement involving a general offer (ie a listed company’s offer to buy back shares) or a takeover offer, approval by the members or a class of the members requires:
• approval by shareholders representing at least 75 per cent of the voting rights of the members present and voting; and
• the votes cast against the scheme at the meeting do not exceed 10 per cent of the total voting rights attached to all disinterested shares.

Other members’ meetings or members’ class meetings
For schemes other than privatisation or takeover schemes, approval of the members or a class of the members requires:
• approval by shareholders representing at least 75 per cent of the voting rights of the members present and voting; and
• unless the court orders otherwise, a majority in number of the members present and voting.

Creditors’ meetings or creditors’ class meetings
Approval of the creditors or a class of creditors requires:
• approval by creditors representing at least 75 per cent in value of the creditors present and voting; and
• a majority in number of the creditors present and voting.

Finally, the scheme of arrangement must be sanctioned by the court in order to become effective.
Provisional liquidation

The court will only exercise its discretion to appoint a provisional liquidator for corporate rescue purposes if:

- the petitioner for the winding up of the company satisfies the court that there is a good prima facie case for a winding up order; and
- in the circumstances, a provisional liquidator should be appointed.

The petition for the winding up of a company by the court must state at least one of six grounds, the most common of which are:

- a special resolution (ie 75 per cent of shareholders’ votes cast) to wind up the company by the court is passed;
- the company is unable to pay its debts (this is presumed if it fails to satisfy a debt equal to or exceeding HK$10,000 within three weeks of service of a statutory demand, if a judgment debt is not satisfied in whole or in part, or if it is proved to the satisfaction of the court that it is unable to pay its debts taking into account contingent and prospective liabilities); and
- it is just and equitable to liquidate the company.

Whether a provisional liquidator should be appointed in the circumstances will broadly depend on the commercial realities of the case, the degree of urgency, the need for an order and the balance of convenience.

1.4 What is the procedure?

Scheme of arrangement

A company which wishes to enter into a scheme of arrangement will first formulate a proposal. Application must then be made to the court for an order authorising the convening of the relevant meetings or class meetings of the company’s shareholders and/or creditors. The application is made by an originating summons, supported by an affidavit (usually by the party putting forward the proposed scheme) containing, among other things, information about the company, the proposed scheme and a draft explanatory statement (explanatory statement), and terms of the scheme. The application is made ex parte (although the application may be brought inter partes if appropriate in the circumstances), and may be made by the company, a shareholder or a creditor. However, if the company is being wound up, the application must be made by a liquidator or a provisional liquidator.

If the court orders the convening of the meetings or class meetings of the shareholders and/or creditors, the meetings are called. The court order will include directions regulating the calling of the meetings. Every notice summoning such meetings must be accompanied by an explanatory statement (or, if the notice is given by way of an advertisement, the notice must state how a creditor or member entitled to attend the meeting may obtain a copy of the explanatory statement). The scheme must be approved by the requisite majorities of creditors and/or shareholders (see section 1.3 above).

If the creditors and/or shareholders approve the scheme proposal at the meetings or class meetings, an application must then be made to the court
to sanction the scheme. The application is made by petition, supported by an affidavit (which is usually made by the chairman of the creditor/shareholder meetings, who is appointed pursuant to the court order convening the meetings). The application may be made by the company, a shareholder or a creditor. However, if the company is being wound up, the application must be made by a liquidator or a provisional liquidator.

If the court sanctions the scheme of arrangement, the scheme will only take effect once an office copy of the court order has been delivered to the Registrar of Companies for registration.

**Provisional liquidation**

Provisional liquidation is not itself a separate procedure, but forms part of the compulsory liquidation procedure, and it has been used in Hong Kong to effect a corporate rescue or restructuring. Thus, the first step requires that a winding up petition be presented to have the company wound up compulsorily by the court.

After presentation of the winding up petition but before a winding up order has been made, any creditor or contributory, the petitioner or the company may apply to the court for the appointment of a provisional liquidator. The application is made by summons, and must be supported by an affidavit setting out sufficient grounds for the appointment of a provisional liquidator. While the court will normally take the view that applications should be heard *inter partes*, in urgent and exceptional cases, the application may be made *ex parte*.

If the court grants the application to appoint a provisional liquidator, the order appointing the provisional liquidator will bear the number of the petition, shall state the nature and a short description of the property of which the provisional liquidator is ordered to take possession, and shall set out the powers of and the duties to be performed by the provisional liquidator. The powers commonly granted by the court to provisional liquidators in the context of corporate rescue include powers to investigate misfeasance, formulate restructuring proposals and exercise rights in respect of subsidiaries.

If a winding up order is made after the appointment of a provisional liquidator, the Official Receiver or such other person appointed as provisional liquidator continues to act as the provisional liquidator until he or another person becomes the liquidator and is capable of acting as such.

If the restructuring has been successfully implemented, then, instead of proceeding with the liquidation of the company, the provisional liquidator will seek the dismissal of the winding up proceedings and his own discharge. Alternatively, a provisional liquidation also concludes at such time as the provisional liquidator or some other person is appointed as liquidator by the court (whereupon the liquidator will proceed to wind up the company).

### 1.5 Is there recourse against the opening judgment?

Yes, parties may lodge an appeal.
1.6 What are the substantive tests/definitions?

**Scheme of arrangement**

There are no substantive tests/definitions that the company, its creditors or its members must meet. It is not necessary for the company to show that it is solvent – schemes of arrangement are available to both solvent and insolvent companies.

Under the scheme of arrangement procedure, it is necessary that there is a ‘compromise’ or an ‘arrangement’. While the term ‘compromise’ is not defined in the CO, it is accepted that there needs to be a pre-existing dispute whereby the creditors and/or shareholders are prepared to give up or modify some of their rights, and the term is more limited than an arrangement. An ‘arrangement’ is interpreted more widely to encompass any agreement modifying rights, and includes a reorganisation of the company’s share capital by the consolidation of different classes of shares and/or by the division of shares into different classes.

**Provisional liquidation**

See section 1.3 above.

1.7 What is the role of a court-appointed agent?

N/A.

1.8 What protection is there from creditors?

**Scheme of arrangement**

Initiation of a scheme of arrangement does not trigger a moratorium on creditor claims. As there is no moratorium, any dissenting creditor can bring legal proceedings or present a winding up petition against the company, which could prevent a scheme from being concluded. To mitigate this, a scheme of arrangement is sometimes prepared after a provisional liquidation order has been obtained (see below).

**Provisional liquidation**

At any time after the presentation of a winding up petition and before a winding up order is made, the company or any creditor or contributory may apply to the court to stay or restrain proceedings against the company, and the court may stay or restrain such proceedings accordingly on such terms as it thinks fit. Further, once a provisional liquidator has been appointed, no action or proceedings may be proceeded with or commenced against the company except by leave of the court, and subject to such terms as the court may impose.

1.9 What is the usual duration of the restructuring process?

**Scheme of arrangement**

There is no prescribed statutory form for a scheme of arrangement (and therefore the duration of each scheme of arrangement will depend on the circumstances of each case), although, due to the court’s involvement and the need to define the classes of creditors and/or members to which the
scheme applies carefully, a scheme may take more than a year to conclude. Given that a scheme of arrangement is a court-monitored process, the court’s timetable may also affect the duration. The scheme terms and conditions which are prepared by the company and its professional advisors will often contain provisions relating to the duration and termination of the scheme.

Provisional liquidation
As mentioned, provisional liquidation forms part of the compulsory liquidation procedure. Furthermore, the courts have taken the view that the appointment of a provisional liquidator must still always be for the purposes of the winding up of the company. Therefore, in many cases, a company in provisional liquidation will eventually be wound up. If, however, a restructuring proposal is developed within the provisional liquidation, the Hong Kong court may allow the provisional liquidator powers to continue for as long as it takes for the proposal to be implemented, with the provisional liquidator being required to return to court every few months to report on the progress of the restructuring.

1.10 Who prepares the restructuring agreement and what are the available tools?
**Scheme of arrangement**
The company, with the assistance of its professional advisors, will put together the explanatory statement and the terms of the scheme of arrangement.

**Provisional liquidation**
The company’s professional advisers (who may also be appointed the provisional liquidator) will often assist the company with formulating a restructuring proposal. The provisional liquidator may also advance the proposal themselves.

1.11 Are subordination agreements necessarily given full effect?
Yes.

1.12 How is exit managed?
**Scheme of arrangement**
After a scheme of arrangement becomes effective (see section 1.4 above), it is binding on the company (and, if the company is being wound up, the liquidator or provisional liquidator and contributories), its creditors and/or shareholders (or a class of them) who are party to the scheme. Under the terms of the scheme, an administrator (who is usually an insolvency accountant) is appointed to implement the arrangement.

A scheme of arrangement concludes when its terms have been implemented. The terms of the scheme will usually contain provisions relating to how exit is managed, including:
• duration and termination of the scheme (eg early termination through a creditors’ vote);
• payment of final dividends; and
• final arrangements on conclusion of the scheme.

On conclusion of a scheme, the scheme administrator will file a notice with the Registrar of Companies.

**Provisional liquidation**
If the restructuring has been successfully implemented, then instead of proceeding with the liquidation of the company, the provisional liquidator will seek the dismissal of the winding up proceedings and his own discharge. Alternatively, a provisional liquidation also concludes at such time as the provisional liquidator or some other person is appointed as liquidator by the court (whereupon the liquidator will proceed to wind up the company).

### 1.13 Who are the necessary parties?

**Scheme of arrangement**
The company and its members (generally those persons whose names are recorded in the register of members) and/or its creditors (including all creditors whose claims would be admitted to proof in the event the company is wound up).

**Provisional liquidation**
The company and its members (generally those persons whose names are recorded in the register of members) and/or its creditors (including all creditors whose claims would be admitted to proof in the event the company is wound up).

The Official Receiver may also be a party.

### 2. POST-INSOLVENCY PROCEEDINGS
In most cases, an insolvent company will be placed into liquidation. As mentioned, Hong Kong does not have any specific statutory court-monitored restructuring mechanism. However, in the absence of a formal restructuring mechanism, post-insolvency corporate rescue or restructuring of a company in liquidation may be achieved through a scheme of arrangement.

#### 2.1 What is the objective of the proceedings?
See section 1.1 (Scheme of arrangement) above.

#### 2.2 Do all kinds of business entities qualify?
See section 1.2 (Scheme of arrangement) above.

#### 2.3 What are the necessary approvals?
See section 1.3 (Scheme of arrangement) above.
2.4 Is it valid and binding to agree that such proceeding be a default/termination event?
An agreement which provides that a default/termination event occurs upon (i) the entry by the company into a scheme of arrangement by the company or (ii) the presentation of a petition for the winding up of the company (and/or appointment of a liquidator) will generally be upheld by the courts to be valid and binding on the company.

2.5 What is the procedure?
See section 1.4 (Scheme of arrangement) above.

2.6 Please provide information about voluntary filings
In a scheme of arrangement, the hearing of the application to call the relevant meetings or class meetings of the company’s shareholders and/or creditors is heard in chambers (i.e., not open to the public) and is normally heard ex parte.

The application must be supported by an affidavit which contains, among other things, information about the company, the proposed scheme, and a draft explanatory statement and terms of the scheme. There is no requirement for an expert opinion/report on the feasibility of the restructuring plan, but the court will not summon the relevant meetings unless it considers that the proposal is a fair one which could be supported by the relevant creditors and/or shareholders. It is common for preliminary negotiations to be held with creditors and/or shareholders prior to the actual submission of the application to ensure that the requisite majorities would be able to be obtained.

If the court orders the convening of the meetings or class meetings of the shareholders and/or creditors, the meetings are called. The court order will include directions regarding the calling of the meetings. Every notice summoning such meetings must be accompanied by an explanatory statement (or, if the notice is given by way of an advertisement, the notice must state how a creditor or member entitled to attend the meeting may obtain a copy of the explanatory statement).

2.7 How are creditors’ representatives chosen?
See section 2.9 below.

2.8 Is there recourse against the opening judgment?
Yes, parties may lodge an appeal.

2.9 What are the roles and powers of committees?
The roles and powers of any committees will usually be set out in the terms of the scheme of arrangement.
2.10 What are the consequences of opening judgments for creditors?

Stay?
See section 1.8 above.

Forbidden payments?
Once a winding up order is made, any disposition of the property of the company (such as payments made to a creditor) made after commencement of the winding up is void, unless the court orders otherwise. Commencement of the winding up is deemed to be the date on which the company passes a resolution for the company to be wound up compulsorily by the court (if any) or the date of presentation of the winding up petition.

Where there is a scheme of arrangement in place, after the scheme becomes effective (see section 1.4 above), it is binding on the company (and if the company is being wound up, the liquidator or provisional liquidator and contributories), its creditors and/or shareholders (or a class of them) who are party to the scheme.

Interests accruing during the period: paid at contractual payment dates? Deferred and paid after plan is adopted? Capitalised? Is the rate necessarily the contract rate?
With respect to an insolvent company in liquidation once the winding up order is made, where the contract itself provides for payment of interest, the contractual rate of interest applies up to either (i) the date the company passes a resolution for the company to be wound up compulsorily by the court (if any) or (ii) in any other case, the date of the winding up order. There is no entitlement to interest accruing after commencement of the winding up unless the company is solvent.

Where there is a scheme of arrangement in place, the terms of the scheme will usually provide for accrual of interest on claims.

Is the opening judgment a valid draw stop for undrawn facilities?
See section 2.19 below.

Necessity to file proof of claim: are all creditors required to file proof of claim? Are secured creditors necessarily notified? Are there any time limits? Are non-resident creditors treated differently? Are there any consequences if the creditor is time-barred? Debtor discharged?
There is no requirement that creditors file a proof of claim in a scheme of arrangement. However, for a scheme to be ultimately sanctioned, it is necessary for the scheme to be properly approved by the correct classes of creditors and/or shareholders. The terms of the scheme of arrangement may provide for creditors to file proofs with the scheme administrator once the scheme is effective and binding.
Does such proceeding entail any limitation on enforcement of contractually created security?
Generally, no (except where, for example, such security is subject to a binding scheme of arrangement or a valid subordination agreement).

2.11 What is the duration of the restructuring process?
See section 1.9 (Scheme of arrangement) above.

2.12 How do creditors vote?
It is the responsibility of the applicant to determine the correct classes of creditors and/or shareholders in a scheme of arrangement. While the court may provide guidance as to the persons who should comprise a class, the constitution of classes may still be challenged at the final sanction hearing.

As to the requisite majorities required at the meetings, see section 1.3 (Scheme of arrangement) above.

2.13 What are the rules on clawback/voidability?
The following rules on clawback/voidability arise once an insolvent company is in liquidation.

Unfair preferences
An unfair preference occurs when an insolvent company does anything which puts a creditor, surety or guarantor in a better position than such person would otherwise have been in had the company gone into liquidation. A liquidator can apply to the court to set aside the unfair preference made within six months (or two years in the case where the preferred person is an associate) before the presentation of the winding up petition.

Floating charges
Floating charges created within 12 months of an insolvent company's liquidation are invalid and can be set aside by the liquidator unless money is advanced to the company at the same time as, or after, the charge is created.

Post-commencement disposals
See section 2.10 (Forbidden payments? Provisional liquidation) above.

Disclaimer of onerous property
The liquidator of a company being wound up may disclaimer onerous property of the company with the leave of the court. Onerous property includes shares or stock in companies, unprofitable contracts and any other property that is unsaleable or not readily saleable by reason of its binding the company to the performance of an onerous act or payment of money. The courts are generally unwilling to sanction a disclaimer of property in cases where the rights of third parties may be adversely affected.
Fraudulent conveyance
A transaction can be set aside if a liquidator can prove to the court that it took place with the aim of defrauding creditors. The company does not need to be insolvent at the time of the transaction, or become insolvent as a result, to set aside the transaction. However, a transaction will not be avoided if the property was disposed of for valuable consideration and in good faith to a person who did not have notice of the intent to defraud the creditors.

Extortionate credit transactions
If a company is being liquidated, the court can make an order setting aside or varying the terms of an extortionate credit transaction which was entered into within three years prior to the commencement of the winding up. An extortionate credit transaction is one which involves the provision of credit to a company, the terms of which require grossly exorbitant payments to be made or otherwise grossly contravene ordinary principles of fair dealing.

Fraudulent trading
If, during liquidation, it appears that any business of the company was carried on with the intent of defrauding creditors or any other person, or for any fraudulent purpose, the court can declare that a person who was knowingly a party to that business is personally liable for the company’s debts.

2.14 What are the rules on set-off/netting?
Hong Kong recognises mandatory set-off of mutual debts in the event of an insolvent company’s winding up. For a set-off to apply, there must be:
- credits, debts or other dealings between the insolvent company and the creditor;
- the credits, debts or other dealings must be mutual (meaning that they must be between the same persons and in the same right); and
- the creditor’s claim must be provable in the winding up.

However, a creditor shall not be entitled to insolvency set-off in any case where he had, at the time of giving credit to the insolvent company, notice that the winding up petition had been presented. The effective date at which the mutual credits, debts or other dealings must exist is at the date of the winding up order.

Neither the existence of a scheme of arrangement nor the appointment of a provisional liquidator affects the above rules on set-off.

2.15 How is exit managed?
See section 1.12 (Scheme of arrangement) above.

2.16 Are ‘prepackaged’ plans, arrangements or agreements permissible?
No.
2.17 Is a public authority involved?
No.

2.18 What is the treatment of claims arising after filing/admission?
Once a liquidator has been appointed in respect of an insolvent company, no action or proceedings may be proceeded with or commenced against the company except by leave of the court, and subject to such terms as the court may impose.

2.19 Are there ongoing contracts?
By itself, the promulgation of a scheme of arrangement does not terminate the company’s contracts (including any credit agreements the company may be party to). The terms of the relevant scheme of arrangement may confer power on the scheme administrator to obtain additional finance.

2.20 Are consolidated proceedings for members of a corporate family/group possible?
While there is no statutory procedure for consolidated proceedings (so that each company in a corporate group must be dealt with separately), the court is aware of the commercial and practical realities concerning group restructurings. For example, in past cases, the court has recognised that (conflicts of interest considerations aside), there are advantages of having a single liquidator in a group liquidation scenario.

2.21 What are the charges, fees and other costs?
The standard court fees will apply.

The costs of the parties of the scheme will normally be dealt with in the terms of the scheme.

3. LIABILITY ISSUES
3.1 What is the liability of managers/directors vis-à-vis creditors?

**Scheme of arrangement**
A responsible person of a company (which includes an officer or shadow director of a company) may be criminally liable if there is failure to comply with certain procedural requirements relating to a scheme of arrangement. For example, failure to provide the explanatory statement to the creditors and/or shareholders together with the notices summoning the relevant meetings is an offence (attracting a fine of up to HK$50,000).

Directors may also be liable for provisional liquidation, as set out below.

**Provisional liquidation**
Directors and officers of a company are liable to the liquidator if they commit offences such as fraud or deception. In a number of situations, a liquidator can also seek a court order requiring certain directors or officers to
either repay or restore property to the company, or provide compensation or contribute to the company’s assets.

A director can be personally liable if:

• he has given a personal guarantee for company debts;
• he has breached his fiduciary duty to the creditors (which arises where the company is insolvent or near insolvency), the company and/or its shareholders;
• on the winding up of the company, it is found that the business of the company has been carried on with intent to defraud creditors (of the company or any other person) or for any fraudulent purpose, and the person is knowingly party to the carrying on of such business; or
• he has misapplied or retained the company’s property for his personal benefit (misfeasance).

Directors can also be criminally liable for certain offences (such as misappropriation of property, for which they can be imprisoned). If company accounts and records are destroyed, or falsified before or after winding up begins, the party responsible (whether a past or present officer or shareholder) can be fined or imprisoned.

3.2 What is the liability of the lender?
The statutory liability of a lender where a company is in financial distress is limited (Hong Kong does not have currently any concept of ‘insolvent trading’ or ‘wrongful trading’). Transactions entered into by lenders with the company before the commencement of its liquidation may be avoided in certain circumstances - see section 2.13 above.

More generally, liability to which lenders may be exposed may also include the following:

• breach of the loan agreement with the company may result in a claim for damages; and
• breach of its general law duties to the company (eg if the lender is a bank, breach of its fiduciary duty to the company in the provision of its services; or, if it is a secured creditor, the duties applicable to it upon enforcement of its security).
Contact details

FOREWORD
Alessandro Varrenti
CBA Studio Legale e Tributario
Galleria San Carlo 6
20122 Milan
Via Flaminia 135
00196 Rome
Italy
T: +39 02 778061
F: +39 02 76002790
E: alessandro.varrenti@cbalex.com
W: www.cbalex.com

Lars Lindencrone Petersen & Ole Borch
Bech-Bruun
Langelinie Allé 35
2100 Copenhagen
Denmark
T: +45 72270000
F: +45 72270027
E: llp@bechbruun.com
obo@bechbruun.com
W: www.bechbruun.com

BELGIUM
Glenn Hansen
Laga
Berkenlaan 8A, 1831
Brussels Diegem
Belgium
T: +32 2 800 70 00
+32 2 800 70 22
F: +32 2 800 70 01
E: glhansen@laga.be
W: www.laga.be

CANADA
Justin R Fogarty, Jason Dutrizac & Pavle Masic
Justin R Fogarty Barrister & Solicitors
180 Bloor Street West, Suite 1000
Toronto, ON M5S 2V6
T: +1 416 840 8992
F: +1 416 369 7610
E: justin@fogartyllc.ca
jd@fogartyllc.ca
pavle.masic@fogartyllc.ca
W: www.justinfogarty.com

CHINA
Victor Wang
AllBright Law Offices
28th Floor, Hong Kong Plaza
No. 283 Huai Hai Road (Mid)
Huangpu District
Shanghai 200021
P. R. China
T: +86 21 2326 1888
F: +86 21 2326 1999
E: victorwang@allbrightlaw.com
W: www.allbrightlaw.com

DENMARK
Lars Lindencrone Petersen & Ole Borch
Bech-Bruun
Langelinie Allé 35
2100 Copenhagen
Denmark
T: +45 72270000
F: +45 72270027
E: llp@bechbruun.com
obo@bechbruun.com
W: www.bechbruun.com

FINLAND
Pekka Jaatinen, Salla Suominen & Anna-Kaisa Remes
Castrén & Snellman Attorneys Ltd
Finland
T: +358 20 7765 765
F: +358 20 7765 001
E: pekka.jaatinen@castren.fi
salla_suominen@castren.fi
anna-kaisa.remes@castren.fi
Contact details

W: www.castren.fi

FRANCE
Joanna Gumpelson
De Pardieu Broc Maffei A.A.R.P.I.
57 Avenue d’Iéna – CS 11610
F-75773 Paris Cedex 16
France
T: +33 1 53 57 61 96
   +33 1 53 57 71 71
F: +33 1 53 57 71 70
E: gumpelson@de-pardieu.com
W: www.de-pardieu.com

GERMANY
Florian Gantenberg, LLM
LADM Liesegang Aymans Decker
Mittelstaedt & Partner Rechtsanwälte
Wirtschaftsprüfer Steuerberater
Germany
T: +49 211 300490-25
F: +49 211 300490-22
E: f.gantenberg@ladm.com
W: www.ladm.com

HONG KONG
Philip Gilligan, Richard Hudson
& Tiffany Cheung
Deacons
5th Floor, Alexandra House, 18
Chater Road
Central
Hong Kong
T: +852 2825 9211
F: +852 2810 0431
E: philip.gilligan@deacons.com.hk
   richard.hudson@deacons.com.hk
   tiffany.cheung@deacons.com.hk
W: www.deacons.com.hk

ITALY
Alessandro Varrenti
CBA Studio Legale e Tributario
Galleria San Carlo 6
20122 Milan
Via Flaminia 135
00196 Rome

IT
T: +39 02 778061
F: +39 02 76002790
E: alessandro.varrenti@cbalex.com
W: www.cbalex.com

MALTA
Nicolai Vella Falzon
Fenech & Fenech Advocates
198, Old Bakery Street
Valletta VLT1455
Malta
T: +356 21241232
F: +356 25990641
E: nicolai.vellafalzon@fenlex.com
W: www.fenclaw.com

THE NETHERLANDS
Lucas Kortmann & Niels Pannevis
RESOR NV
Symphony Offices
Gustav Mahlerplein 27
1082 MS Amsterdam
The Netherlands
T: +31 20 570 9020
F: +31 20 570 9021
E: niels.pannevis@resor.nl
   lucas.kortmann@resor.nl
W: www.resor.nl

POLAND
Jon Skjørshammer
Advokatfirmaet Selmer DA
Tjuvholmen allé 1 N-0252
Oslo
Norway
T: +47 23 11 65 00
F: +47 23 11 65 01
E: j.skjorshammer@selmer.no
W: www.selmer.no

EUROPEAN LAWYER REFERENCE SERIES
Poland
T: +48 22 608 7062
+48 22 608 7369
F: +48 22 608 7070
E: marcin.olechowski@skslegal.pl
borys.sawicki@skslegal.pl
W: www.skslegal.pl

PORTUGAL
Mafalda Barreto & Carlos Soares
Gómez-Acebo & Pombo
Avenida Duque d’Avila
nº 6, 6º
Lisbon
Portugal
T: +351 213 408 600
F: +351 213 408 608
E: mbarreto@gomezacebo-pombo.com
csoares@gomezacebo-pombo.com
W: www.gomezacebo-pombo.com

ROMANIA
Bogdan Bibicu
Kinstellar
8 – 10 Nicolae Iorga
010434 Bucharest
Romania
T: +40 21 307 1664
E: bogdan.bibicu@kinstellar.com
W: www.kinstellar.com

SINGAPORE
Sim Kwan Kiat
Rajah & Tann Singapore LLP
9 Battery Road
#25-01 Straits Trading Building
Singapore 049910
Republic of Singapore
T: +65 6535 3600
F: +65 6225 9630
E: kwan.kiat.sim@rajahtann.com
W: www.rajahtannasia.com

SPAIN
Fernán Garbayo Renouard & Julio Pernas Ramírez
Gómez-Acebo & Pombo
Abogados, S. L. P.
Castellana, 216
28046 Madrid
Spain
T: +34 91 582 91 00
F: +34 91 582 91 14
E: fgarbayo@gomezacebo-pombo.com
jpernas@gomezacebo-pombo.com
W: www.gomezacebo-pombo.com

SWEDEN
Odd Swarting, Mathias Winge & Nina Baeklund
Setterwalls
Arsenalsgatan 6
Stockholm
Sweden
T: +46 8 598 890 00
F: +46 8 598 890 90
E: odd.swarting@setterwalls.se
mathias.winge@setterwalls.se
nina.baeklund@setterwalls.se
W: www.setterwalls.se

TURKEY
Gökben Erdem Dirican & Erdem Atilla
Pekin & Pekin
Lamartine Cad. No:10, Taksim Beyoğlu, İstanbul
Turkey 34437
T: +90 212 313 35 00
F: +90 212 313 35 35
E: gerdem@pekin-pekin.com
eatilla@pekin-pekin.com
W: www.pekin-pekin.com

UNITED KINGDOM
Jat Bains, Simon Beale & Paul Keddie
Macfarlanes LLP
20 Cursitor Street
London EC4A 1LT
UK
T: +442078319222
UNITED STATES
J William Boone, Michael A Dunn & Doroteya N Wozniak
James-Bates-Brannan-Groover-LLP
3399 Peachtree Rd NE, Suite 1700
Atlanta, GA 30326
USA
T: +4048442766
F: +4049976021
E: bboone@jamesbatesllp.com
    mdunn@jamesbatesllp.com
    dwozniak@jamesbatesllp.com
W: www.jamesbatesllp.com