



**IBA TOOLKIT ON INSOLVENCY AND ARBITRATION**  
**QUESTIONNAIRE**  
**NATIONAL REPORT OF HONG KONG**

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\* For the avoidance of doubt, this report is not intended to provide legal advice applicable to specific fact situations.

## IMPACT OF NATIONAL INSOLVENCY ON DOMESTIC OR FOREIGN ARBITRATION

[These questions relate to the effects that insolvency proceedings initiated in Hong Kong produce on arbitration commitments (foreign as well as national/local) involving the insolvent party.]

### Part I: Impact of Insolvency Proceedings on Ability to Commence or Continue Arbitration

**1. Does the law of Hong Kong contain any provision on the effect that the opening of insolvency proceedings produces on arbitration? If so, what is the source of the provision or provisions providing for the effects? That is, are the effects provided by the insolvency legislation as part of the consequences produced by the opening of insolvency proceedings? Or, are they provided by the arbitration legislation or law as a matter concerning the arbitrability of disputes, the capacity of the parties to arbitrate, the validity and effectiveness of arbitration agreements, or any other arbitration-specific category?**

1. Yes. Section 186 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Chapter 32) (“CWUO”)<sup>1</sup> provides for a general stay upon the opening of insolvency proceedings: “When a winding-up order has been made, or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court, and subject to such terms as the court may impose.” It is established by case law that an arbitration is a “proceeding” and is thus covered by the automatic stay under this section.<sup>2</sup> Section 181 of the CWUO further gives power to the court (upon application by the company, its creditors, or its shareholders) to stay or restrain pending arbitral proceedings against the company after the presentation of a winding up petition and before a winding up order has been made against it. For voluntary winding-up<sup>3</sup>, please refer to Paragraph 10 below.

**2. Does the insolvency legislation in Hong Kong provide for the concentration of disputes concerning the insolvent debtor before the insolvency court (*vis attractiva concursus*)? If so,**

**a. Which disputes fall under the rules on *vis attractiva concursus*?**

<sup>1</sup> For the full text of the section, see <[https://www.elegislation.gov.hk/hk/cap32?xid=ID\\_1438402995384\\_002](https://www.elegislation.gov.hk/hk/cap32?xid=ID_1438402995384_002)> accessed 29 December 2023.

<sup>2</sup> See *Re UDL Contracting Ltd* [2000] 1 HKC 390, at 395A-E.

<sup>3</sup> There are two principal types of winding-up in Hong Kong, namely, voluntary winding-up (which consists of members’ voluntary winding-up and creditors’ voluntary winding-up) and compulsory winding-up by the Hong Kong Court (which is commenced by presentation of a winding-up petition and may be followed by an application for appointment of provisional liquidators to safeguard the assets of the company). Hong Kong currently does not have any formal insolvency proceedings aimed at rescuing companies which may be found in some other common law jurisdictions (such as administration in England and Wales, Chapter 11 procedures in the United States) (see Paragraph 7 below).

**b. Are disputes in arbitration or subject to an arbitration agreement covered by the *vis attractiva concursus*?**

2. Insolvency legislation in Hong Kong has no express rules on “*vis attractiva concursus*”. However, given the automatic stay of proceedings against the insolvent debtor (see Paragraph 1 above) and the statutory regime on determining claims by way of proof of debts (see generally Paragraphs 11, 16 and 32 below), the effect of insolvency legislation (insofar it concerns compulsory winding-up by Court<sup>4</sup>) is that all claims against the insolvent debtor should be resolved by the liquidator after the winding-up order is made. Notably, whether a creditor may commence or continue any arbitration against the insolvent debtor is subject to the Court’s discretion (see Paragraph 11 below).

**3. What are the effects (if any) of the opening of insolvency proceedings in Hong Kong on the possibility to commence or continue arbitration proceedings?**

In answering this question, please address separately each of the following points:

**a. Does the law draw any distinction between arbitration proceedings where the insolvent party acts as defendant and as claimant?**

3. Yes, the law draws a distinction between arbitration proceedings where the insolvent party acts as defendant and as claimant. Sections 181 and 186 of CWUO (as mentioned in Paragraph 1 above) only deal with proceedings *against* an insolvent party. If the insolvent party is the claimant, these sections do not apply. The insolvent party, or the liquidator or provisional liquidator appointed over it (as the case may be), may consider using arbitration to pursue the claim.

**b. Does the law draw any distinction between insolvency proceedings aimed at the liquidation of the company and proceedings aimed at the financial restructuring or rehabilitation of the company?**

4. No, other than schemes of arrangement under Section 673 of the Companies Ordinance (Chapter 622)<sup>5</sup>, Hong Kong currently does not have any separate proceedings aimed at the financial restructuring or rehabilitation of insolvent companies.

**c. Does the law draw any distinction based on the subject matter or relief sought in the arbitration?**

<sup>4</sup> Please refer to footnote 3 for further details about the modes of winding-up in Hong Kong.

<sup>5</sup> For the full text of the section, see <[https://www.elegislation.gov.hk/hk/cap622!en@2021-08-23T00:00:00?INDEX\\_CS=N&xpid=ID\\_1438403547638\\_001](https://www.elegislation.gov.hk/hk/cap622!en@2021-08-23T00:00:00?INDEX_CS=N&xpid=ID_1438403547638_001)> accessed 29 December 2023.

5. No.

**d. Do these effects (if any) also extend to pre-insolvency proceedings or restructuring proceedings which do not require a declaration of insolvency?**

6. No, there are no such pre-insolvency proceedings or restructuring proceedings in Hong Kong.

**e. Does the law draw any distinction between arbitration proceedings which are pending at the time of the opening of insolvency proceedings and arbitration proceedings which commence after the opening of insolvency proceedings?**

7. The automatic stay of proceedings referred to in Paragraph 1 above applies equally to both arbitration proceedings which are pending at the time of the opening of insolvency proceedings and arbitration proceedings which commence after the opening of insolvency proceedings. However, the stage of the arbitration proceedings may be relevant when the Court decides whether to lift the stay. Please see Paragraph 11 below.

**f. Does the law regulating the effect of insolvency on arbitration make any distinction between voluntary and compulsory insolvency proceedings?**

8. Yes. Section 186 of the CWUO does not apply to a voluntary insolvency proceeding. A liquidator in a voluntary liquidation may apply to the court under Section 255 of the CWUO to seek a discretionary stay of the arbitration proceedings.

**g. Do those effects intend to apply extraterritorially, ie, to every arbitration regardless of the location of the seat in Hong Kong or abroad?**

9. Sections 181 and 186 of the CWUO have no extra-territorial effect. These provisions are modelled after Sections 172 and 177 of the Companies Act, 1929 (UK) respectively, which have been held in England to have no application to proceedings in a foreign court.<sup>6</sup> The Hong Kong Court would be likely to interpret these provisions in the same manner.

**h. When do the effects (if any) of insolvency on arbitration become operative (eg, from the time of the opening of insolvency proceedings, the declaration by the court, its publication or service of process through other means on the affected parties or even the arbitrators, etc.)?**

<sup>6</sup> See *Re Vocalion (Foreign) Ltd* [1932] 2 Chapter 196, at 200-204.

10. Section 186 of the CWUO takes effect when the court makes a winding-up order or appoints a provisional liquidator. Section 181 of the CWUO has no automatic effect on an arbitration; it only affects an arbitration if a court makes an order under this section to stay the proceeding.

**4. Does the law of the jurisdiction permit relief from the effects above? If so, what procedures must be followed in order to proceed with an arbitration?**

- a. Can an interested party seek to intervene in the insolvency proceeding in order to proceed with arbitration?
- b. What considerations will the insolvency court take into account in making the decision of whether to send the matter to arbitration?

11. The court may lift the stay imposed by Section 186 of the CWUO (as referred to in Paragraph 1 above). In deciding whether to lift the stay, the court's main consideration is whether lifting the stay would be in the best interests of creditors as a group. The court would consider if the matter can be conveniently decided in the course of the winding up, with savings in time and cost. Where an arbitration is the most convenient method of trying a dispute, especially when the dispute involves substantial/complex issues of facts and law, the arbitral proceeding will generally be allowed to be commenced or continued.<sup>7</sup> Hence, in *Union Charm Development Ltd. v. B+ B Construction Co Ltd*, the court granted leave for an arbitration proceeding against the insolvent company to continue, on the basis the claim in the arbitration (which was valued at approximately \$1.1 billion and involved allegations of defects in certain piling works undertaken by the company in respect of a substantial development) was technically complex, and that in the absence of professional expertise in building construction, the liquidators could not speedily and relatively inexpensively deal with the claim by way of proof of debt. The court also took into account the fact that the arbitration proceeding was at a mature stage in granting leave for the application.<sup>8</sup> Further, leave is more likely to be granted where the company in liquidation is insured in respect of the claim made against it, as the legal costs will be funded by an insurance company. If leave is granted, the claimant may be required to give an undertaking to the court not to enforce any award obtained against the company without the leave of the court<sup>9</sup>.

**5. Can the insolvency courts give an order to stop arbitration proceedings (eg, an anti-arbitration injunction)? If so, does it depend on the seat of the arbitration being in the jurisdiction or abroad?**

12. An anti-arbitration injunction is possible where the seat of the arbitration is abroad. It is established that Hong Kong courts have the inherent jurisdiction to grant anti-suit injunctions

<sup>7</sup> See *Re B+B Construction Co. Ltd.* [2003] HKCU 406, at [4]-[8].

<sup>8</sup> *Union Charm Development Ltd. v. B+ B Construction Co Ltd* [2001] HKCU 536.

<sup>9</sup> See in *Re King's Dyeing & Weaving Factory Ltd (No 2)* [1986] HKC 621.

to restrain foreign proceedings against an insolvent company which has been wound up. While there is no direct case authority, there is no reason why, in principle, the court cannot similarly exercise jurisdiction to grant anti-arbitration injunctions to restrain a person from commencing, or continuing to pursue, arbitration against an insolvent company, regardless of the location of the seat of the arbitration. For the insolvency court's power to stay Hong Kong seated arbitration proceedings, please refer to Paragraph 1 above.

**6. Can the insolvency administrator or the insolvency court terminate or suspend the effectiveness of contracts that contain arbitration agreements concluded by the insolvent party before the opening of insolvency proceedings? If so, on what basis?**

13. The insolvency administrator's right to apply to the court to terminate contracts derives from the general insolvency law, e.g., disclaimer of onerous contracts<sup>10</sup> and avoidance of antecedent transactions (such as transactions at an undervalue,<sup>11</sup> unfair preferences,<sup>12</sup> and transactions to defraud creditors.)<sup>13</sup> The insolvency administrator may exercise these rights whether or not the relevant contracts contain an arbitration clause.

**7. What is the effect (if any) on the arbitration agreement of the decision of the insolvency administrator or insolvency court to terminate/disclaim the contract that contains such arbitration agreement?**

14. The arbitration agreement is likely to become unenforceable on policy grounds following the disclaimer or termination (see explanation set out in Paragraph 17 below).

**8. Can the insolvency administrator or the insolvency court terminate or suspend the effectiveness of arbitration agreements themselves? If so, on what basis? What is the effect**

<sup>10</sup> Under Section 268 of the CWUMPO, the Hong Kong Court may grant leave to liquidators to disclaim "onerous property" (including "unprofitable contracts") within 12 months after the commencement of the winding up.

<sup>11</sup> Under Section 265D of the CWUMPO, if a company goes into liquidation and the company has, at a time in the period of 5 years ending with the day on which the winding up of the company commences, entered into a transaction with any person at an undervalue, the liquidator may apply to the court for an order to restore the position to what it would have been if the company had not entered into that transaction.

<sup>12</sup> In very brief terms, "unfair preference" arises when an insolvent company does anything which has the effect of putting a creditor into a position which, in the event of the company going into insolvent liquidation, will be better than the position that creditor would have been in if that thing had not been done. Section 266 of CWUMPO allows a liquidator to apply to the court for an order to restore the position to what it would have been if the company had not given that unfair preference.

<sup>13</sup> Under Section 60 of Conveyancing and Property Ordinance (Cap. 219), dispositions of property made with intent to defraud creditors is voidable, at the instance of any person thereby prejudiced. For the full text of the section, see <[https://www.elegislation.gov.hk/hk/cap219?xid=ID\\_1438402847090\\_002](https://www.elegislation.gov.hk/hk/cap219?xid=ID_1438402847090_002)> accessed 29 December 2023.

**of such decision on pending arbitration proceedings derived from the arbitration agreement in question?**

15. No, but see Paragraphs 13 and 14 above.

**9. Does the insolvency regime require the alleged creditor to take any step in the insolvency process to be able to commence or continue with the arbitration (eg, file the claim within the insolvency proceedings for verification/registration/proof)?**

- a. **If an alleged creditor files its claim with the insolvency proceedings and the claim is refused, does the existence of an arbitration agreement mean that an arbitral tribunal would have jurisdiction to decide on the existence and amount of the claim, so that it can be eventually submitted to the insolvency proceedings?**
- b. **Does the filing of the claim with the insolvency proceedings amount to a submission of the jurisdiction of the insolvency court and a waiver of the arbitration agreement?**

16. No, but leave of the court will be needed to commence or continue with the arbitration (see Paragraph 1 above). If an alleged creditor files its claim with the insolvency proceedings and the claim is refused, the creditor's remedy is to appeal to the court under Rule 95 of the Companies (Winding-up) Rules (Cap 32H),<sup>14</sup> which provides that: "If a creditor or contributory is dissatisfied with the decision of the liquidator in respect of a proof, the court may, on the application of the creditor or contributory, reverse or vary the decision." It might be possible for a creditor-petitioner to refer a liquidator's rejection of a proof of debt to arbitration. In a recent judgment delivered in *Dayang (HK) Marine Shipping Co., Ltd v. Asia Master Logistics Ltd*, Deputy High Court Judge William Wong SC commented (in obiter) that: "... it might be possible for a creditor-petitioner to refer a liquidator's rejection of a proof of debt to arbitration. Whilst the point remains untested in Hong Kong, the High Court of Australia had held in *Tanning Research Laboratories v O'Brien* (1990) 169 CLR 332 that a liquidator could be bound by an arbitration clause between the debtor-company and the creditor-petitioner insofar as the liquidator's rejection of proof is based on the general law (at pp. 342-343 per Brennan and Dawson JJ). This is because the liquidator who defends his decision to reject a proof is no longer acting in a quasi-judicial capacity but is cast in the role of an adversary in defending the assets available for distribution (at pp. 342-343 per Brennan and Dawson JJ)."<sup>15</sup>

**10. In the event of a contract concluded by the insolvent party and a creditor prior to the opening of the insolvency proceedings, is an arbitration agreement contained in that contract enforceable in relation to an action commenced by the insolvency administrator to**

<sup>14</sup> For the full text of the rule, see <[https://www.elegislation.gov.hk/hk/cap32H?xid=ID\\_1438403008036\\_003](https://www.elegislation.gov.hk/hk/cap32H?xid=ID_1438403008036_003)> accessed 29 December 2023.

<sup>15</sup> *Dayang (HK) Marine Shipping Co., Ltd v. Asia Master Logistics Ltd* [2020] HKCU 494 at [78].

**avoid that transaction based on grounds provided by insolvency law (insolvency *actio pauliana* or setting aside action)?**

17. There is no case law, but the general view is that disputes arising out of or subject to the operation of the statutory provisions of the insolvency regime (such as avoidance of antecedent transactions) are not arbitrable. There may be a strong policy ground not to uphold a private arrangement on dispute resolution in view of the substantive rights of the body of creditors as a whole that arise in the context of an insolvency regime.<sup>16</sup>

**11. Can the insolvency administrator conclude new arbitration agreements after the opening of insolvency proceedings?**

18. Yes. Schedule 25 to the CWUO lists out the powers a liquidator may exercise (subject to sanctions by the court or the committee of inspection in appropriate cases, as required under Section 199 of the CWUO), including for example, selling real and personal property of the company in winding-up by public auction or private contract, appointing an agent to do any business that the liquidator is unable to do in person, and employing a solicitor to assist with performing the liquidator's duties. It is possible for the liquidator to conclude new arbitration agreements in exercising these powers.

**12. Do the effects of insolvency on arbitration (if any) operate after a creditors' arrangement has been agreed and approved by the competent authority?**

19. Yes, the effects of insolvency on arbitration (as described in Paragraph 1 above) would continue to apply unless a permanent stay of the winding-up of the company is sought and granted afterwards. Such a stay is often applied for in pursuance of a scheme of arrangement sanctioned by the court. Once a permanent stay of the winding up is granted, the winding-up proceedings would effectively be put to an end, and the stay would no longer apply.

**13. Are any or all the rules regulating the effects of insolvency on arbitration mandatory? That is, can an agreement between the insolvent party and one or more of its creditors (eg, the parties to the arbitration) exclude the application of those rules?**

20. The effects of insolvency are mandatory. It is established that an insolvent party cannot contract with some of its creditors for the non-application of certain insolvency rules.<sup>17</sup>

<sup>16</sup> See Ma, *Arbitration in Hong Kong: a Practical Guide* (4th edn, Sweet & Maxwell, 2017) at 20.064.

<sup>17</sup> See, for example, *Peregrine Investments Holdings Ltd (in Liquidation) v. Asian Infrastructure Fund Management Co Ltd* L.D.C. [2004] 1 HKLRD 598, at 27.



**14. Are arbitrators seated in the jurisdiction bound by the rules discussed above in considering whether to proceed with an arbitration?**

21. Yes.

**15. Does the court's personal jurisdiction over the party to the arbitration that is *not* in insolvency make any difference with respect to the effectiveness of the insolvency court's position on the arbitration?**

22. No.

**Part II: Considerations with Respect to the Arbitration Proceeding Where a Party Is Subject to Insolvency Proceedings**

**16. Will the insolvency administrator take part in the arbitration exclusively or will the insolvent party in some instances continue to have procedural capacity to participate in the arbitration in its own name (debtor in possession)?**

- a. **If the insolvency administrator takes part in the arbitration, does she step into the shoes of (i.e., replace) the insolvent party or can the insolvent party continue to appear in its own name? [in the latter option, what are the roles of the insolvency administrator and the insolvent debtor?]**

23. The liquidator, who acts as an agent of the insolvent party, may, with the sanction of the court or the committee of inspection, bring or defend arbitrations in the name and on behalf of the insolvent party. In the event the stay is lifted with the leave of the Court, the liquidator would require the sanction of either the Court or the committee of inspection to continue with arbitration proceedings and to take part in arbitration in the name of the insolvent party (pursuant to Section 199 of the CWUO and Part 2 of Schedule 25 of CWUO).

**17. Do the considerations of confidentiality that apply in a non-insolvency scenario vary as a consequence of the opening of insolvency proceedings against one of the parties to the arbitration? For instance, are there any restrictions on the information that the insolvency administrator can share with the insolvency court or with the creditors in the insolvency concerning the conduct, status or content of the arbitration? Or can the creditors appear in the arbitration as parties interested in the outcome of the proceedings?**

24. The insolvency administrator is an officer of the court and has a duty to share information with the court concerning the insolvency proceedings. The insolvency administrator may have to share information with creditors from time to time, especially when the creditors' committee's approval is needed. Creditors may not appear in the arbitration merely as interested parties.

Disclosure in such instances should not contravene the duty of confidentiality, as Section 18 of the Arbitration Ordinance (Chapter 609) (“AO”)<sup>18</sup> stipulates that disclosure of information relating to arbitral proceedings or awards made in arbitral proceedings is permissible if such disclosure is made to (1) protect or pursue a legal right or interest of the party, or to enforce or challenge the award, in legal proceedings before a court; or (2) governmental, regulatory body, court or tribunal, in accordance with obligations imposed under the law.

**18. Does the name of a party change as a consequence of the opening of insolvency proceedings over it?**

25. No, but every invoice, order for goods, or business letter issued by or on behalf of the company being wound up, being a document on or in which the name of the company appears, must contain a statement that the company is being wound up. Conventionally, the term “in liquidation” or “in voluntary liquidation” would be inserted after the company’s name.

**19. Is the insolvency administrator (or the debtor in possession) empowered to reach a settlement in the arbitration, or is the insolvency court required to authorise any settlement for it to be effective?**

26. Settlement has to be approved by the court or the committee of inspection (if there is one). In deciding whether or not to sanction a proposed settlement, the court must consider whether the interests of creditors or contributories are likely to be best served (i) by permitting the company to enter into that compromise with all the terms that it contains; or (ii) by not permitting the company to enter into that compromise. Obvious considerations that are to be taken into account by the court include the strengths of a claim, prospects of recovery, and a company’s ability to finance either the prosecution or defence of legal proceedings.

**20. Can an arbitral tribunal adopt interim measures concerning a party subject to insolvency proceedings?**

27. Yes, assuming the arbitration does not violate the stay mentioned in Paragraph 1 above. It should be noted that, under Section 61 of AO, any order for interim measures granted, whether in or outside Hong Kong, is enforceable in the same manner as an order or direction of the court that has the same effect but only with the leave of the court.

<sup>18</sup> For the full text of the section, see <[https://www.elegislation.gov.hk/hk/cap609?xid=ID\\_1438403520930\\_004](https://www.elegislation.gov.hk/hk/cap609?xid=ID_1438403520930_004)> accessed 29 December 2023.

**21. Does the opening of insolvency proceedings in Hong Kong affect the validity of interim measures adopted against the insolvent party by an arbitral tribunal prior to the opening of the insolvency proceedings?**

28. The presentation of a petition against an insolvent party would not affect the validity of interim measures adopted against it. However, if the arbitration is stayed and cannot continue (see Paragraph 1 above), the interim measures must lapse. Even if the arbitration is permitted to continue, the interim measures cannot interfere with the liquidator's functions (to, for example, take custody of the insolvent party's assets), and once a liquidator has taken control of the insolvent party, the interim measures may no longer serve any purpose.

**22. Is the capacity of the insolvent party to settle the dispute in the arbitration affected by the opening of insolvency proceedings in the jurisdiction?**

29. Yes. After a compulsory winding-up order has been made, any disposition of the insolvent party's property (including any payments out) in the period between presentation of a winding-up petition and the making of the winding-up order will, unless the court makes a validation order, be void under Section 182 of the CWUO. If there is a question regarding the solvency of the company, the court will generally only validate dispositions which are in the interests of the general body of the creditors of the company, such as profitable transactions. Further, during the winding-up process, any settlement negotiated by the insolvency administrator on behalf of the insolvent party would be subject to the sanction of the court or committee of inspection (see Paragraph 26 above).

### **Part III: Ability to Enforce an Arbitration Award in Insolvency Proceedings**

**23. Does the opening of insolvency trigger a general prohibition of individual enforcement actions by creditors against the insolvent estate?<sup>19</sup>**

30. Yes. See Paragraph 1 above.

**24. What is the status of a claim that is being pursued in arbitration but has not yet reached a final award? Will that claim be converted to a different status once the arbitration award has been rendered and/or becomes enforceable?**

31. It is a contingent debt. Section 263 of the CWUO provides "In every winding up . . . all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the

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<sup>19</sup> The expression "individual enforcement actions" refers to actions commenced outside of the insolvency proceedings for the enforcement of a credit.

company, a just estimate being made, so far as possible, of the value of such debts or claims as may be subject to any contingency or sound only in damages, or for some other reason do not bear a certain value". A claim being pursued in arbitration would therefore be admissible to proof against the insolvent party in a liquidation process.<sup>20</sup> If the claimant/creditor were to put in a proof based on claims "sounding in damages only" (i.e., unliquidated claims), the liquidator would then have to make a "just estimate, so far as possible" of the value of the claims. In adjudicating a proof of debt, the liquidator is under a duty to "go behind a judgment" and is not stopped from disclaiming liability to pay an award creditor (in whole or in part), even if the proof of debt had arisen from an arbitral award against the debtor-company. In so doing, the liquidator is acting in a quasi-judicial capacity. The liquidator will have to assess *de novo* whether to accept such proof of debt. In particular, the liquidator must be satisfied that there is adequate evidence that the debt on which the proof is based exists. Unless and until set aside by way of an appeal to the court, the decisions of the liquidator in rejecting a proof of debt are binding for all purposes.<sup>21</sup> Regarding the possibility of a creditor referring a liquidator's rejection of a proof of debt to arbitration, please refer to Paragraph 16 above. Proven debts in the same class would be discharged on a *pari passu* basis (after all claims against the insolvent debtor have been proved and adjudicated), out of the assets of the insolvent party that are available for distribution.

**25. Is a credit contained in an arbitration award a valid proof of credit (ie, valid title) for the purposes of the insolvency proceedings? If it is a foreign award, will it need to be recognised under the New York Convention for it to be accepted or is there any other requirement that needs to be satisfied?**

32. It is provable debt, although the arbitration award is not conclusive, as discussed in Paragraph 31 above. There is no formal requirement that foreign awards should first be recognised in Hong Kong for proof of debt purposes in the insolvency proceedings. As mentioned in Paragraph 31 above, an insolvent party's liability to pay any creditor is a matter for the liquidator's determination, and it is possible for the liquidator to reject any proof of debt (in whole or in part), even if it was made on the basis of an arbitral award, and regardless of whether the arbitral award is recognised under the New York Convention.

**26. Are any or all the rules regulating the effect of insolvency on arbitration considered part of public policy?**

33. Yes. For example, the rationale or policy behind Section 186 of the CWUO, which provides for a general stay upon the making of a winding-up order, is to maintain equality amongst creditors

<sup>20</sup> It should be noted that where the insolvent party is undergoing insolvency proceedings, all proceedings that are already on foot against the insolvent party will be automatically stayed, unless the Court grants leave for such proceedings to continue (see Paragraphs 1 and 11 above).

<sup>21</sup> *Dayang (HK) Marine Shipping Co., Ltd v. Asia Master Logistics Ltd* [2020] HKCU 494 at [76]-[77].

and prevent waste of company assets in litigation or arbitration. The statutory scheme for determining proofs of debt, supported by Section 186 (mandatory stay of proceedings), is considered to be a more convenient, more cost-effective, and less time-consuming way of dealing with potentially competing claims against a wound-up company.

**27. Is the principle of *par conditio creditorum* part of public policy? If so, is public policy linked to the equal treatment of creditors from a substantive point of view (ie, proportion of their credit that is satisfied in the insolvency process) or does it extend to the equal treatment of creditors from a procedural point of view (eg, prohibiting individual proceedings [eg, arbitration] outside the insolvency process)?<sup>22</sup>**

34. Yes, Hong Kong embraces the principle of equal treatment of creditors from both procedural and substantive points of view. This can be seen, for example, in the rules providing for *pari passu* distribution of the insolvent party's assets among creditors of the same class, as well as the test as to whether or not the court should grant leave under Section 186 of the CWUO (Please see Paragraphs 11 and 33 above).

**28. Are there any other provisions or case law of Hong Kong concerning the effect of national insolvency on arbitration that have not been mentioned in the previous answers?**

35. No.

## **IMPACT OF FOREIGN INSOLVENCY ON ARBITRATION SEATED IN NATIONAL JURISDICTION**

**[These questions focus on the effects that foreign insolvency proceedings produce on arbitration seated in Hong Kong concerning the insolvent party]**

**29. Do foreign insolvency proceedings need to be recognised under any formal procedure to produce effects in Hong Kong?**

Yes. Hong Kong's insolvency legislation contains no provisions dealing with cross-border insolvency. However, at common law, the court has power to recognise and grant assistance to foreign insolvency proceedings. The Hong Kong Companies Court may, pursuant to a letter of request from a foreign jurisdiction with a similar substantive insolvency law, make an order

<sup>22</sup> If the equality of creditors is part of public policy only from a substantive point of view, an award rendered by a foreign arbitral tribunal despite the prohibition of arbitration might still be effective in the insolvency proceedings because the award creditor will still abide by the *pari passu* distribution in insolvency. If, on the contrary, the public policy consideration of equality of creditors also extends to its procedural dimension, ie, every creditor should have its claim decided under the same procedure, an award rendered in breach/disregard of such procedures might not be effective in the insolvency proceedings.

of a type, which is available to a provisional liquidator or liquidator under Hong Kong’s insolvency regime.<sup>23</sup>

36. On 14 May 2021, the Supreme People’s Court and the Government of Hong Kong reached a consensus in relation to mutual recognition of and assistance to insolvency proceedings between the courts of the Mainland and of Hong Kong (“**Cooperation Mechanism**”) and published (among other things) the “Record of Meeting of the Supreme People’s Court and the Government of the Hong Kong Special Administrative Region on Mutual Recognition of and Assistance to Bankruptcy (Insolvency) Proceedings between the Courts of the Mainland and of the Hong Kong Special Administrative Region” (“**Record of Meeting**”).
37. The Cooperation Mechanism creates a framework for mutual recognition of and assistance to insolvency proceedings between the courts of Hong Kong and certain pilot regions in Mainland China (being Shanghai, Xiamen and Shenzhen (the “**Pilot Areas**”)) and prescribes the manner in which an application is to be made. However, the jurisdiction of the relevant court to seek recognition and assistance is still governed by existing laws. As far as the Hong Kong court is concerned, the jurisdiction to recognise and assist office-holders appointed by a court of another jurisdiction is to be found in common law.<sup>24</sup>
38. It has recently been confirmed in Linda Chan J’s judgment in *Re Guangdong Overseas Construction Cooperation Corporation* that a Mainland Chinese court outside of the Pilot Areas could initiate a request for assistance to the Hong Kong courts.<sup>25</sup>

**30. Has the jurisdiction adopted legislation implementing the UNCITRAL Model Law on Cross-Border Insolvency? If so, does that legislation adopt the Model Law in full, or does it amend any provision of the Model Law related to the effect of insolvency on arbitration?**

39. The UNCITRAL Model Law on Cross-Border Insolvency has not been adopted in Hong Kong.

**31. Does the opening of insolvency proceedings outside of the territory of Hong Kong produce any effect on arbitrations seated in jurisdiction? What is the source of the rule or legislation providing for such effects?**

40. As a matter of Hong Kong insolvency law, the opening of foreign insolvency proceedings against a party in a Hong Kong-seated arbitration would not produce any effect on the arbitration proceeding itself, unless and until the foreign insolvency proceedings have been recognised at common law in Hong Kong. Upon the foreign insolvency proceedings being recognised, the court may grant assistance to the foreign officeholders by applying Hong Kong insolvency law. The form of assistance may include a stay on specific arbitration proceedings seated in Hong

<sup>23</sup> See *Joint Official Liquidators of A Company v B & C* [2014] 5 HKC 152, at 157B-160A.

<sup>24</sup> See *Re Guangdong Overseas Construction Cooperation Corporation* [2023] HKCFI 1340, at 16.

<sup>25</sup> See *Re Guangdong Overseas Construction Cooperation Corporation* [2023] HKCFI 1340, at 18 to 22.

Kong. The foreign officeholders' application for a stay will need to be considered on a case-by-case basis.<sup>26</sup>

**32. Are arbitrators seated in the jurisdiction required to take into account the rules on recognition of foreign insolvencies (if any) to evaluate the effects of such insolvencies in the arbitration, as described in the previous question?**

41. Yes.

**33. Are the rules that regulate the effects on arbitration of foreign insolvency proceedings of mandatory application for arbitral tribunals seated in the jurisdiction?**

42. Yes.

**34. Will an award which does not respect the effects of insolvency provided by the relevant regime in the jurisdiction be set aside?**

43. That is possible (see, for example, the scenarios set out in Paragraphs 14 and 17 above), although there is no relevant case law in Hong Kong.

**35. Are there any other provisions or case law concerning the effect of foreign insolvency on arbitration seated that have not been mentioned in the previous answers?**

44. No.

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<sup>26</sup> See *Re The Joint and Several Provisional Liquidators of FDG Electric Vehicles Limited (Provisional Liquidators Appointed)* [2020] 5 HKLRD 701, at [7] to [10] and *Nuoxi Capital Ltd (in Liquidation in the British Virgin Islands) v. Peking University Founder Group Co Ltd* [2021] HKCFI 3817 at [15] and [69(3)].