Such guidelines, and informal workouts generally, are particularly significant because there is no formal, moratorium-based statutory corporate rescue mechanism in Hong Kong. Later in this *Manual*, the proposals for a statutory corporate rescue mechanism, termed 'provisional supervision', contained in the Companies (Corporate Rescue) Bill 2001 (Hong Kong Government Gazette 2001, Legal Supplement No 3, C 615, 18 May 2001) will be commented on.[7] At the time of preparation of this edition, the Government is (again) actively working towards the re-introduction of provisional supervision but with a more balanced approach to the protection of employees' interests. In the meantime, since 2002, IPs and the courts have demonstrated their flexibility by using, in appropriate circumstances, provisional liquidation, often in conjunction with schemes of arrangement, as a mechanism to facilitate corporate restructurings. This development demonstrates two points: (1) it supports earlier observations concerning the increasing role of private sector IPs in Hong Kong and (2) it shows that in the absence of legislative reform, significant changes to the liquidation procedures can only proceed so far before running into judicial resistance.[8]

1.3 The Insolvency Regime in Hong Kong

1.3.1 Overview

The affairs of insolvent companies in Hong Kong are dealt with under the provisions of C(WUMP)O and the Bankruptcy Ordinance (Cap 6) ('BO'). Given that the BO applies to personal insolvency, it is appropriate to explain why the BO is part of the regime for dealing with insolvent companies. Although the two ordinances are separate pieces of legislation, over the years the legal draftsmen within the Department of Justice, whose role is to draft legislation for consideration by LegCo, have on numerous occasions drafted amendments to legislation by cross-referring parts of the Former CO, or C(WUMP)O, as the case may be, to the BO.

One example of this was in relation to the changes introduced in 1998 to the provisions relating to unfair preferences in respect of insolvent companies. In C(WUMP)O, s 266B makes reference to a liquidator being able to go back up to two years to review a transaction if it involves a person who was an associate. However, there was no definition of 'associate' in C(WUMP)O. The definition of who is an associate is contained in s 51B of the BO. Therefore, C(WUMP)O borrowed the definition of

7 See Chapter 12.5.
8 See Chapter 12.4.

associate from the BO through C(WUMP)O, s 266B – see the emphasised phrase below:

> (1) On and after the day section 36 of the Bankruptcy (Amendment) Ordinance 1996 (76 of 1996) (the 'amending Ordinance') comes into operation, where the winding up of a company commences on or after that date–
>
> (a) a reference in section 266 or 266A of this Ordinance to a fraudulent preference shall be deemed to be a reference to an unfair preference as provided for in section 50; and
>
> (b) a reference in section 266 of this Ordinance to a period of 6 months shall be deemed to be a reference to a period of–
>
> (i) 6 months; or
>
> (ii) 2 years in the case of **a person who is an associate as provided for in section 51B of the Bankruptcy Ordinance (Cap 6)** (the 'principal Ordinance'). [Emphasis added]

For more details of the problems caused by using the definition of an individual in the personal insolvency context (bankruptcy) in the corporate insolvency context (liquidation), see Chapter 8.2.7.

This *lacuna*, or missing piece, was resolved by the amendments to C(WUMP)O by the 2016 Amendment Ordinance, referred to above, which removed the current cross references to the BO in C(WUMP)O and placed the definition of associate and unfair preference, relevant time etc in C(WUMP)O.

Since bankruptcy law was well developed in English law long before the development of the limited liability company, it is not surprising that there are a number of other interactions between C(WUMP)O and the BO, including in the areas of proofs of debt and meetings of creditors. See, for example, s 264 (Chapter 10.1).

1.3.2 Hong Kong Judiciary

The Court of First Instance ('CFI') deals with all corporate insolvency matters. They are not dealt with by the District Court. One of the judges of the CFI is from time to time designated the Companies Judge (currently Mr Justice Harris). Appeals from decisions by the CFI go firstly to the Court of Appeal, which usually has three judges. Any further appeal lies with the Court of Final Appeal where matters are heard by five judges. At present, the majority of applications to the CFI are heard by the Companies Judge or another CFI judge doing civil work. Many subsidiary applications are heard by Masters (Registrars of the CFI) whose decisions may be appealed, usually to the CFI.

1.4 Types of Winding Up

(a) Liquidation under a court order (called a compulsory liquidation); or

(b) Voluntary liquidation; ie the shareholders/members resolve to wind up the company (or, less frequently, the directors put the company into liquidation under C(WUMP)O, s 228A) rather than liquidation being forced on the company by a creditor. For its part, a voluntary liquidation can be either:

(i) a members' voluntary liquidation ('MVL'), where directors sign a certificate as to the solvency of the company; or
(ii) a creditors' voluntary liquidation ('CVL'), where they do not.

Note: The following chapters deal with the winding up of commercial companies in general; in cases where banks, insurance companies, or other financial institutions are being wound up, additional statutory provisions may also apply. These provisions can be found in the relevant regulatory legislation, such as the Banking Ordinance (Cap 155) in the case of a bank.[9]

1.5 Dissolution

1.5.1 Dissolution after winding up

There are various provisions in C(WUMP)O dealing with the dissolution of a company, which has been wound up and where the administration of the estate of the company has been completed. In the case of a compulsory winding up, dissolution may occur either without a court order or with a court order. Dissolution after a compulsory winding up without a court order occurs where the affairs of the company have been completely wound up and the liquidator has been granted his release by the court under s 205 and the Official Receiver or the liquidator has delivered a certificate in the specified form (NW 6) to the Registrar of Companies. The Registrar shall forthwith register the certificate and, on the expiration of 2 years from the registration (or such later date as the court may determine), the company shall be dissolved (s 226A). Dissolution after a compulsory winding up with a court order obtained on the application of the liquidator occurs under s 227 where the affairs of the company have been fully wound up and the distribution takes place from the date of the court order. Dissolution in the case of a members' voluntary winding up occurs after the affairs

9 For further details, see Booth, Charles D, 'When Government Intervenes: Winding Up Fraudulent Companies in Hong Kong' (1999) 29 *Hong Kong Law Journal* 368.

of the company are fully wound up, the final meeting has been held, the liquidator has sent to the Registrar of Companies a copy of an account of the winding up and a return as to the meeting, and the Registrar has registered the account and the return. The company will then be dissolved on the expiration of 3 months from the registration (s 239). In the case of a creditors' voluntary winding up there is an equivalent process under s 248.

Where a company is being wound up, if the Registrar of Companies has reasonable cause to believe that no liquidator or provisional liquidator is acting or that the company's affairs are fully wound up and the returns required to be made by the liquidator or provisional liquidator have not been made for 6 consecutive months, the Registrar, after a specified procedure (which involves publishing a notice in the Gazette and, where appropriate, sending a notice to the company) may strike the company's name off the Companies Register and upon publication of the striking off in the Gazette, the company is dissolved (CO, s 747).

The Companies Registry website no longer provides a breakdown of the dissolutions by reference to the relevant section, but in 2016 there were 1,080 dissolutions following liquidation, and 1,241 in 2017.

Section 290 of C(WUMP)O gives the court power to declare the dissolution of a company void where the company has been dissolved under ss 226A, 227, 239, and 248. The application must be made within 2 years of the date of the dissolution or such extended time as is permitted by the court under s 290(1A) (an order for restoration is called a 'Lazarus order').[10]

1.5.2 Dissolution without winding up

There may be dissolution of a company under the CO without it being wound up.

(a) Under CO, s 746, the Registrar of the Companies may strike a company's name from the Companies Register, after which it is dissolved. The Registrar may do this if the Registrar has reasonable cause to believe that a company is not in operation or carrying on business (and additionally the specified procedures laid down in CO, ss 744 and 745 have been followed by the Registrar).

These provisions were derived from s 291 of the Former CO. The Registrar of Companies conducts a continuous

10 For the procedure and Hong Kong cases see the commentary to that section in *Butterworths Hong Kong Company Law (Winding Up and Miscellaneous Provisions) Handbook* (3rd edn, LexisNexis, 2017), paras [290.01] et seq.