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Chinese characteristics and Universalist Insolvency Ideals

Chuyi Wei[1]

Gerard McCormack[2]

Abstract

This paper argues that it is possible for China to adopt the UNCITRAL Model Law on Cross Border Insolvency, as it is a soft law that could be adopted with modifications. It is necessary for China to build a cross-border insolvency framework based on the Model Law as it is now at the heart of the global trading and investment network. Adopting the Model Law can improve certainty, access, and fairness of treatment in the Chinese bankruptcy procedure and encourage both inbound and outbound investments. In particular, such framework will facilitate investments under the Belt and Road Initiative. This paper suggests however, that effective implementation of the Model Law will depend on judicial interpretations of the domestic courts though this can be guided by the Supreme People's Court.

1. Introduction

In this paper we argue that China should adopt the UNCITRAL Model Law on Cross Border Insolvency (MLCBI) and the recently promulgated Model Law on insolvency related judgments (MLIRJ). This will put China first in class thereby leapfrogging India, which is presently considering adoption of the MLCBI[3] and the US which has the MLCBI on its statute books since 2005 but has not yet enacted the MLIRJ. Indeed, no country has yet translated the Judgments Model Law into its domestic law. The Model Law regime(s) is international soft law and States are free to implement it in different ways. Therefore, this gives China ample space to take account of special Chinese characteristics and tailor

[1] Lecturer at Nottingham Law School, Nottingham Trent University; Research Fellow, School of Law, University of Leeds, UK. This article was primarily done while Chuyi Wei was working at the University of Leeds, and then it was revised after Wei moved to join Nottingham Law School.

Email: C.Wei@leeds.ac.uk

[2] Professor, School of Law, University of Leeds, UK, Visiting Professor, University of Vaasa, Finland.

Email: G.McCormack@leeds.ac.uk

[3] *See* "Report of Insolvency Law Committee on Cross Border Insolvency" (October, 2018) available at <https://ibbi.gov.in/webadmin/pdf/whatsnew/2018/Oct/Report%20on%20Cross%20Border%20Insolvency_2018-10-22%2018:55:11.pdf> (visited 13 July 2020).

the adoption to local Chinese conditions.

China is not only integrated into the global economy, but also plays a crucial role in both trade and investment. In particular, the Belt and Road Initiative (BRI) has fostered a substantial flow of outbound foreign direct investment (FDI) from China. In order to give more certainty to investors and Chinese companies that raise funds abroad, there is a need for China to adopt or assimilate the principles contained in the MLCBI into its domestic legal system. In addition, adoption of the MLCBI will give confidence to foreign investors who invest in China and strengthen China's position as a major destination for inbound FDI. Unlike some countries that only adopt the MLCBI as a result of international pressure, China can put such transplanted law into use as there is a real demand.[4]

The Chinese authorities seem to be embracing a more universalist approach and are prepared to enhance cooperation in cross-border insolvency. The Supreme People's Court (SPC) has played a crucial role in facilitating the development of a cross-border insolvency framework. For example, the SPC and National Development and Reform Commission (NDRC) jointly released the Reform Proposal for Speeding Enhancement of the Exit Mechanism for Market Players, which stresses that cross-border insolvency laws will be strengthened[5]. In the 3rd Sino-Singapore Law and Justice Roundtable held on August 28th 2019, Liu Guixiang, a senior judge in the SPC also calls for improvement of cross-border insolvency based on the experience of Singapore as an effort to establish a fair business environment.[6] Furthermore, the newly formed specialised bankruptcy courts and the Chinese International Commercial Court (CICCs) will deal with cross-border insolvency cases and related issues. As these courts are staffed with ''elite'' judges, it is likely that the MLCBI will be effectively enforced once it is adopted. Even if China does not adopt the MLCBI formally, these courts could assimilate principles of the MLCBI and develop a cross-border insolvency framework through

[4] Daniel Berkowitz, Katharina Pistor and Jean-Francois Richard, "The Transplant Effect" (2003) 51 The American journal of comparative law 163 (argues the transplanted law will only be used when it has been adapted to the local conditions or there is a population familiar with its basic legal principles because only under such conditions there is a real demand for the transplanted law).

[5] "Reform Plan for Accelerating Improvement of the Exit System [加快完善市场主体退出制度改革方案]" (2019) <http://www.gov.cn/guowuyuan/2019-07/16/5410058/files/bbaef6612fed4832b70a122b39f1d5bd.pdf> (visited 2 July 2020).

[6] "Liu Guixiang Made a Speech at the 3rd China-Singapore Legal and Judicial Roundtable: Improve the Coordination Mechanism for Cross-Border Insolvency and Create Fairness and Justice [刘贵祥在第三届中新法律和司法圆桌会议上作专题发言表示：完善跨境破产协调机制， 营造公平公正]" (2019) <http://www.court.gov.cn/zixun-xiangqing-179382.html> (visited 7 July 2020).

judicial interpretation.

This paper consists of 6 sections. After this first introductory section, the second section will address the conflicting paradigms of universalism and territorialism and considers how they are reflected in the Model Law regimes. The third section will provide a basic account of these regimes. The fourth section will address the current state of Chinese cross border insolvency law and practice. The fifth section will consider how the current situation might be improved by adoption of the Model law regime as well as how this regime might be modified to bring it closer into line with the situation on the ground in China. Finally, the sixth section concludes.

2. Paradigms for governing cross-border insolvency

In domestic insolvency cases, a seminal explanatory tool is the "common pool" theory which conceptualise insolvency as a governance problem. This theory has in turn shaped the dominant paradigms of universalism and territorialism in cross-border insolvency discourse. According to the ‘‘common pool’’ theory, in the absence of formal insolvency law, creditors might act like self-interested fishermen and the lack of coordinated collective action will exhaust the ‘‘common pool’’ of fish that by analogy, encompasses the debtor's assets.[7] The main function of insolvency law is to facilitate collective action by creditors and to place necessary constraints on their private bargaining.[8] The formal rules can reduce the incentives of individual creditors to ‘‘hold out’’ and therefore prevent the dissipation of assets.

This theory of insolvency law has highlighted the role of the State in facilitating private bargaining. To be specific, the State can facilitate creditor bargaining by threatening to impose other solutions in the absence of private agreements, providing a venue for negotiation and a neutral source of information as well as enforcing and imposing sanctions for default.[9] Private parties can be described as bargaining in the shadow of the law.[10] In the context of cross-border insolvency however, there is no universal,

[7] Thomas H Jackson, ‘‘Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors Bargain’’ (1982) 91 Yale Law Journal 857.

[8] David T Brown, ‘‘Claimholder Incentive Conflicts in Reorganization: The Role of Bankruptcy Law’’ (1989) 2 The Review of Financial Studies 109.

[9] Jane Mansbridge, ‘‘The Role of the State in Governing the Commons’’ (2014) 36 Environmental Science & Policy 8.

[10] Robert H Mnookin and Lewis Kornhauser, ‘‘Bargaining in the Shadow of the Law: The Case of Divorce’’ (1978) 88 Yale lJ

mandatory laws that can be enforced by a world government. National insolvency law operates under the sovereignty of a State and is enforced by the domestic court through its coercive power. As a general proposition, insolvency law does not have extraterritorial effects in the absence of recognition and enforcement by other States.[11]

For cross-border insolvency, two competing, polar opposite, paradigms---universalism and territorialism have been advanced. Universalism is the ideal that there is a unitary administration of assets in the debtor's home country and the insolvency proceeding is governed by a single insolvency law. Under a universalist regime, domestic courts in each country will cooperate and provide recognition and relief in order to give the insolvency proceeding a worldwide effect subject only to public policy restrictions.[12] The polar opposite of universalism is territorialism, which connotes multiple insolvency proceedings in different States where the debtor has an establishment or assets and the domestic court in each State attempts to seize the available assets to satisfy local creditors.[13]

''Universalism'' advocates that the globalisation of investment and trade produces the need for an international insolvency system that is symmetrical to the globalised market and reflects the activities of multinational companies.[14] The argument is that through procedural unity and worldwide effects, universalism can facilitate coordination at a global level, improve value for creditors and increase the chances of rescue for companies that operate globally. On the other hand, if States adopt a territorial approach, a tragedy of commons[15] will occur when creditors initiate multiple legal proceedings and cause premature liquidation and asset dissipation.

The 2008 global financial crisis highlighted the fact that multinational companies are embedded in a ''global risk society'' characterised by a rise of interconnected networks and systemic risk endogenous

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[11] Kent Anderson, ''Testing the Model Soft Law Approach to International Harmonization: A Case-Study Examining the UNCITRAL Model Law on Cross-Border Insolvency'' (2004) 23 Aust. YBIL 1.

[12] Jay Lawrence Westbrook, ''A Global Solution to Multinational Default'' (1999) 98 Mich. L. Rev. 2276; Jay Lawrence Westbrook, ''Chapter 15 at Last'' (2005) 79 Am. Bankr. LJ 713; Lynn M LoPucki, ''Universalism Unravels'' (2005) 79 Am. Bankr. LJ 143; Robert K Rasmussen, ''Where Are All the Transnational Bankruptcies-The Puzzling Case for Universalism'' (2006) 32 Brook. J. Int'l L. 983; .

[13] Lynn M LoPucki, ''The Case for Cooperative Territoriality in International Bankruptcy'' (1999) 98 Mich. L. Rev. 2216.

[14] Westbrook (1998) (n 12 above, p 2277).

[15] Garrett Hardin, ''The Tragedy of the Commons'' (1968) 162 Science 1243.

to these networks.[16] When local short-termism takes over, financial regulation on the global level fails and this results in a worldwide recession.[17] Like in the area of financial regulation, cross-border insolvency requires enhanced cooperation in order to reduce the risk and unpredictability in a globalised economy. Universalism can provide practical tools to solve the collective action problem, overcome localism and coordinate actors at different levels including multinational companies, creditors, insolvency practitioners, national governments, and domestic courts.

Universalism however, is unlikely to be achieved in reality. Universalism allows foreign courts and laws to ''interfere'' with domestic proceedings and gives rise to concerns that it could undermine sovereignty and local priority rules that reflect the distributional value judgments in a particular country. It is also difficult to implement a universalist regime in the absence an international convention and a ''world government''.[18]

For these reasons, versions of ''modified'' universalism, ''diluted'' versions of universalism, have become the pragmatic solution to the global governance of cross-border insolvency. Under this paradigm, a main insolvency proceeding will be opened in the ''home'' country of the debtor, however defined. Main proceedings will then be supplemented by ancillary, or secondary proceedings in other countries. Modified universalism recognises the national interest in protecting sovereignty and does not provide for the unity and universal effects of the main insolvency proceedings. It stresses cooperation but leaves discretion to domestic courts to decide whether to recognise foreign judgments and to provide relief based on due regard for domestic creditors and national policies.[19]

Modified universalism has the advantage of flexibility and recognises the policy differences between countries. It has also been criticised however, for leaving too much discretion to local courts and leading to uncertainty and inefficiency.[20] There are also different versions of ''modified'' universalism.

[16] Ross Levine, ''The Governance of Financial Regulation: Reform Lessons from the Recent Crisis'' (2012) 12 International Review of Finance 39.

[17] Ibid.

[19] Westbrook (2005) (n 12 above, p 716); John AE Pottow,''''Procedural Incrementalism: A Model for InternationalBankruptcy'' (2004) 45 Va. J. Int ' l L. 93; Irit Mevorach,''''Modified Universalism as Customary InternationalLaw'' (2017) 96 Tex. L. Rev. 1403.

[20] Lynn M LoPucki, ''Cooperation in International Bankruptcy: A Post-Universalist Approach'' (1998) 84 Cornell L. Rev. 696.

On the more universalist end of the spectrum lies the EU Insolvency Regulation (EIR) which provides for the automatic recognition of insolvency proceedings opened in one EU Member States in other Member States and also for the recognition and enforcement of insolvency-related judgments; in both cases, subject to a limited public policy exception.[21] More modified in its universalist approach is the Model law regime which conditions recognition etc. on application to local courts; provides more defences against recognition and enforcement and, in doing so, entrusts more discretion to local courts.

Even before the enactment of these ''harmonised'' and Model law regimes, common law courts tended to place reliance on the principle of comity to coordinate and cooperate in cross-border insolvency cases. Comity is a loose concept and often suggests reciprocity.[22] In *Hilton v Guyot*,[23] comity was defined by the US Supreme Court as ''the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.'[24]

The role of comity in cross-border insolvency is most evident in common law jurisdictions where the courts have inherent power to provide assistance to other courts and common law courts have promoted universalism through a wide interpretation of judicial power of assistance.[25] In cases such

[21] The EU Insolvency Regulation (Regulation 848/2015) was enacted in 2000, came into effect in 2002 and amended in 2005. Compared with the Model Law, the EIR is not soft law and is mandatory in nature. It is directly applicable to member states of the EU. It is also more ambitious than the Model Law as it has directly proscribed on conflict of law issues in cross-border insolvency, most notably by providing that both main and non-main insolvency proceedings are automatically recognised in all other members states and the main proceeding will have a universal effect, including the stay of litigation in member states where there are no secondary proceedings. See EIR, articles 16-17; also Gerard McCormack, ''Reconciling European Conflicts and Insolvency Law'' (2014) 15 European Business Organization Law Review 309.

[22] Joel R Paul, ''Comity in International Law'' (1991) 32 Harv. Int'l. LJ 1; Stuart A Krause, Peter Janovsky and Marc A Lebowitz, ''Relief Under Section 304 of the Bankruptcy Code: Clarifying the Principal Role of Comity in Transnational Insolvencies'' (1995) 64 Fordham L. Rev. 2591.

[23] 159 U.S. 113 (1895).

[24] Ibid, at 163-64.

[25] Andrew Godwin, Timothy Howse and Ian Ramsay, ''The Inherent Power of Common Law Courts to Provide Assistance in Cross‐Border Insolvencies: From Comity to Complexity'' (2017) 26 International Insolvency Review 5; Gerard McCormack, ''Universalism in Insolvency Proceedings and the Common Law'' (2012) 32 Oxford Journal of Legal Studies 325.

as *Cambridge Gas*[26] and *Re HIH Insurance*,[27] the UK courts seem to be strong proponents of a universalist approach to cross-order insolvency. In *Re HIH Insurance*, Lord Hoffmann stated that the "primary rule of private international law ...applicable to this case is the principle of universalism, which has been the golden thread running through English cross-border insolvency law since the eighteenth century".[28]

In the US, it has been argued that the courts there already marched to a universalism drumbeat through the principle of comity before the Model Law was formally translated into US law by a new Chapter 15 of the US Bankruptcy Code.[29] But comity and reciprocity are vague and hard to define and therefore, the assistance provided by the courts relying on such notions can be uncertain and inconsistent. Certainly, in the UK there has been a judicial "kick-back" against broad notions of universalism in the common law. In *Rubin,*[30] for example, the UK Supreme Court refused to enforce a US judgment on the fraudulent transfer of assets belonging to an insolvent business entity on the basis that, in accordance with traditional English jurisdictional rules, the US court had no personal jurisdiction over the defendants. Lord Collins said that insolvency related judgments were no different from other types of foreign judgments and the traditional common rules on enforcement of foreign judgments should apply. He also stressed that a "change in the settled law of the recognition and enforcement of judgments... is a matter for the legislature and not for judicial innovation".[31]

In *Singularis*,[32] the Privy Council imposed limitations on the common law power to assist foreign

[26] *Cambridge Gas Transport Corporation v Official Committee of Unsecured Creditors (of Navigator Holdings Plc)* [2006] UKPC 26 (the Privy Council recognised a US chapter 15 plan even though the petitioner argued that it did not submit to the jurisdiction of the court in New York. It holds that the purpose of insolvency proceedings was to "provide a mechanism from of collective execution against the property of the debtor'...and should be distinguished from proceedings that determine rights in rem and in personam).

[27] *Re HIH Casualty and General Insurance Ltd* [2008] UKHL 21 (the House of Lords decided to remit assets to Australian liquidators despite the different priority order in Australia).

[28] Ibid, at para 33. For an early case in British colony, *see Re African Farms Ltd* [1906] TS 373.

[29] For example, *see Re Maxwell Communication Corp.*, 170 BR 800 (1994). Also *see* Jay Lawrence Westbrook, "Interpretation Internationale" (2014) 87 Temp. L. Rev. 739.

[30] *Rubin v Eurofinance S.A.* [2012] UKSC 46. Also *see New Cap Reinsurance Corporation v Grant* [2011] EWCA Civ 971; also see *Fibria Celulose S/A v. Pan Ocean Co Ltd* [2014] EWHC 2124 (Ch)

[31] *Rubin v Eurofinance S.A.*, at para 129-130. Also *see* Andrew Godwin, Timothy Howse and Ian Ramsay, "The Inherent Power of Common Law Courts to Provide Assistance in Cross - Border Insolvencies: From Comity to Complexity" (2017) 26 International Insolvency Review 5.

[32] *Singularis Holdings Limited v Pricewater house Coopers* [2014] UKPC 36.

courts. It did not agree that a domestic court could provide assistance to a foreign court by doing whatever it could have done in the case of domestic insolvency. Following this case, common law courts can only provide assistance that is available both under the domestic law and the law of the foreign jurisdiction that is seeking assistance.

Adoption of the Model Law regime would seem to provide a more stable foundation for modified universalism and a surer basis for adjudicating upon cross-border insolvency cases. This will now be considered.

3. The Model Law regimes

The Model Law has greatly reduced the uncertainty associated with comity and reciprocity by creating a framework for cooperation and assistance centred on the main insolvency proceeding.[33] It requires that enacting States recognise foreign main proceedings in the country where the debtor has its centre of main interests (COMI), as well as non-main proceeding in countries where the debtor has an ;establishment' subject to exceptions for public policy and for protecting the interests of domestic creditors.[34] The Model Law counsels against introduction of a 'reciprocity requirement' i.e. recognition of foreign insolvency proceedings is conditional on a foreign court recognizing proceedings that emanate from the enacting State. It does not however, completely forbid such a reciprocity condition.[35]

Under the Model Law, the recognition procedure is triggered by the action of a representative in the foreign insolvency proceedings. This foreign representative is given rights of access to the insolvency proceedings of enacting States, including the right to apply for recognition of the foreign proceedings and to obtain consequential relief.[36] Upon recognition of foreign main proceedings, the court will impose a stay on proceedings against the debtor or its assets and the right of the debtor to dispose of

[33] Adrian Walters, "Modified Universalisms & the Role of Local Legal Culture in the Making of Cross-Border Insolvency Law" (2019) 93 Am Bankr LJ 47.

[34] Model Law, articles 15-17.

[35] For a discussion of the countries that have versions of the reciprocity requirement, such as South Africa, Mexico and Romania, see Keith D Yamauchi, 'Should Reciprocity be Part of the UNCITRAL Model Cross-border Insolvency Law' (2007) 16 *International Insolvency Review* 145.

[36] Model Law, articles 13-14.

its assets is automatically suspended.[37] The court can also grant any ‘‘appropriate’’ relief at its discretion and also modify the normally automatic consequences of recognition. There is no automatic relief upon recognition for non-main foreign proceedings, but the court may grant the same types of relief that are available in respect of main insolvency proceedings at its discretion.[38] Additionally, in order to improve efficiency and avoid asset dissipation, the Model Law encourages courts to cooperate and communicate with foreign courts and foreign representatives and provides for the coordination of insolvency proceedings.[39]

However, the extent of harmonisation of law brought about by the Model Law is limited. Instead of harmonising choice of law issues directly, the Model Law is mainly concerned with procedural matters.[40] It is also soft law in nature and allows States to make local variations with a major area of discordance being the existence or otherwise of a requirement of reciprocity before foreign insolvency proceedings are recognised.[41]

Moreover, even in countries that have adopted the Model Law without a reciprocity requirement, variations in domestic legislation are often exacerbated by different judicial interpretations and thereby undermining the efforts at harmonisation.[42] In this connection, commentators have pointed out differences between the US and UK in the willingness of domestic courts to recognise foreign proceedings. The US has found to be ‘‘exceptional’’ in its willingness to recognise foreign insolvency proceedings as it appears that the US courts have granted recognition in 96% of the recognition cases that have been filed.[43] On the other hand, UK judicial interpretations on cross-border insolvency

[37] Model Law, article 20.

[38] Model law, articles 19 and 21.

[39] Model law, article 25. Also *see* ‘‘UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective’’ (2013) <www.uncitral.org> (visited 10 March 2019).

[40] Susan Block-Lieb and Terence Halliday, ‘‘Harmonization and Modernization in UNCITRAL’s Legislative Guide on Insolvency Law’’ (2006) 42 Tex. Int’l LJ 475.

[41] Walters (above n 33, p 69).

[42] For example, *see* Walters (above n 33); Kent Anderson, ‘‘Testing the Model Soft Law Approach to International Harmonization: A Case-Study Examining the UNCITRAL Model Law on Cross-Border Insolvency’’ (2004) 23 Aust. YBIL 1; Sandeep Gopalan and Michael Guihot, ‘‘Recognition and Enforcement in Cross-Border Insolvency Law: A Proposal for Judicial Gap-Filling’’ (2015) 48 Vand. J. Transnat’l L. 1225.

[43] Westbrook (above n 29); Gerard McCormack, ‘‘US Exceptionalism and UK Localism? Cross-Border Insolvency Law in Comparative Perspective’’ (2016) 36 Legal Studies 136.

issues has been criticised for failing to uphold the universalist goals of the Model Law and being hidebound by the constraints of the common law.[44] In *Rubin,*[45] for example, the UK Supreme Court held that the Model Law imported only procedural norms. Therefore, it did not overturn or disturb traditional rules for the recognition of insolvency-related judgments which were held to be the same as those applicable to standard commercial judgments i.e. before a foreign judgment could be recognised the defendant had either to be ''present'' in the relevant foreign jurisdiction or in some way submitted to the relevant foreign jurisdiction.

According to UNCITRAL, the *Rubin*[46] case brought to light problems of a global nature. It noted that the Model Law did not provide an explicit solution with respect to the recognition and enforcement of insolvency-derived judgments.[47] This had led to significant uncertainty and might have a chilling effect on the prospects of the Model Law gaining international acceptance. Therefore, it was considered to be an opportune time to tackle the recognition and enforcement of these types of judgments and this has now been done through a new Model Law.[48]

In providing for the recognition of insolvency related judgments, a number of approaches are possible.[49] One approach is to stipulate that if main or secondary insolvency proceedings are opened in a particular State, then the court opening the insolvency proceedings also has jurisdiction in respect of insolvency related actions and other States should recognise judgments resulting from such actions. This is basically the approach adopted in the European Insolvency Regulation (EIR) where recognition and enforcement extends to judgments handed down in any ''action which derives directly from the insolvency proceedings and is closely linked with them, such as avoidance actions''.[50]

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[44] Ibid.

[45] *Rubin v Eurofinance S.A.* [2012] UKSC 46. Also *see New Cap Reinsurance Corporation v Grant* [2011] EWCA Civ 971; also see *Fibria Celulose S/A v. Pan Ocean Co Ltd* [2014] EWHC 2124 (Ch)

[46] [2012] UKSC 46, [2013] 1 AC 236.

[47] *See* UNCITRAL documents A/CN.9/WG.V/WP.126 - Recognition and enforcement of foreign insolvency-derived judgment and A/CN.9/WG.V/WP.117, available at <https://uncitral.un.org/en/working_groups/5/insolvency_law> (visited 13 July 2020).

[48] *See* ''UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments'' (2018) available at <https://uncitral.un.org/en/texts/insolvency/modellaw/mlij> (visited 13 July 2020).

[49] For a discussion of different approaches *see* the UNCITRAL document A/CN.9/WG.V/WP.126 - Recognition and enforcement of foreign insolvency-derived judgment.

[50] Article 6, EU Insolvency Regulation (Regulation 848/2015)

There is an extensive body of case law as to what constitutes an insolvency related action.[51] The following categories of case have been held to fall into the realm of insolvency-related actions though the categories undoubtedly overlap: actions based on insolvency law that seek to fix liability on company officers;[52] actions based on provisions particular to insolvency law or to insolvency-related adjustments of general legal provisions; actions based on insolvency law that seek to set aside pre-insolvency transactions entered into by the debtor[53] and actions challenging the exercise of a power or discretion by an insolvency representative.[54] The following types of actions have been held however, not to be insolvency-related; actions based on general contract or commercial law that seek the recovery of monies allegedly owing to the debtor[55] and actions by an insolvency representative seeking to establish the debtor's ownership of property.[56]

Under the new Model Law however, the definition of an ''insolvency-related foreign judgment'' is broader than that under the EIR though the relevant judgment must have been issued on or after the commencement of the insolvency proceedings to which it relates.[57] Article 7 of the new law contains the familiar public policy exception and Article 14 sets out a number of additional grounds on which recognition and enforcement may be refused. Article 14(a) refers to lack of notification in sufficient time and in a manner which enables a defence to be arranged and Art 14(b) provides that recognition and enforcement can be refused if a judgment was obtained by fraud. Article 14(f) allows for refusal of recognition and enforcement where the judgment materially affects the rights of creditors generally and their interests were ''not adequately protected'' in the proceedings in which the judgment was issued. Article 14(g) in effect requires, as a condition of recognition, either that the foreign court should have exercised jurisdiction on the basis of consent from the defendant;

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[51] *See* generally McCormack (above n 21) and *see* also *Nickel and Goeldner Spedition GmbH v "Kintra" UAB* Case C-157/13, [2015] QB 96.

[52] *Gourdain v Nadler Case 133/78 [1979] 3 CMLR 180*; *Kornhaas v Dithmar* ECLI:EU:C:2015:806; [2016] ILPr 25.

[53] *Seagon v Deko Case C-339/07 [2009] ECR I-767*.

[54] Case C-111/08 *SCT Industri AB v Alpenblume AB [2009] ECR I-5655.*

[55] *Tunkers France v Expert France* Case C-641/16 [2018] ILPr 7.

[56] *German Graphics Case C-292/08, [2009] ECR I-8421.*

[57] For the definition of ''insolvency related judgment'' *see* Article 2(d) – ''(i) Means a judgment that: a. Arises as a consequence of or is materially associated with an insolvency proceeding, whether or not that insolvency proceeding has closed; and b. Was issued on or after the commencement of that insolvency proceeding; and (ii) Does not include a judgment commencing an insolvency proceeding''.

submission to the jurisdiction; the exercise of the foreign court's jurisdiction on a basis which the receiving court could have exercised jurisdiction or the exercise by the foreign court of jurisdiction on a basis that was not incompatible with the law of the recognising State.

Article 15 allows the option of recognition and enforceability having the same effect as it has in the originating State or the effect it would have if it had been issued by a court in the receiving State. Finally, the new Model Law provides for a possible "Article X" that tackles and reverses the *Rubin* decision directly. It suggests that laws implementing the MLCBI should be amended so as to provide that "notwithstanding any prior interpretation to the contrary" the available relief includes recognition and enforcement of a judgment.

4. China and Cross Border Insolvency Law and Practice

a. Overview

China's "basic law" on cross border insolvency is contained in Article 5 of the Enterprise Bankruptcy Law (EBL) 2006. It seems to adopt a "modified unversalist" approach and states that Chinese insolvency proceedings have extraterritorial effects over assets located outside China.[58] It also duplicates a provision in the 1991 Civil Procedural Law[59] that recognition of foreign judgment shall be granted on the basis of treaty or reciprocity, subject to the requirement that the foreign judgment should not contravene China's fundamental legal principles, sovereignty, security, and public

[58] The drafters of the EBL 2006 took notice of these early cross-border cases and addressed both the effects of foreign cases in China and the outbound effects of Chinese insolvency judgments. International trends on the reform of insolvency law also clearly influenced the making of the Chinese law. *See* Weiguo Wang , "Chapter 4 Several Goals in the Current Drafting of the Bankruptcy Law [当前《破产法》起草的几个目标]" in Shaoping Zhu and Yi Ge (eds), Bankruptcy Law of the People's Republic of China: Compilation of Information on the Legislative Process: 2000 [中华人民共和国破产法: 立法进程资料汇编 : 2000年] (CITIC Press 2004); Terence Halliday and Bruce Carruthers, Bankrupt: Global Lawmaking and Systemic Financial Crisis (Stanford University Press 2009) 308.

[59] Civil Procedural Law 1992, article 268

interests; or undermine the interests of domestic creditors.

Before the EBL 2006, China did not have any specific legal rules on cross-border insolvency. Early cases were resolved in accordance of the civil procedural rules. In these cases, the Chinese courts generally adopted a territorial approach and denied requests for recognition with some exceptions.[60] Even after the EBL was enacted 2006, courts continue to rely on the civil procedural rules when resolving cross-border insolvency cases, possibly because Article 5 provides no guidance for recognition of foreign proceedings.[61] There are also no rules on the powers of a foreign insolvency representative or how parallel insolvency proceedings should be coordinated.

The precondition of a treaty or reciprocity under both the Civil Procedural Law and Article 5 of the EBL is a significant barrier to the recognition of foreign proceedings. With respect to treaties, until March 2019, 37 countries have concluded judicial assistance treaties with China on commercial matters including France, Italy and Singapore, which can provide basis for cooperation in cross-border insolvency cases since insolvency is generally regarded as a commercial matter in China. However, China has not reached such treaties with major trading partners such as the US, Japan and the UK.[62]

In the case of foreign proceedings in countries that have no such treaties in China, the court will look at whether there is *de facto* reciprocity between China and the relevant foreign jurisdiction,[63] meaning that the court will examine whether there is a precedent for recognising Chinese proceedings in that jurisdiction.[64] Chinese courts have not yet taken the initiative and recognised a foreign

[60] For example, In *BCCI,* the Intermediate Court of Shenzhen distributed assets of the Shenzhen branch of Bank of Credit and Commerce International SA (BCCI) to Chinese creditors without remitting the assets to foreign courts. This will be further discussed.

[61] The specific procedure for recognising and enforcing foreign judgments is provided for by the Civil Procedural Law, which states that a recognition application should be made to a local intermediate court in the relevant municipality. See Civil Procedural Law, article 281.

[62] *See* the website of Chinese Ministry of Justice: http://www.moj.gov.cn/Department/node_592.html (visited 29 March 2019).

[63] For example, in Hua'An *Funds v Lehman Brothers International Europe (LBIE)*, a Shanghai Court refused to recongise a bankruptcy order made by the UK court on the ground that there was an absence of reciprocity. This case will be further discussed in the next section.

[64] *See* the following discussions. Also *see* Ronald A Brand, "Recognition of Foreign Judgments in China: The Liu Case and the "Belt and Road" Initiative" (2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3198312> (visited 1 April 2019).

judgment based on presumed reciprocity albeit that the SPC has now given a push in that direction.[65]

b. Recognition of Foreign Insolvency Proceedings by Chinese Courts

So far, Chinese courts have recognised foreign insolvency proceedings in a small number of cases where a treaty[66] or *de facto* reciprocity[67] could be identified between China and the foreign country. All of these cases are decided on the basis of Civil Procedural Law without reference to Article 5 of the EBL.

The first case was decided after China's accession to the WTO and therefore when the ''reform and opening up'' process was in full swing. Basically, the case concerned the recognition of an order made by an insolvency court in Milan, Italy in 1999. This order required the transfer of all assets of the bankrupt debtor, EN Group, to B&T Ceramic Group. Since EN Group had a 98% shareholding in a Chinese joint venture Nanhai Nassetti that was located in Foshan, China, the B&T Group petitioned the Chinese Court in Foshan for the recognition of the Italian order allowing it to assume ownership of these shares. In accordance with the Civil Procedural Law, the Foshan court recognised the order made by the Italian court[68] on the basis of the treaty for judicial assistance between China and Italy.[69] But the case was complicated by the fact that after being declared bankrupt in Italy, the debtor executed what may have been an avoidable transfer of the shares to a Hong Kong company. Since, at that time, it was unclear whether a judgment from a Mainland court would be enforced in Hong Kong, the Foshan court did not issue an enforcement order but instead suggested that the applicant should enforce its rights through other legal proceedings. The applicant eventually enforced its rights through

[65] Jingxia Shi and Yuanyuan Huang , ''Recognition and Relief System in Cross-Border Insolvency: Based on the Observation and Analysis of ''Hanjin Bankruptcy Case'' [跨界破产中的承认与救济制度 ———基于 ''韩进破产案"的观察与分析]'' (2017) 2 Journal of Renmin University of China 34, 35.

[66] B&T Ceramic Group v. E.N.Group, Foshan Intermediate People"s Court (2001, Fo Zhong Fa Jing Chu Zi No. 6 33); PELLIS CORIUM (P.E.L.C.O.R.), Guangzhou Intermediate People's Court (2005, Sui Zhong Fa Min San Chu Zi No. 146).

[67] Dr . Koehler v Seehaus, Wuhan Intermediate People's Court (2012, E Wuhan Zhong Min Shang Wai Chu Zi No. 16)

[68] B&T Ceramic Group v. E.N.Group, Foshan Intermediate People's Court (2001, Fo Zhong Fa Jing Chu Zi No. 6 33), For a discussion of the case, *see* Jingxia Shi, ''Recent Developments in Chinese Cross-Border Insolvencies'' (2002) < https://www.iiiglobal.org/sites/default/files/2-_060710shi-3.pdf> (visited 14 January 2019).

[69] The Judicial Assistance Treaty between the People's Republic of China and the Republic of Italy on Civil Matters, taking effect from 1 January 1995, <http://wcm.fmprc.gov.cn/pub/chn/pds/ziliao/tytj/t422606.htm> (visited 29 March 2019).

diplomatic rather than judicial procedures.[70]

In another case from 2005, upon application by a French liquidator, the Guangzhou Intermediate People's Court recognised an insolvency judgment issued by a regional court in France in Poitiers based on the judicial assistance treaty between China and France.[71] But in the absence of any such treaty, a different result was reached in *Hua'An Funds v Lehman Brothers International Europe (LBIE)* notwithstanding that the EBL 2006 by that time had been enacted. In the *Hua'An Funds* case, Hua'An Funds sued LBIE for breaching a "product cooperation agreement" between the two parties and, upon application, the Shanghai High Court froze some of LBIE's assets in China.[72] The court dismissed a claim to recognise the effect of UK insolvency proceedings in respect of LBIE as there was no relevant treaty between the UK and China. Neither did the principle of reciprocity apply as there was no precedent of a Chinese commercial judgment being recognised by the UK courts.[73] As the Shanghai court refused to recognise the UK proceedings, the assets located in China were distributed to domestic creditors without anything being remitted to the UK.

A narrow interpretation of reciprocity has meant that for a long time, China never recognised a foreign judgment on this basis. The Chinese court's approach is "positive reciprocity" as defined by Professor Westbrook, which requires that domestic courts only recognise foreign judgments if the foreign court has previously recognised Chinese judgments.[74] Another approach that is more conducive to international cooperation is negative reciprocity, which allows the domestic court to recognise a foreign judgment, unless the foreign court has previously refused to recognise or enforce a domestic court's judgment.

There appears to have been something of a breakthrough however in 2012 when the Wuhan

[70] Shi (above note 67).

[71] PELLIS CORIUM (P.E.L.C.O.R.), Guangzhou Intermediate People's Court (2005, Sui Zhong Fa Min San Chu Zi No. 146), see MJ Moser and F Yu, *Doing Business In China* (Juris Publishing Incorporated 2014), section 9.03 [3].

[72] Xinyi Gong, "To Recognize or Not to Recognize? Comparative Study of Lehman Brothers Cases in the Mainland China and Taiwan" (2013) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2284026> (visited 29 March 2019).

[73] Ibid.

[74] Jay Lawrence Westbrook, "Choice of avoidance law in global insolvencies" (1991) Brook. J. Int'l L.

Intermediate People's Court recognised a bankruptcy judgment made by the Montabaur District Court of Germany.[75] It seems to be the first example of such recognition since the EBL 2006 and the decision was made on the ground that a Berlin High Court had recognised a Chinese judicial decision previously.[76]

Driven by the BRI, the Chinese judiciary now appears to be more willing to recognise foreign judgments. The SPC states that Chinese courts may provide judicial assistance on the basis of "presumed reciprocity",[77] which means that judicial assistance can be provided in anticipation that other countries will reciprocate, shifting from the previous stance that Chinese court will not recognise a foreign judgment unless the foreign jurisdiction has already recognised a Chinese judgment.[78] This softened approach could increase the possibility for foreign proceedings to be recognised by Chinese courts on the grounds of reciprocity. For example, in *Kolmar Group v Jiangsu Textile Industry* (2016), the Nanjing Intermediate Peoples Court, recognised a Singapore judgment thereby reciprocating the enforcement of a Chinese court judgment by the Supreme Court of Singapore.[79] It is worth noting that the SPC has published this case as a "typical case" in relation to BRI disputes.[80] In addition, the Nanning Statement issued at the second China - ASEAN Conference of Justices in 2017 states that courts in the participating countries will apply the principle of reciprocity to recognition and enforcement of foreign judgments and reciprocity can be presumed in the absence of treaties on recognition and enforcement of foreign civil or commercial judgments.[81]

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[75] *Dr. Koehler v Seehaus,* Wuhan Intermediate People's Court (2012, E Wuhan Zhong Min Shang Wai Chu Zi No. 16), for a discussion of the case, *see* Brand (above n 63).

[76] Ibid.

[77] Opinions on Providing Judicial Services and Safeguards for the Construction of the Belt and Road initiative [关于人民法院为"一带一路"建设提供司法服务和保障的若干意见] (2015), available at <http://www.court.gov.cn/zixun-xiangqing-212931.html> (visited 29 March 2019).

[78] Ibid., article 6.

[79] Ibid.

[80] The SPC has published a number of "typical cases" in relation to the BRI in order to guide the adjudication of cases involving BRI projects. These cases have been translated by the China Guidance Case Project of the Stanford Law School. The *Kolmar case* was published as the BRI Typical Case No.13, see the translation of the case on <https://cgc.law.stanford.edu/belt-and-road/b-and-r-cases/typical-case-13/> (visited 9 July 2020).

[81] *See* the English version of Nanning Statement at < http://cicc.court.gov.cn/html/1/219/208/209/800> (visited 9 July 2020).

In terms of recognition of foreign insolvency proceedings, the SPC has explored alternative grounds that are not preconditioned on treaty or reciprocity. In another "typical case" for BRI, *Sino-Environment Technology (Singapore) V. Thumb Environmental Technology Group (Fujian)* (2014)[82], the SPC recognises the power of a foreign representative based on article 14 of the Law on Choice of Law for Foreign-Related Civil Legal Relationships (2010). This provision states that the law of the place of incorporation shall govern corporate issues such as its legal capacity, organisational structure and rights and obligations of shareholders. In this case, the debtor company, Sino-Environment, was registered in Singapore and went into Singaporean judicial management (equivalent to reorganisation).[83] The judicial managers made a resolution on behalf of the Sino-Environment to replace all the directors of Thumb, its wholly-owned subsidiary based in Fujian. The most important issue before the Chinese court was whether the judicial manager's s position and powers could be recognised in China. The SPC held that the authority of the judicial manager should be determined on the basis of Singaporean law, which was the law of the place of incorporation for the debtor company. As the judicial managers were eligible to represent Sino-Environment under Singapore's Companies Act, the resolution to replace the directors of its subsidiary, Thumb, was therefore valid.

This case indicates an alternative ground for foreign insolvency representative who seeks recognition in China. In particular, it opens a gateway for insolvency representatives of offshore entities incorporated in places such as Hong Kong, British Virgin Islands, Cayman Islands, who could act on behalf of these entities if authorised by the law of the place of incorporation and thereby gain a voice in insolvency proceeding in respect of Chinese incorporated subsidiaries.[84] Currently, as Article 5 of the EBL does not provide a formal mechanism to coordinate parallel insolvency proceedings and recognise foreign insolvency representatives, the Mainland insolvency proceeding is usually excluded from the global restructuring of Chinese corporations. For example, in the case of LDK Solar, parallel restructuring schemes were implemented in Cayman Islands and Hong Kong in

[82] Supreme People's Court (2014, Min Si Zhong Zi No. 20). This case was published as the BRI Typical Case No.1, *see* the translation of the case on <https://cgc.law.stanford.edu/wp-content/uploads/sites/2/2016/11/B-and-R-TC1-English.pdf> (visited 9 July 2020).

[83] Singapore Companies Act(REVISED EDITION 2006), Part VIIIA (Judicial Management), available at <https://sso.agc.gov.sg/Act/CoA1967#P1VIIIA-> (visited 9 July 2020).

[84] It is common for Chinese corporations to register the holding company in offshore jurisdictions and issue bonds to foreign investors through the offshore entity. But the main assets are usually held by the operating subsidiaries in China. *See* Mark Fucci and Naomi Moore, "Is It the Structure? Chinese Onshore Bankruptcies and Offshore Bond Default" (2019) <http://globalrestructuringreview.com/article/1074766/is-it-the-structure-chinese-onshore-bankruptcies-and-offshore-bond-default> (visited 25 March 2019).

November 2014.[85] Subsequently, the US court recognised the Cayman Islands insolvency proceeding as the main proceeding [86] and confirmed a 'prepackaged reorganisation' plan for LDK's US subsidiary. Separately, the Chinese subsidiaries of LDK went into reorganisation in China [87] without communication or cooperation with other jurisdictions.

It should be noted that the Chinese SPC approach on entitlement to represent foreign legal corporations is consistent with that adopted in certain other jurisdictions. For instance, an important case in the Netherlands highlights the intersection between the law of legal personality and cross border insolvency law.[88] The case arose out of insolvency proceedings in Russia involving the major Russian oil conglomerate – Yukos. Yukos, a Russian legal entity, had assets in the Netherlands and the question arose whether the Yukos administrator appointed in the course of the Russian insolvency proceedings had any authority over those Dutch assets. The Netherlands has not adopted the Model Law and applies more a territorialist, rather than a universalist approach, towards insolvency proceedings. The authority of a liquidator or other insolvency representative is generally limited to assets within the State under whose law the insolvency representative was appointed. The Dutch Supreme Court[89] however, was able to overcome some of the limitations of the territorial approach by holding that Russian law, as the law of the State where the legal entity was incorporated, governed who could speak for that legal entity and under Russian law it was the insolvency administrator in this particular matter.[90]

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[85] LDK Solar Co Ltd (in provisional liquidation) HCMP2215/2014. For discussions on the global restructuring of LDK, see Harneys, "Parallel Schemes of Arrangement" (2015) <https://www.insol.org/emailer/May_2015_downloads/Document%201.pdf> (visited 2 July 2020); Taylor P, "LDK Solar: Implementing a Global Restructuring of a China-Based Corporate Family" (2015) <https://www.insol-europe.org/download/documents/741+&cd=1&hl=en&ct=clnk&gl=uk> (visited 7 July 2020);

Goodman M and Gow I, "LDK Solar: A New Dawn in International Restructuring" (2016) <http://www.chasecambria.com/site/journal/article.php?id=943> (visited 7 July 2020).

[86] In re *LDK Solar Co.*, No. 14-12387 (PJW) (Bankr. D. Del. Nov.21, 2014).

[87] *Jiangxi LDK Solar*, Xinyu Intermediate Court (2015, Yu Po Zi No. 6-1).

[88] For an overview of Dutch cross border insolvency law, see inter alia: Michael Veder, *Cross-Border Insolvency Proceedings and Security Rights* (Kluwer Legal Publishers, 2004) chapter 3; Bob Wessels, *International Insolvency Law*, (4th edn, Kluwer 2015) chapter 2.

[89] Supreme Court Decision of 13th September 2013, ECLI: NL: HR: 2013: BZ5668. For a translation of the decision see <www.insol.org/emailer/Oct_2013_downloads/Yukos%20decision%20e%20translation.pdf> accessed 30 August 2019.

[90] This is somewhat an oversimplification of a complex ruling. See generally on the decision Barbar F.H. Rumora-Scheltema, 'The Dutch Supreme Court Yukos Rulings: From Territoriality to Universality' [2015] ICR 112. In later proceedings, the Amsterdam Court of Appeals ruled in May 2017 that the Russian liquidation order in respect of Yukos was contrary to Dutch public order and therefore null and void - Amsterdam Court of Appeals, May 9 2017, ECLI:NL:GHAMS:2017:1495. Consequently and necessarily, the Russian insolvency representative was not entitled to represent Yukos in the Netherlands.

c. Extraterritorial effect of Chinese Insolvency Proceedings

With the limited number of treaties and the "de facto" reciprocity approach, it is questionable whether the extraterritorial effect of Chinese insolvency proceedings will be supported by foreign courts. It is possible however, for countries that have adopted the Model Law without any reciprocity qualifications to recognise Chinese insolvency proceedings and provide judicial assistance in respect of such proceedings. For example, in 2017, the United States Bankruptcy Court District of New Jersey recognised the Chinese insolvency proceeding in *Zhejiang Topoint* as the main proceeding and stays legal actions against the debtor pursuant to Chapter 15 US Bankruptcy Code which implements the MLCBI in the US.[91] This is the first time that the US court recognises the Chinese insolvency proceeding. Further, in *Reward Science and Technology Industry Group,*[92] the Bankruptcy Court for the Southern District of New York recognises the Chinese insolvency proceeding in Beijing as the main proceeding. Based on the reciprocity principle under Chinese law, Chinese courts might be willing to recognise and enforce insolvency proceedings in the US.

Given the special relationship between Hong Kong and Mainland China, Hong Kong courts seem to be willing to recognise Mainland insolvency proceedings. One notable case involves Guangdong International Trust and Investment Corporation (GITIC or Guangxin), a state-owned investment bank. In 1999, GITIC filed for insolvency in Guangdong High People's Court and become the first and only financial institution that went into formal insolvency in China. The insolvency of GITIC send shocks both domestically and abroad with 80% of creditors being foreign.[93] There was an expectation that foreign creditors would be fully paid by the Chinese government, as this had happened previously in the insolvency of other financial companies in China;[94] but *GITIC* proved to be different and it was placed in the insolvency procedure under the EBL 1986 instead of the government-led administrative

[91] In re *Zhejiang Topoint Photovoltaic Co. v. Chen*, Case No. 14-24549 (Bankr. D.N.J. Dec. 19, 2017).

[92] In re *Reward Science and Tech. Industry Grp. Co, Ltd.,* Case No. 19-12908 (MEW) (Bankr. S.D.N.Y. September 9, 2019).

[93] See general discussions on this case: Joseph Lam, "The Closure of GITIC" (1999) 14 *Journal of International Banking Law* 127; Xin Zhang , "The Emerging Insolvency Risks of Chinese Financial Institutions" (1999) 3 *Journal of International Banking and Financing Law* 91; Jing Yang, "Summary of Cross-Border Insolvency Research in China [中国跨境破产研究综述]" (2018) <http://www.gdcourts.gov.cn/web/content/40940-?lmdm=1041> (visited 7 July 2020).

[94] T K Chang, "The East is in the Red" (1999) 18 *International Financial Law Review* 43, 45.

procedures.[95] GITIC's insolvency administrator stated that all creditors, both domestic and foreign, would be treated equally, under the *pari passu* rule provided by Article 37 EBL 1986.[96] In the end, The average recovery rate for creditors was around 12%.[97]

After GITIC went into insolvency in Guangdong, a creditor of the company sought to make a garnishee order absolute in Hong Kong[98] so that GITIC HK, a subsidiary of GITIC could pay the debts owed to GITIC directly to the creditor. This would amount to individual enforcement and cause unfairness for other creditors of GITIC. This application was rejected by the Hong Kong High Court considering the principle of comity and the adherence to the *para passu* principle by the Chinese administrator. After hearing expert evidence on Chinese insolvency law, Judge Gill concluded that "the GITIC liquidation is being pursued, without challenge, on the basis of a universal collection and distribution of assets and that the paramount principle of *pari passu* distribution is strictly being adhered to. The making absolute of a garnishee order will interfere with that process".[99]

The GITIC decision indirectly recognises the extraterritorial effect of Chinese insolvency proceedings[100] but this does not mean that any Chinese insolvency proceeding will be recognised by Hong Kong. The decision will be made by reference to statutes in Hong Kong or common law.[101] In terms of cross-border insolvency, Hong Kong courts largely rely on common law principles as there is a lack of statutory rules on this matter.[102]

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[95] *See* Y C Richard Wong and M L Sonia Wong, "Competition in Domestic Banking Industry" (2001) 21 *Cato Journal* 19, 21.

[96] *See* Campbell Korff and Xinhong Liu, "Why China's Insolvency Must Improve" (2002) 21 *International and Financial Law Review* 33, 35.

[97] Yang (above n 89).

[98] *CCIC Finance Ltd v Guangdong International and Investment Corp. (GITIC)* [2005] HKEC 1180.

[99] Ibid., at para 84-85; Also *see* Prue Mitchell, "Recent Cross-Border Insolvency Developments In Hong Kong" (2002) <http://www.law.hku.hk/aiifl/wp-content/uploads/2014/07/2002_apr_Recent-Cross-border-Insolvency-Developments-In-Hong-Kong.doc> (visited 7 July 2020).

[100] ibid.

[101] The statutes include Foreign Judgments (Reciprocal Enforcement) Ordinance (1997, Cap. 319) and Mainland Judgments (Reciprocal Enforcement) Ordinance (2008, Cap. 597).

[102] The corporate insolvency regime (without mentioning cross-border issues) in Hong Kong is provided by Companies (Winding Up and Miscellaneous Provisions) Amendment Ordinance (2016 revision, Cap 32), available at <https://www.elegislation.gov.hk/hk/cap32> (visited 7 July 2020). *See* Emily Lee, "Problems of Judicial Recognition and Enforcement in Cross-Border Insolvency Matters Between Hong Kong and Mainland China" (2015) 63 The American Journal of Comparative Law 439.

There are no provisions for judicial assistance between the Mainland and Hong Kong in cross-border insolvency cases. Judicial cooperation between the Mainland and Hong Kong is however, required under the Chinese Basic Law, which specifies the basic principles for the "one country, two systems" model.[103] There is an arrangement for judicial assistance for civil and commercial cases between the Mainland and Hong Kong,[104] but cross border insolvency cases are explicitly excluded from this arrangement.

This means Hong Kong courts will continue to rely on common law principles to handle cross-border insolvency cases, including those from the Mainland, but recent cases have confirmed the willingness for cooperation on the side of Hong Kong. In *CEFC (Huaxin)*,[105] Hong Kong High Court recognises an insolvency proceeding initiated in Shanghai in respect of a debtor company registered in Shanghai. The HK court granted assistance to the insolvency representative who sought to prevent a third party from obtaining a garnishee order absolute against the company. The decision holds that Hong Kong will recognise and provide assistance to a Mainland insolvency proceeding if it is a collective proceeding and initiated in the company's place of registration. In the decision, Harris J points out that this is the first time that the Hong Kong Court grants orders of recognition and assistance to Mainland administrators. He also states that this is, however, not the first time Mainland insolvency proceedings being recognised by foreign courts as such recognition have been given by US courts in two cases — *Zhejiang Topoint Photovoltaic Co, Ltd* and *Reward Science and Technology Industry Group Co, Ltd.*[106]

Technically speaking, however, this is not the first case in which the Mainland insolvency proceeding

[103] Chinese Basic Law, Article 95 — "The Hong Kong Special Administrative Region may, through consultations and in accordance with law, maintain juridical relations with the judicial organs of other parts of the country, and they may render assistance to each other".

[104] Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region (first enacted in 2008, reenacted in 2019), available at <https://www.doj.gov.hk/eng/public/pdf/2019/Doc6_481354e.pdf>(visited 7 July 2020).The arrangement is given effect in Hong Kong by Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap. 597). There are also similar arrangements with Macau and Taiwan, i.e. Arrangement between the Mainland and the Macau Special Administrative Region on the Mutual Recognition and Enforcement of Civil and Commercial Judgments and Provisions of the Supreme People's Court on Recognition and Enforcement of Civil Judgments Issued by Courts in Taiwan.

[105] *Re CEFC Shanghai International Group Ltd* , [2020] HCMP 2295/2019, HKCFI 167.

[106] Ibid., at para 2. These US cases are discussed in previous paragraphs.

is recognised by a Hong Kong court, since the first such case is *GITIC*. In both *GITIC* and *CEFC,* the Hong Kong court have recongised the effects of the Mainland insolvency proceeding and refused to make a garnishee order absolute against the debtor; but the court in GITIC did not consider the powers of the Mainland administrator. [107]

Following CEFC, the Hong Kong High Court reaffirmed its position in *Everich.*[108] It recognised a Mainland insolvency proceeding and provided assistance to the administrator of a company registered in Shenzhen to take control of its Hong Kong subsidiaries and collect their receivables.

These cases demonstrates the modified universalism adopted by Hong Kong, developed on the basis of common law principles and not conditioned on reciprocity.[109] Nevertheless, it is hard to tell if the Mainland would reciprocate in the absence of a formal framework for cooperation in cross-border insolvency.

To summarise, as of July 2020, the Chinese insolvency proceedings have been recognised by courts in the US and Hong Kong in five cases.[110] On the other hand, the Mainland Courts have only recognised foreign insolvency proceedings in four cases and none of them involves a Hong Kong proceeding.[111]

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[107] Jingxia Shi, "Hong Kong Court's Recognition and Assistance of Mainland Insolvency Proceedings——From the Perspective of Huaxin [香港法院对内地破产程序的承认与协助——以华信破产案裁决为视角]" (2020) 42 Global Legal Review 162.

[108] *Re The Liquidator of Shenzhen Everich Supply Chain Co.* [2020] HKCFI 965.

[109] Hong Kong has recongised insolvency proceedings in Bermuda, the Cayman Islands and the British Virgin Island and Japan and is keen to establish a mechanism for cooperation in cross-border insolvency with the Mainland. *See* Legislative Council Panel on Administration of Justice and Legal Services, "Proposed Framework for Co-Operation with the Mainland In Corporate Insolvency Matters" (2020) <https://www.legco.gov.hk/yr19-20/english/panels/ajls/papers/ajls20200622cb4-715-4-e.pdf+&cd=7&hl=en&ct=clnk&gl=uk> (visited 7 July 2020).

[110] *CCIC Finance Ltd v Guangdong International and Investment Corp. (GITIC)* [2005] HKEC 1180;

In re *Zhejiang Topoint Photovoltaic Co. v. Chen,* Case No. 14-24549 (Bankr. D.N.J. Dec. 19, 2017);

In re *Reward Science and Tech. Industry Grp. Co*, Ltd., Case No. 19-12908 (MEW) (Bankr. S.D.N.Y. September 9, 2019);

Re the *Liquidator of Shenzhen Everich Supply Chain Co.*, [2020] HKCFI 965; Re *CEFC Shanghai International Group Ltd (Huaxin)* [2020] HCMP 2295, HKCFI 167.

[111] *B&T Ceramic Group v. E.N.Group*, Foshan Intermediate People's Court (2001, Fo Zhong Fa Jing Chu Zi No. 6 33); *PELLIS CORIUM (P.E.L.C.O.R.)*, Guangzhou Intermediate People's Court (2005, Sui Zhong Fa Min San Chu Zi No. 146); *Dr. Koehler v Seehaus*, Wuhan Intermediate People's Court (2012, E Wuhan Zhong Min Shang Wai Chu Zi No. 16); *Sino-Environment Technology (Singapore) V. Thumb Environmental Technology Group (Fujian)* (Supreme People's Court (2014, Min Si Zhong Zi No. 20). *See* previous discussions.

Also, in all cases the recognition is based on civil procedural or choice of law rules rather than Article 5 of the EBL. Given the regional integration of Hong Kong and Mainland , it is crucial to establish a formal regime for cooperation in cross-border insolvency and a viable option is for both jurisdictions to adopt the the MLCBI. This will also increase the advantage of Hong Kong as a global restructuring centre in the competition with Singapore and other jurisdictions.

5. Adopting the Model Law regime and adapting it to fit with Chinese conditions

a. Why it is necessary for China to adopt the model law

Developed countries have led the way in promoting universalism ideals in cross-border insolvency cases. Lord Hoffmann pointed out in the *Cambridge Gas* case the UK's inclination to embrace universalism could be ascribed to the fact that the UK was an imperial power during the 18th and 19th centuries.[112] The UK traded and financed development all over the world and the philosophy and practice of univeralism could protect UK creditors who claimed for assets in foreign jurisdictions.

By way of contrast, developing countries lacked this incentive to adopt the universalism ideal, as they are not so much involved in international trade and investment. This explains China's previous territorialist stance on cross-border insolvency. China however, is now not only integrated into the global economy, but also plays a crucial role in both trade and investment. In particular, with rising outbound investments related to the BRI projects, China has a paramount interest in protecting domestic investors and is propelled to adopt the MLCBI, which can facilitate recognition by foreign courts of China's insolvency proceedings and increase the access to foreign insolvency proceeding of domestic creditors.

On the other hand, adoption of the MLCBI, would help to fill in the gaps in Chinese insolvency law; strengthen the norms of accessibility, equality and certainty in the system; and strengthen the confidence of foreign investors who invest in China and lower the costs of credit for Chinese companies that raise funds from foreign investors. Data from the World Bank suggest that countries with more

[112] *Cambridge Gas Transport Corporation v Official Committee of Unsecured Creditors (of Navigator Holdings Plc)* [2006] U, 26, para 17.

developed insolvency laws tend to have higher FDI inflows.[113] While China has attracted a rising level of FDIs with the initiation of the "open-up" policy, since 2007 there has been a decline in the level of FDI.[114] This may be caused by the macro-economic environment but it also suggests the need for China to implement institutional and legal reforms that give confidence to investors. China has risen to 31st on the rank of the Doing Business Report (2020),[115] due to its various legal and regulatory reforms. Adopting the Model Law would be viewed as an additional improvement in its business environment.

In addition, as today's international trade has become more complex and interconnected, territorialism has become impractical and cannot address the problems arising from transnational business activities. The territorial approach will result in parallel insolvency proceedings in different countries and the lack of transnational cooperation allows creditors to seize the assets in their own country. Modified universalism as embodied by the Model Law is more appropriate to coordinate insolvency proceedings in different jurisdictions. The need for the international community to move to a more cooperative position is highlighted by the insolvency proceedings affecting Hanjin Shipping, the seventh largest shipping company in the world. The business was put into reorganisation proceedings in South Korea, which has adopted the Model Law and is also the "home" country of the business. These proceedings were recognised by Model Law adopters including the US, the UK, Canada, Japan, Singapore[116] as well as non-adopters including Germany.[117]

Hanjin had operations in China and the maritime courts in China have also adjudicated on many disputes involving Hanjin since its collapse but recognition for the Korean proceeding was never sought in China and an insolvency proceeding was not initiated in respect of Hanjin in China. The main reason

[113] Jason Jack, "A Missing Variable: The Impact of Cross-Border Insolvency Laws on Foreign Direct Investment" (2018) 27 Minn. J. Int'l L. 313.

[114] Ibid.

[115] The World Bank "Doing Business" indicators - www.doingbusiness.org/ measure the quality of legal institutions in supporting economic development. *See* www.doingbusiness.org/(visited 7 July 2020).

[116] Singapore has recognised the South Korean bankruptcy order of Hanjin before adopting the Model Law in its Companies (Amendment) Act 2017 (No 15 of 2017) available at <https://sso.agc.gov.sg/Acts-Supp/15-2017/Published/20170330?DocDate=2> (visited 7 July 2020); *see In the Matter of Hanjin Shipping Co Ltd* [2016] SGHC 195.

[117] Ping Zhou , "Hanjin Shipping's Hurdles for Chinese Bankruptcy Recognition Highlight Country's Cross-Jurisdictional Challenges" (2016) <https://www.debtwire.com/info/hanjin-shipping's-hurdles-chinese-bankruptcy-recognition-highlight-country's-cross-jurisdictional>(visited 7 July 2020)..

for this might be the lack of specific rules for cross-border insolvency in China and the uncertainties under the current insolvency regime.[118] In the absence of recognition and stay or restraint orders from the Chinese courts, Chinese creditors seized ships belonging to Hanjin and this arguably contributed to the failure of the reorganisation proceedings in South Korea.[119]

China is also under increasing international pressure to adopt the MLCBI as its domestic proceedings are have beeb recognised by the US and Hong Kong and more countries are joining the cross-border insolvency network established by the MLCBI . In Asia, Japan (2000) and Korea (2006) have adopted and implemented the Model law for many years. Singapore (2017) and the Dubai International Financial Centre (DIFC) (2019) follwed suit in recent years.[120] India is a proposed new adopter of the Model Law and practitioners there observe that Model Law application will reduce risks for foreign investors that provide funding for M&A transactions and make it more attractive for FDI.[121] Given China's weight in international trade and investment, it should play a more responsible and cooperative role in the international system of cross-border insolvency law and practice.

One of the most important concerns for China in adopting the Model Law might be the interests of domestic creditors but the recognition of foreign insolvency proceedings would not necessarily undermine the local interests. Recognition and relief are different and separate concepts under the MLCBI and the grant of relief can be subject to constraints and judicial discretion.[122] Moreover, by

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[118] Jingchen Xu, "Maritime Cross‐border Insolvency in China" (2020) 29 International Insolvency Review 118; Shi Jingxia and Huang Yuanyuan, "Recognition and Relief System in Cross-Border Insolvency: Based on the Observation and Analysis of "Hanjin Bankruptcy Case" [跨界破产中的承认与救济制度 ———基于 "韩进破产案"的观察与分析]" (2017) 2 Journal of Renmin University of China 34; *see* also the article on Hanjin by a former judge in the SPC, Jianli Song, "Judicial Response to Cross-Border Insolvency Cases [跨境破产案件的司法应对]" (2018) 22 People's Justice (application) 30.

[119] Jingchen Xu, "Maritime Cross‐border Insolvency in China" (2020) 29 International Insolvency Review 118; Shi Jingxia and Huang Yuanyuan, "Recognition and Relief System in Cross-Border Insolvency: Based on the Observation and Analysis of "Hanjin Bankruptcy Case" [跨界破产中的承认与救济制度 ———基于 "韩进破产案"的观察与分析]" (2017) 2 Journal of Renmin University of China 34; *see* also the article on Hanjin by a former judge in the SPC, Jianli Song, "Judicial Response to Cross-Border Insolvency Cases [跨境破产案件的司法应对]" (2018) 22 People's Justice (application) 30.

[119] Joyce Lee, "Hanjin Shipping Gets $54 Million Loan to Unload Stranded Cargo" *Reuters* (London, 21 September 2016) <http://www.reuters.com/article/us-hanjin-shipping-debt-idUSKCN11R05Z> (visited 7 July 2020).

[120] *See* <https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status> (visited 7 July 2020).

[121] KR Srivats, "Cross-Border Insolvency Framework Will Help Attract More FDI: Experts - The Hindu Business Line" (2018) <https://www.thehindubusinessline.com/economy/cross-border-insolvency-framework-will-help-attract-more-fdi-experts/article24273079.ece> (visited 7 July 2020).

[122] The enacting state can impose limitations on the automatic stay granted to the foreign main proceeding under Article

participating in an international and cooperative process of asset distribution, Chinese creditors may ultimately recover more than if they relied solely on a national and territorial process. Two examples spring to mind – the *BCCI and Hua΄An Funds* cases.

In *BCCI*, when Bank of Credit and Commerce International SA (BCCI),[123] an international bank incorporated in Luxemburg and headquartered in the United Kingdom, collapsed in 1992, Chinese creditors immediately seized the assets of its Shenzhen branch and opened a local insolvency procedure; the foreign insolvency judgments and orders were never considered. The Intermediate Court of Shenzhen city appointed a liquidation committee to distribute the branch's assets among domestic creditors.[124] In this case, the territorial approach appeared to be beneficial for domestic creditors as the Shenzhen branch had substantial assets. The assets located in China were necessarily limited however, and it might be more beneficial for the Chinese courts to recognise the foreign proceedings and remit the assets to the foreign representative so that domestic creditors could participate in the distribution of the global assets of the debtor.

In the second case, *Hua΄An Funds v Lehman Brothers International Europe (LBIE)*, the Shanghai High Court upon application made to it, froze some of LBIE's assets in China after the latter had entered insolvency proceedings in the UK..[125] Since the Shanghai court refused to recongise the UK administration, the assets located in China were distributed to domestic creditors without anything being remitted to the UK.[126] As a result, Hua΄An in 2011 was able to recover about 46% of its losses whereas in the UK proceeding, all unsecured creditors were finally fully repaid by 2017.[127]

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20 of the MLCBI if such limitations are provided in its domestic proceeding and the automatic stay will not prevent local creditors from initiating a parallel insolvency proceeding; the discretionary relief provided by Article 21 will only be granted if the domestic court is satisfied that the interests of domestic creditors are adequately protected. On this point *see*, Meng Seng Wee, "The Belt and Road Initiative, China's Cross-Border Insolvency Law, and the UNCITRAL Model Law on Cross-Border Insolvency" (2020) 8 The Chinese Journal of Comparative Law 116.

[123] BCCI was placed in the administrative receivership in the UK in 1992. *See M S Fashions Ltd & Ors v Bank of Credit and Commerce International SA & Anor* [1993] BCC70.

[124] *See* Campbell Korff and Xinhong Liu, "Why China's Insolvency Must Improve" (2002) 21 *International and Financial Law Review* 33, 34.

[125] Gong (above n 71).

[126] Ibid.

[127] *The Joint Administrators of LB Holdings Intermediate 2 Limited v the Joint Administrators of Lehman Brothers International (Europe) and others* [2017] UKSC 38. *See* Zhang, Corporate Reorganisations in China: An Empirical Analysis, p

b. New Developments and Challenges for China in implementing the Model Law regime

Along with the benefits, adoption of the Model Law regime also presents China with a number of choices not only on how its norms might be translated into domestic insolvency law and practice but also on how the complementary institutional framework should be strengthened. This strengthening is already in the process of taking place.

The Model Law regime ultimately depends on interpretation and enforcement by domestic courts. Since implementation of the new law is controlled by national actors, in particular judges, judicial corruption or incompetence, will increase the indeterminacy of law and gaps between law on books and law in action.[128] This undermines the effects of the reform and pushes the reform into a recursive pattern, as lawmakers begin another cycle of reform to bridge the gap in law and practice.[129] Therefore, to avoid the costs of recursive reform, it is necessary to strengthen the Chinese judiciary and improve judicial understanding of the Model Law and their ability to apply it. In particular, judges should be capable of using judicial discretion in a principled way and producing more consistent decisions. Cross-border insolvency cases in particular, usually involve substantial assets and interests and require judges to use their discretion to allocate value in individual cases and make policy-oriented judgments based on an evaluation of specific circumstances.

Any arbitrariness and unpredictability in Chinese insolvency procedure will increase the risks for both Chinese companies and foreign investors; reduce predictability in their business transactions and restrict their ability to plan for the future and seek redress. Uncertainty in judicial decisions can send unclear signals and distort the decision-making of private parties who are bargaining in the shadow of the law. As pointed out by Raz, violation of the rule of law can result in uncertainty and frustrate people's expectations.[130] Moreover, the failure to institute and action reforms may cause foreign courts to refuse to recognise Chinese insolvency judgments on the basis of public policy because of a

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[128] Terence C Halliday and Bruce G Carruthers, "The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes" (2007) 112 American Journal of Sociology 1135.

[129] Ibid.

[130] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (OUP Oxford 2009), p 214.

perceived lack of certainty and procedural fairness in the Chinese procedure.[131]

The relevant authorities have already put in place measures to address deficiencies and, with a view to facilitating further the decision-making process in cross-border insolvency cases, the SPC can issue specific rules to guide judicial discretion and to improve insolvency procedures in a way that is consistent with basic values. Recent developments in Chinese insolvency law, including the establishment of specialised bankruptcy courts, Chinese International Commercial Courts (CICCs) and existing guidance issued by the SPC give grounds to believe that the Chinese judiciary is striving to become more professional. It is possible the specialised bankruptcy courts and CICCs will lead the way as specialised judges can accumulate experience and in-depth knowledge through hearing a large amount of similar cases.[132] Experienced bankruptcy judges also are more likely to improve returns for creditors and adjudicate on cases more efficiently.[133]

Special bankruptcy tribunals within the intermediate courts ((qingsuanpochan shenpanting清算破产审判庭,) in major cities came with the launch by the Chinese government in 2015 of a ‘‘supply-side’’ reform that aims at reducing overcapacity and eliminating ‘‘zombie companies’’ that are operating at a loss.[134] This was an attempt to concentrate bankruptcy cases within the intermediate courts and reduce the levels of ‘‘outside’’ intervention which were most prevalent in the basic courts (county level). In[135] a further reform, the SPC issued *Minutes of the National Court*

[131] The Model Law stipulates that domestic courts can refuse to taken actions that violate the public policy. Although in practice, public policy has only been applied in limited circumstances, however, the procedural fairness of the insolvency proceeding can be a major element of public policy considered by the court in the recognising state. For example, in *Yukos*, Amsterdam Court of Appeal refused to recognise enforcement of the Russian judgment regarding Yukos Company on the ground of public policy. In particular, it was held that the proceeding in Russia had violated the due process principles and the impartiality and independence of Russian courts is questionable. See Amsterdam Court of Appeals, May 9 2017, ECLI:NL:GHAMS:2017:1495. This decision has been confirmed by the Dutch Supreme Court. *See* ‘‘Dutch Supreme Court: Russian Federation Unlawfully Bankrupted Yukos Oil’’ (2019) <https://www.yukosfoundations.org/dutch-supreme-court-russian-federation-unlawfully-bankrupted-yukos-oil/> (visited 7 July 2020).

[132] Markus Zimmer, ‘‘Overview of Specialized Courts’’ (2009) 2 International Journal for Court Administration 46.

[133] Benjamin Iverson and others, ‘‘Learning by Doing: Judge Experience and Bankruptcy Outcomes’’ (2018) <https://experts.illinois.edu/en/publications/learning-by-doing-judge-experience-and-bankruptcy-outcomes+&cd=3&hl=en&ct=clnk&gl=uk> (visited 7 July 2020) (This empirical study on the bankruptcy courts in the US finds that more experienced judges spend less time in bankruptcy and it takes on average up to four years for a judge to manage large Chapter 11 filings. With more experienced judges, the debtor is more likely to be kept as a going-concern and produce higher recovery rate for creditors).

[134] Linxi Chen, Ding Ding and Rui Mano, ‘‘China’s Capacity Reduction Reform and Its Impact on Producer Prices’’, vol 18 (2018) <https://www.imf.org/~/media/Files/Publications/WP/2018/wp18216.ashx> (visited 7 July 2020).

[135] ‘‘Fourth Five-Year Reform Outline of the People's Court (2014-2018) [人民法院第四个五年改革纲要]’’ (2014) <http://www.court.gov.cn/zixun-xiangqing-8168.html> (visited 7 July 2020); Wang **Feng,** ‘‘Closing of Zombie Companies Led to a Sharp Increase in Bankruptcy Cases [僵尸企业”出清致破产案件猛增]’’ (*21st century business herald*, 2018)

Bankruptcy Trial Work Conference (hereafter *Minutes*)[136]on March 6, 2018. In this document, the SPC emphasises, *inter alia*, the specialisation of insolvency courts and insolvency judges and requires adequate communication and coordination among various parties in a business restructuring process.

In terms of cross-border insolvency, the *Minutes* clarifies two principles of cooperation: First, the principle of reciprocity requires the courts to resolve conflicts in cross-border insolvency appropriately and make reasonable determinations on jurisdiction; the courts shall coordinate a balance between the interests of foreign and domestic creditors under the principle of proportionate treatment and appropriately protect the interests of employees, tax claims and other domestic rights.[137] The courts are also required to "actively participate in and promote the negotiation and conclusion of international treaties on cross-border insolvency; explore new ways to apply the principle of reciprocity; strengthen cooperation between Chinese courts and administrators in cross-border insolvency; and promote the healthy and orderly development of international investment".[138] Second, in accordance with the principle of "protecting rights and balancing interests in cross-border insolvency cases", the courts shall cooperate in the manner stipulated by Article 5 of the EBL and distribute domestic assets of the debtor as required by the foreign courts only after the payment of domestic secured creditors and priority claims including employees' salary and social insurance, and tax arrears, etc.[139]

Following the sentiments expressed in these policy pronouncements, fully-fledged specialised bankruptcy courts were established in China. In 2018 December, the first such court was established in Shenzhen, as an affiliate to Shenzhen Intermediate Court. Similar courts were also established in Shanghai and Beijing.[140] Specialised bankruptcy courts were also established in Beijing , Shanghai,

<https://m.21jingji.com/article/20180817/2f095e99b918cc7409d7b4bffadaa2c7.html> (visited 7 July 2020).

[136] SPC, "Minutes of the National Court Bankruptcy Trial Work Conference [全国法院破产会议纪要]" (2018), available at <http://www.court.gov.cn/zixun-xiangqing-83802.html> (visited 7 July 2020).

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[137] Minutes, article 49.

[138] Ibid.

[139] Minutes, article 50.

[140] Huifeng He and Lum Alvin, "Shenzhen's New Bankruptcy Court Could Track Assets Transferred to Hong Kong" (*South China Morning Post*, 2019) <https://www.scmp.com/economy/china-economy/article/2182479/bankrupt-tycoons-beware-

Shenzhen, Tianjin, Guangzhou, Wenzhou and Hangzhou.[141] According to the media report, the insolvency courts will hear cases of compulsory liquidation, bankruptcies and bankruptcy-related cases as well as cross-border insolvency cases.[142] But specific regulations on the scope of the jurisdiction of insolvency courts are yet to be formulated. Compared with ordinary courts in China, the new insolvency courts are better resourced with staff, workplace and other resources specifically allocated for hearings. The judges in the insolvency courts are also notably more elite than ordinary Chinese judges. For example, 83% of the judges in the Beijing Insolvency Court have postgraduate qualifications with an average trial experience of 12 years.[143]

Another major institutional reform that could impact cross-border insolvency cases is the establishment of the Chinese International Commercial Court (CICCs), which is propelled by the Belt and Road Initiative (BRI) and could foster expanded judicial cooperation.[144] The BRI consists of a ‘‘belt’’ of land corridors and a ‘‘road’’ of sea routes, stretching from East Asia to Europe.[145] The BRI was first announced by President Xi Jinping in 2013 and is an ambitious plan to expand infrastructure investment overseas, reduce domestic overcapacity and strengthen trade and diplomatic links.[146] With the BRI, it is evident that China is going to play a greater role in global governance and actively promote cooperation in trade and investment. The FDI inflows in BRI economies have increased substantially in recent years and China now account for 20% of the total inflows.[147] But this also means a rise of legal disputes related to the BRI and the pressure for China to develop a more

new-court-china-could-track-funds> (visited 7 July 2020).

[141] Xiao Ma, ‘‘China Continues to Issue New Rules Promoting Corporate Rescue Culture, Facilitation OfBankruptcy Proceedings’’ (2020) <http://blogs.harvard.edu/bankruptcyroundtable/files/2020/03/China-Restructuring-for-BRT.pdf> **(visited 7 July 2020).**

[142] Ibid.

[143] Shan Ren, ‘‘83% of Judges in Beijing Bankruptcy Court Have Postgraduate Education [北京破产法庭法官团队研究生以上学历占比83%]’’ (*Beijing Daily*, 2019) <http://finance.sina.com.cn/china/dfjj/2019-02-02/doc-ihqfskcp2530092.shtml?cre=tianyi&mod=pcpager_fintoutiao&loc=20&r=9&rfunc=100&tj=none&tr=9> (visited 7 July 2020).

[144] for an insider’s view on the CICC, see the article by a judge of the CICC, Sun Xiangzhuang, , “A Chinese Approach to International Commercial Dispute Resolution: The China International Commercial Court” (2020) 8 The Chinese Journal of Comparative Law.

[145] Zeng Lingliang, ‘‘Conceptual Analysis of China’s Belt and Road Initiative: A Road towards a Regional Community of Common Destiny’’ (2016) 15 Chinese Journal of International Law 517.

[146] ‘‘Belt and Road ’ s Purposes Differ in Different Regions’’ (*Oxford Analytica Daily Brief*, 2019) <https://dailybrief.oxan.com/Analysis/GA241080/Belt-and-Roads-purposes-differ-in-different-regions> (visited 7 July 2020).

[147] Maggie Xiaoyang Chen, ‘‘Foreign Investment Growth in the Belt and Road Economies’’ <https://blogs.worldbank.org/trade/foreign-investment-growth-belt-and-road-economies> (visited 7 July 2020).

effective judiciary to handle cross-border cases.[148]

As a response, the SPC has established three Chinese international commercial courts (CICCs) in Shenzhen, Xi'An and Beijing.[149] This institutional reform reflects the recent trend to establish "international domestic courts". Prime examples are the Singapore International Commercial Court (SICC), the Dubai International Financial Centre Courts (DIFCC), and the Abu Dhabi Global Market Courts.[150] It is possible that CICCs will adjudicate upon "international commercial cases'[151] related to cross-border insolvency, especially high value cases.[152] Compared with ordinary domestic courts, the CICCs may handle cross-border disputes more effectively and efficiently, facilitated by elite judges and the International Commercial Expert Committee which is a one-stop service that integrates mediation, arbitration and litigation.[153]

At this stage however, CICCs are still domestic courts with few international characteristics. Only Chinese nationals are eligible for judgeship in CICC and parties must be represented by PRC-qualified lawyers, although foreign experts can provide assistance through the International Commercial Expert Committee. Also, the court proceedings will be conducted in Chinese and governed by

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[148] "Understanding the Commercial Courts of the China One Belt One Road Initiative – INS Consulting" (2018) <https://ins-globalconsulting.com/china-commercial-courts-one-belt-road/> (visited 7 July 2020).

[149] SPC, Regulation on Several Issues regarding the Establishment of International Commercial Courts [最高人民法院关于设立国际商事法庭若干问题的规定] (2018) (hereafter ICC Regulations). For the English website of CICCs, see http://cicc.court.gov.cn/html/1/219/199/201/817.html. Also see "China Establishes International Commercial Courts to Handle Belt and Road Initiative Disputes" (*Freshfields briefing*, 2019) <https://communications.freshfields.com/SnapshotFiles/30d385d8-07d3-494d-acea-95a37747720b/Subscriber.snapshot> (visited 7 July 2020).

[150] Sundaresh Menon, "International Commercial Courts: Towards A Transnational System of Dispute Resolution" (2015) <http://plato.stanford.edu/entries/sovereignty/> (visited 7 July 2020).

[151] ICC Regulation, Article 3 — "an International Commercial Case has at least one of the following elements: one or both parties are foreign nationals;

one or both parties reside outside China, even if they are both Chinese nationals; the subject matter in dispute is outside the territory of China; "legal facts" that create, change, or terminate the commercial relationship have taken place outside China".

[152] ICC Regulation, Article 2 — "the CICC has jurisdiction over international commercial cases: with an amount in dispute of at least RMB 300,000,000 when the parties submitted to the jurisdiction of the SPC; transferred by the High Court to the SPC; have a national impact; applications for preservation in in arbitration, for setting aside or enforcement of international commercial arbitration awards international commercial cases. Other international commercial cases might also be tried by the CICC if considered appropriate by the SPC".

[153] ICC Regulation, Article 11.

Chinese civil procedural law.[154]

The enforceability of CICC awards is an issue that needs to be addressed if it is going to play an important role in cross-border disputes. While the arbitral awards can be enforced broadly via the New York convention,[155] the decisions of CICCs, as ordinary domestic courts, can only be enforced through bilateral treaties, regional arrangements, or on the basis of the principle of reciprocity. A possible route for extending the effects of the CICC awards is through the Hague Convention on Choice of Court Agreements 2005, which China signed in 2017 but has not yet ratified.[156]

c. Moving to a Universalist Future

Given the recent institutional reforms in the judiciary, China could adopt a gradual approach to develop the cross-border insolvency regime first through the steps taken by the judiciary. Firstly, the SPC could issue specific rules to guide judicial discretion and to improve certainty, accessibility and equality in the bankruptcy procedure. In particular, before the Model Law is adopted, , the SPC can clarify the implementation of Article 5 and guide judicial discretion through issuing a judicial interpretation and guidance cases. If the Model Law is not adopted eventually, its principles could be assimilated into the Chinese legal system through the adjudication by the bankruptcy courts and judicial interpretation by the SPC. After China has adopted the Model Law, specific legal rules issued by the SPC are also necessary to reduce the arbitrariness in exercising judicial discretion caused by the inadequate professionalisation of judges and the flawed system for accountability.[157]

Secondly, the SPC could issue guidance to improve the regional cooperation between the Mainland and Hong Kong. It is crucial for mainland China to further strengthen the judicial cooperation with Hong Kong as it plays a unique role in the "going abroad" strategy of Chinese companies.[158] The

[154] Ibid.

[155] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)

[156] See <https://www.hcch.net/en/instruments/conventions/specialised-sections/choice-of-court> (visited 7 July 2020).

[157] Randall Peerenboom, "Judicial Independence in China: Common Myths and Unfounded Assumptions" (2008) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1283179> (visited 7 July 2020).

[158] John Chrisman, David Richardson and Alan Lee, "Hong Kong's Role in China's Financial Reform - The Era of the "New Normal"" (2015) <https://www.lexisnexis.com/lexis-practice-advisor/the-journal/b/lpa/posts/hong-kong-s-role-in-china-s-financial-reform-the-era-of-the-new-normal> (visited 7 July 2020).

Hong Kong Stock Exchange is a major destination for the listing of Chinese companies. As the largest offshore Renminbi trading hub, Hong Kong is also a major market for trading offshore bonds and distressed debt of Chinese companies.[159] Hong Kong has received requests for judicial assistance not only from Mainland China but also from offshore jurisdictions, such as Cayman Islands or the British Virgin Isands where many Chinese corporations are registered. Hong Kong is likely to play a greater role in connecting Chinese companies with the world as a platform for raising funds [160] for BRI projects and companies in the Greater Bay Area.[161]

Thirdly, the SPC could strengthen the transnational judicial cooperation informally by encouraging courts to communicate and cooperate with foreign courts based on soft guidelines. Earlier examples for soft guidelines[162] in cross-border insolvency include the Cross-border insolvency Concordat drafted by the International Bar Association in the 1990s, the Guidelines developed by the American Law Institute (ALI) /International Insolvency Institute (III),[163] and the Coco Guidelines in the EU.[164] More recently, the Judicial Insolvency Network (JIN) Guidelines were initiated by judges in several common law jurisdictions in 2016, including the US, the UK, Singapore, Australia, Bermuda and Canada.[165] Although Hong Kong has not formally joined the JIN, its representative attended the conference and the Hong Kong court referred to the Guidelines in the *China Fishery case.*[166] The JIN

[159] *See* the speech of Mr Paul Chan, the Financial Secretary of Hong Kong, at the Greater China Restructuring Forum 2019 at <https://www.info.gov.hk/gia/general/201901/16/P2019011600391.htm> (visited 7 July 2020).

[160] Ibid.

[161] Greater Bay Area consists of Shenzhen, Hong Kong, Macau and some cities in the Guangzhou province and is under a new government plan to strengthen the economic integration and growth in the region. *See* "China Unveils Plans to Develop Greater Bay Area" <https://www.reuters.com/article/us-china-hongkong-guidelines/china-unveils-plans-to-develop-greater-bay-area-idUSKCN1Q70Z3> (visited 7 July 2020).

[162] For an overview of the soft guidelines in cross-border insolvency, *see* Bob Wessels, Gert-Jan Boon, "Soft law instruments in restructuring and insolvency law: exploring its rise and impact" (2019), available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3397874> (visited 7 July 2020).

[163] In 2000, the American Law Institute (ALI) developed the Guidelines Applicable to Court-to-Court Communications to facilitate the cross-border insolvency in the countries that joined the North American Free Trade Agreement (NAFTA). *See* Jay Lawrence Westbrook, "Multinational Enterprises in General Default: Chapter 15, the ALI Principles, and the EU Insolvency Regulation" (2002) 76 Am. Bankr. LJ 1; In 2009, the ALI, jointly with International Insolvency Institute (III), published Global Principles for Cooperation in International Insolvency Cases, available at <https://www.iiiglobal.org/sites/default/files/ALI-III%2520Global%2520Principles%2520booklet_0.pdf+&cd=2&hl=en&ct=clnk&gl=uk> (visited 7 July 2020).

[164] European Communication and Cooperation Guidelines for Cross Border Insolvency Proceedings (CoCo Guidelines) was endorsed by INSOL Europe in 2007, available at <https://www.insol-europe.org/download/documents/1113> (visited 7 July 2020).

[165] For a discussion on the JIN guideline, *see* Emily Lee and Eric C. Ip, "Judicial Diplomacy In The Asia-Pacific: Theory And Evidence From The Singapore-Initiated Transnational Judicial Insolvency Network" (2020) Journal of Corporate Law Studies.

[166] *China Fishery Group Ltd* [2017] HKEC 2174.

Guideline reflects the principles of universalism and is likely to greatly promote the transnational judicial cooperation in the Asia-Pacific region. It is possible for Chinese courts to consider the JIN guideline and play a more active role in communicating and cooperating with foreign courts. The accumulation of experience in transnational cooperation will enable Chinese courts to implement the Model Law in a truly universalist spirit once it is adopted.

6. Conclusion

This paper goes further than recent academic papers and argues that there are no insuperable obstacles to China enacting the UNCITRAL Model Laws on Cross Border Insolvency and Insolvency Related Judgments.[167] The Model Laws are networked and embedded in a system of global trading relationships and China is now at the heart of these relationships. Model Law adoption should enhance these reciprocal flow of investment and promote China's role as a cooperative partner not least through its leadership of the BRI.

That is not to say that the Model law regime maps neatly onto China's current cross-border insolvency regime, which is encapsulated in Article 5 of the Enterprise Bankruptcy Law. Nevertheless, in the process of enactment and implementation there is ample scope in the existing instruments to modify the Models so as to fit with Chinese conditions and its own unique process of social, political and economic evolution. The regime contains savers for the protection of the interests of local creditors and also for local public policy norms in terms of qualifying or refusing recognition of foreign proceedings.

China could also go further by adopting a form of ''country accreditation'' system for recognising and

[167] But see MS Wee 'The Belt and Road Initiative, China's Cross-Border Insolvency Law, and the UNCITRAL Model Law on Cross-Border Insolvency' (2020) 8 Chinese Journal of Comparative Law 116–142. See also WY Wan & G McCormack, 'Implementing Strategies for the Model Law on Cross-Border Insolvency: The Divergence in Asia-Pacific and Lessons for UNCITRAL,' (2020) 36 *Emory Bankruptcy Developments Journal* 59-96; G McCormack & WY Wan, 'The UNCITRAL Model Law on Cross-Border Insolvency Comes of Age: New Times or New Paradigms?' (2019) 54Texas International Law Journal 274-305

granting assistance to foreign insolvency proceedings under the Model Law. If a country is accredited then China will apply the Model Law norms to insolvency proceedings emanating from that country but not otherwise. Accreditation might consist of participation in the BRI framework or something similar.

Moreover, to enhance the prospects of Chinese proceedings being recognised overseas and overcoming any barriers to recognition and assistance in the foreign jurisdiction such as public policy, it is important for China to carry on with reforms in the insolvency and judicial spheres. The SPC can guide judicial discretion through handing down more judicial interpretation and guidance cases. Even after China has adopted the Model Law regime, specific guidance issued by the SPC is necessary to reduce the arbitrariness in the exercise of judicial discretion caused by the insufficient professionalisation of judges and a system for accountability that has its challenges and question marks.