A balanced way for China's inter-regional cross-border insolvency cooperation

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A Balanced Way for China’s Inter-Regional Cross-Border Insolvency Cooperation

Xinyi Gong

A Balanced Way for China's Inter-regional Cross-Border Insolvency Cooperation

PROEFSCHRIFT

ter verkrijging van
de graad van Doctor aan de Universiteit Leiden,
op gezag van Rector Magnificus prof. mr. C.J.J.M. Stolker,
volgens besluit van het College voor Promoties
te verdedigen op dinsdag 27 september 2016
klokke 15.00 uur

door

Xinyi Gong
龚新怡
geboren te Shanghai, China
in 1983

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To my parents

Acknowledgement

In this dissertation, parts of my research have been published in separate articles, which are referred to in the footnotes of the text. I also list them below:

- *When Hong Kong Becomes SAR, Is the Mainland Ready? – Problems of Judgments Recognition in Cross-border Insolvency Matters*, in: International Insolvency Review, Wiley-Blackwell, Vol. 20, Issue 1, 2011, pp. 56-73;

- *To Recognize or Not to Recognize? - Comparative Study of Lehman Brothers Cases in the Mainland China and Taiwan*, in: International Corporate Rescue, Chase Cambria, Vol 10, Issue 4, 2013, pp. 240 – 247;

- *A Middle Way – Tailoring the Model Law and the Regulation into China's Context*, in: Norton Journal of Bankruptcy Law and Practice, October 2014, Vol.23, Issue 5, Article 9, p.691-738 (Westlaw citation: 23 No. 5 JBKRLP-NL Art. 9)

- *Can the Day Understand the Night? Brief Introduction into Problems of the Current Insolvency System in China*, available at http://www.iiiglobal.org/node/1929

All these aforementioned articles have been accepted for publication through peer review.

Since the comparative research in this dissertation related to China, the relevant legislative documents, cases and articles are originally written in Chinese. Some of them have been officially translated into English but most of them are only available in Chinese. Despite of official translation, those contents that have been translated by the author are marked with the indication "in Chinese".

Please note that the subsequent parts, including Annexes, bibliography and etc. do not constitute the main text of the dissertation.

Everyday I'm learning.

PREFACE

While completing this dissertation, reforms on insolvency legislations are undergoing in both east and west. In China's inter-regional regime (consisting of the Mainland, Hong Kong, Macao and Taiwan), in July 2014, the Legislative Council of Hong Kong SAR released a consultation conclusions documents on legislative proposals concerning improvement of corporate insolvency law. The problems of cross-border insolvency, especially involving Mainland-related companies, were brought to the attention of the Legislative Council of Hong Kong SAR and it was suggested to adopt proper measures to address that kind of issues. It is intended to prepare an amendment bill with a view to introduce the proposal into the Legislative Council in 2015. On 15 June 2015, the Judicial Yuan of Taiwan published the draft bankruptcy law (the Debt Clearance Act), a complete revision ever since 1935, in which a new chapter concerning recognition of foreign insolvency proceedings is included and the insolvency proceedings opened in the Mainland, Hong Kong SAR and Macao SAR also fall within the ambit of application, which has been forwarded to the legislative procedure. In EU, the EU Insolvency Regulation, twelve years after it came into effect, received the political agreement on its amended text by the Council (Justice and Home Affairs) on 4 December 2014. On 26 June 2015, the EU Regulation (recast) entered into force and shall apply from 26 June 2017.

It is also the very moment when concerns arose on cooperation within one country in the course of integration. In March and April 2014, the debating chamber of the Legislative Yuan in Taiwan was occupied by the protesters against an agreement on opening up services trade between the Mainland and Taiwan. In September and October 2014, roads in the city center of Hong Kong Special Administrative Region (SAR) were blocked by thousands of protesters due to disagreement with the Central Government on the way of the Chief Executive election. In June 2015, the reform on the way of the Chief Executive election proposed by the government was vetoed by the Legislative Council of HKSAR.

In the midst of uncertainty and reforms, this dissertation aims at pursuit of arrangements with respect to China's inter-regional cross-border insolvency cooperation in a balanced manner. My research questions are defined in Part I ('Introduction') of this study. A balanced way that can be tailored into China's regional cooperation arrangements shall be achieved based on China's regional political, economic and legal cooperation reality, by exploring the current cross-border insolvency systems in individual regions of China, and through the comparative study between China and EU on the main aspects of the regional regime, i.e. the EU Insolvency Regulation, as well as the UNICTRAL Model Law, which serves as the international standards of cross-border insolvency cooperation for more comprehensive reference. Considering that the cross-border insolvency legislations in the four regions are still under development, it is hoped that this dissertation can sketch the mainlines of the most relevant elements of cross-border insolvency cooperation on the regional level in China

and attempt to provide some “road signs” for future study and research on this topic.

I owe a debt of gratitude to my supervisor, Prof. Bob Wessels, for the opportunity to conduct independent research as Ph.d candidate in Leiden University and who, as eternal optimist of cooperation, keeps inspiring me with his professional advices to help me to complete this dissertation. I feel grateful to Leiden University for the kind academic support and host. A special appreciation also goes to China Scholarship Council who financially supports me to do my research in an independent way.

My sincere appreciation to those who rendered their voluntary assistance to the realization of this work, to my former colleagues from Department of Justice of Hong Kong SAR, United Nations Commission on International Trade Law (UNCITRAL) and the Hague Conference on Private International Law (HCCH), where I used to serve as intern in addition to my research, as well as to the professors from National Taiwan University, where I spent half one year studying the local legal system.

All the information collected in the dissertation was updated till 14 June 2016.

List of Abbreviations

ALI	American Law Institute
ARATS	Association for Relations across the Taiwan Straits
Cap 32	Companies (Winding-up and Miscellaneous Provisions) Ordinance
Cap 622	New Companies Ordinance
CEPA	Closer Economic Partnership Agreements
CICIA	China's Inter-regional Cross-border Insolvency Arrangement
COMI	center of main interests
CO	Companies Ordinance
CPCM	Civil Procedure Code of Macao
EBL	Enterprise Bankruptcy Law
ECFA	Economic Cooperation Framework Agreement
EC Regulation	EC Regulation on insolvency proceedings [Council Regulation (EC) 1346/2000
EU Regulation (recast)	Regulation (EU) of the European Parliament and of the Council on insolvency proceedings (recast) 2012/0340 (COD)
GDP	gross development product
Guide and Interpretation	Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency
HCCH	Hague Conference on Private International Law
HK	Hong Kong
HK and Macao Act	Act Governing Relations with Hong Kong and Macao
III	International Law Institute
Model Law	UNCITRAL Model Law on Cross-border Insolvency
Mainland Act	Act Governing Relations between Peoples of the Taiwan Area and the Mainland Area
Mainland-HK Arrangement	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 Pursuant to Choice of Court Agreements between Parties Concerned

Mainland-Macao Arrangement	Arrangement Between the Mainland and the Macao Special Administrative Region on the Mutual Recognition and Enforcement of Civil and Commercial Judgments
P.R.C.	People's Republic of China
Regulation[*]	EC Regulation and EU Regulation (recast)
UNCITRAL	United Nations Commission on International Trade Law
Virgós/Schmit Report	Virgós/Schmit Report on the Convention on Insolvency Proceedings, Brussels, 1996
SAR	Special Administrative Region
SEF	Straits Exchange Foundation
SOE	State Owned Enterprise
TBA	Taiwan Bankruptcy Act

[*]The EC Regulation and the EU Regulation (recast) altogether will be referred to as the Regulation in this dissertation in order to utilize the simplified expression to conduct comparison with the UNCITRAL Model Law

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Part I Introduction

1.01 This dissertation is about seeking solutions to China's inter-regional cross-border insolvency cooperation. Those solutions are developed mainly on the basis of two groups of comparative studies, including comparison among the cross-border insolvency systems of the four independent jurisdictions in China and comparison between the EU Insolvency Regulation and the UNCITRAL Model Law. In the end, it tentatively provides 10 original recommendations, accompanied with comments, which are entitled "China's Inter-regional Cross-border Insolvency Arrangement"("CICIA").

1.1 Possibility of Cooperation on a Regional Level

1.02 Integration encourages people to move increasingly across borders. "They studied, worked, got married, had children, purchased property, divorced and died in a region other than the one they were from. Businesses started to offer their products and services across borders on a regular basis. They set up factories and subsidiaries in other regions and acquired companies there."[1] As result, the legal systems of individual jurisdiction become too integral a part to remain isolated. The entire European Union is "a form of cooperation between its Member States",[2] which is supervised and governed by its regional legal order. Meanwhile, China's integration was partly crystalized by the "one country, two systems" policy. As result, four independent jurisdictions (the Mainland[3], Hong Kong, Macao and Taiwan) operate simultaneously and equally effectively within one country. That also gave rise to an inter-regional legal order, which involves the rules regulating the intersection between the Mainland and the three regions. The first intersection concerns interpretation of the constitutional document, i.e. the Basic Law, which is binding on the Mainland and the two SARs. The second intersection relates to the bilateral legal cooperation arrangements. (Please refer to Annex I for more detailed information.) The third intersection happens in the courtrooms of each region. For each decision involving inter-regional factors rendered, the courts make contribution to establishment of the inter-regional legal order.

1.03 What is essential to a regional legal order? Based on the EU's experience, it is loyalty and mutual trust. According to the Oxford English Dictionary, loyalty means faithful adherence to the sovereign or lawful government. In the EU, the principle of loyalty is embedded in the duty of sincere cooperation, which is now stipulated under Article 4(3) TEU (ex Article 10 EC, ex Article 5 EEC). It is a principle "central to the development of Union law since the 1960s and that it

[1] Reding, Viviane, From Maastricht to Lisbon: building a European area of Justice in small steps and great bounds, available at: http://europa.eu/rapid/press-release_SPEECH-13-960_nl.htm (Last visited on 14 June 2016)

[2] Weller, Matthias, Mutual Trust: in search of the future of European Union private international law, Journal of Private International Law, 2015, Vol. 11, No. 1, 64–102, p.73

[3] In this whole dissertation the Mainland (China) purely serves as a geographic term to describe the geopolitical area under the jurisdiction of the People's Republic of China (P.R.C.), generally excluding the P.R.C. Special Administrative Regions of Hong Kong and Macao.

still shapes its structure today"[4]. The EU Commission indicated, "the whole EU legal system … is based on mutual trust."[5] However, it is noteworthy that the origin of such cooperation was initiated by an agreement between five European states[6] and Germany, while the bitter memory left by the World War II was still fresh. In fact, the first agreement to cooperate was founded upon distrust. At that time, France feared of emerging German industry compounded by Germany's increasing share of European steel production and then proposed the Schuman Plan.[7] The solidarity in coal and steel production could make any war between France and Germany "not merely unthinkable, but materially impossible".[8] The integration of the European Union, including judicial cooperation, was not achieved through a single plan. Nevertheless, it demonstrated that cooperation was also possible if the parties concerned were not in a faithful relationship but fully aware that an individual party was incapable of realizing certain goals alone. That probably explains why there are bilateral legal cooperation arrangements concluded between the Mainland and the three regions before a sense of rooted attachment to their country is fostered and trust in each other is completely built. To deal with a series of contemporary problems and realize a set of goals in the process of integration, it is in the common interest to cooperate and an individual region cannot manage alone. In China, the development of regional legal cooperation is continuing.[9] Trust is most likely to evolve in contexts in which the parties find themselves in ongoing relationships.[10]

1.04 The possibility of inter-regional insolvency cooperation is also connected with the nature of cross-border insolvency. Insolvency proceedings touch upon one of the most long-standing and dynamic relations, which is the debtor-creditor relation. As a predominant metaphor, the limited assets of a debtor are usually described as fishes in a common pool and the creditors as self-interested fishermen.[11] The resources in the common pool would be diminished if they

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[4] Klamert, Marcus, The Principle of Loyalty in EU, Oxford University Press, 2014, p.1

[5] European Commission, Building Trust in Justice Systems in Europe "Assises de la Justice" Forum to Shape the Future of EU Justice Policy (Press Release), 21 November 2013, available at: http://europa.eu/rapid/press-release_IP-13-1117_en.htm

[6] The five European states are Belgium, Netherlands, Luxembourg, Italy and France.

[7] Diebold, William, The Schuman Plan: a study in economic cooperation, 1950-1959, New York: Frederick A. Praeger for the Council on Foreign Relation, 1959, p.10

[8] European Parliament, Selection of Texts concerning Institutional Matters of the Community for 1950 – 1982, Luxembourg: European Parliament, 1982, p.47

[9] For instance, on 21 March 2016, the Executive Vice President of the Supreme People's Court of the People's Republic of China at the invitation of the Hong Kong Special Administrative Region (SAR) Government had a meeting with the Secretary for Justice of the Department of Justice of Hong Kong SAR. Both agreed to explore and take forward mutual legal assistance on civil and commercial matters.

[10] Cook, Karen S., Hardin, Russell, Levi, Margaret, Cooperation without Trust?, Volume IX in the Russell Sage Foundation Series on Trust, 2005, p.4

[11] Block-Lieb, Susan, Fishing in Muddy Waters: Clarifying the Common Pool Analogy As Applied to the Standard for Commencement of a Bankruptcy Case, 42 Am. U. L. Rev. 337 1993, p.343; Jackson, Thomas, The Logic and Limits of Bankruptcy Law, 1986, p. 12-13; Baird, Douglas G., & Jackson, Thomas H., Adler Barry E., Cases, Problems and Materials on Bankruptcy (2nd ed.), Little, Brown and Company, 1990, p.20-30; Jackson, Thomas & Scott, Robert, On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain, 75 Va. L. Rev. 155, 1989, p.178.

could not be prevented from overuse by the individual creditors. The common pool problems are often viewed as a multi-player Prisoner's Dilemma game.[12] In the two-person game that is played only once, both players must cooperate in order to maximize their joint welfare;[13] in the n-person one-shot game, welfare maximization occurs only if all n players cooperate.[14] Accordingly, in order to ensure equal treatment of creditors and maximize value of the debtor's assets, insolvency proceedings are designed as a collective debt collection mechanism. Although the analogy of the assets of an insolvent debtor to a common pool used to be hotly debated among bankruptcy scholars,[15] the conclusion that a need exists for the "collective remedy of bankruptcy" is hardly controversial on national level.[16] As for cross-border insolvency, both the Model Law and the Regulation require that the proceedings must be collective.[17] More importantly, given its nature, cross-border insolvency can possibly bring higher degree of cooperation than ordinary civil and commercial matters. For instance, Taiwan adopted differentiated attitudes towards the civil and commercial judgments rendered in the Mainland, Hong Kong and Macao (which will be explained in Part II), which have been changed in the approved draft of the Debt Clearance Act (the 2015 Draft) issued by the Judicial Yuan of Taiwan in June 2015 and passed by the Executive Yuan of Taiwan in April 2016. It is stipulated under the 2015 Draft that Taiwan intends to apply uniform rules in matters of recognition of cross-border insolvency proceedings regardless of its place of origins among China, Hong Kong, Macao and other foreign countries for equal treatment of creditors.[18]

1.2 Lack of a Regional Cross-border Insolvency Framework

1.05 Cooperation is accompanied with uncertainty over the future. Insolvency could be a conflict trigger. Insolvency law on the whole is a response to credit, which is "the disposition of one man to trust another".[19] "The essence of credit

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[12] Block-Lieb, Susan, Congress's Temptation to Defect: A Political and Economic Theory of Legislative Resolutions to Financial Common Pool Problems, 39 Ariz. L. Rev. 801, 1997, p. 811

[13] Baird, Douglas G., ET AL., Game Theory and the Law, Harvard University Press, 1998, p.31-35

[14] Molander, Per, The Prevalence of Free Riding, 36 J. CONFLICT RESOL 756, 1992, p. 759; See also Schelling, Thomas C., Micromotives and Macrobehavior, W. W. Norton & Company, 1978, p.218

[15] Friedman, Alan E., The Economics of the Common Pool: Property Rights in Exhaustible Resources, 18 UCLA L. REV. 855, 1971, p.856; Countryman, Vern, The Concept of a Voidable Preference in Bankruptcy, 38 VAND. L. REV. 713, 1985, p.823-825; Carlson, David Gray, Philosophy in Bankruptcy, 85 MICH. L. REV. 1341, 1987; Roe, Mark J., Commentary on "On the Nature of Bankruptcy": Bankruptcy, Priority, and Economics, 75 VA. L. REV.,1989, p.219-220; Korobkin, Donald R., Contractarianism and the Normative Foundations of Bankruptcy Law, 71 TEX. L. REV. 541, 1993, p.553-559; Block-Lieb, Susan, Fishing in Muddy Waters: Clarifying the Common Pool Analogy As Applied to the Standard for Commencement of a Bankruptcy Case, 42 Am. U. L. Rev. 337 1993, p.412-432

[16] Block-Lieb, Susan, Fishing in Muddy Waters: Clarifying the Common Pool Analogy As Applied to the Standard for Commencement of a Bankruptcy Case, 42 Am. U. L. Rev. 337 1993, p.346

[17] The Model Law, article 2(a); the EC Regulation, recital (10), article 1(1); the EU Regulation (recast), recital (12), (14), article 1(1)

[18] The 2015 Draft, article 319. Clarification to the 2015 Draft, Chapter VI, article 319.

[19] Posner, Kenneth A., Stalking the Black Swan: Research and Decision Making in a World of Extreme Volatility, Columbia Business School Publishing, 2010, p. 17

system is people and firms that can be called debtors borrowing money".[20] Insolvency law copes up with the risk that a debtor fails to observe the obligation to repay. If the risk of debtor's default cannot be handled properly, that will incur distrust between creditors and debtors. Therefore, insolvency law basically helps to establish an enduring cooperative relationship between debtors and creditors. Cross-border insolvency adds complexity to the scenario because it involves creditors from the different jurisdictions and debtors' fragmented assets governed by different rules. Under that circumstance, what kind of rules should apply? No individual jurisdictions intend to regulate every action or event that occurs anywhere and the law implemented in each of them has its boundaries, which are shaped through the recognition of claims of other jurisdictions.[21] Hence, coordination of rules on a regional and international level is necessary in order to provide proper reference for cross-border insolvency cooperation for the benefit of long-term and reliable cross-border debtor-creditor relation. Moreover, in order to maintain an enduring regional cooperative relation, it is of significance to make arrangements for such conflict to be resolved in a smooth manner.

1.06 Unfortunately, coordination of rules on inter-regional insolvency proceedings cannot be found either in any local law of the respective jurisdiction or in any bilateral arrangements in China. In 2011, upon a request for recognition of the winding-up proceeding concerning *Norstar Automotive*, the High Court of Beijing referred a question to the Supreme People's Court in order to make clear whether or not the winding-up order rendered by the High Court of Hong Kong can be recognized in the Mainland China. The Supreme People's Court replied,

"In accordance with the Article 1 of Arrangement of the Supreme People's Court between the Mainland and the HKSAR on Reciprocal Recognition and Enforcement of the Decisions of Civil and Commercial Cases Pursuant to Choice of Court Agreements between Parties Concerned, the winding-up order in dispute does not fall within the ambit of the enforceable final judgment under the Arrangement and thus the Arrangement is irrelevant to this case. The Article 265 of the Civil Procedure Law and the Article 5 of the Enterprise Bankruptcy Law, which provide rules on recognition and enforcement of judgments rendered by the ***foreign*** courts, (bold and italics added by the author) cannot be applied to this case, either. The decision of your court that in accordance with the aforementioned legislation, recognition of the winding-up order in dispute can be granted is groundless."[22] (translated by the author)[23]

1.07 It is noteworthy that the High Court of Beijing tended to recognize the HK winding-up order based on those rules applicable to foreign judgments. In fact,

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[20] Jackson, Thomas H., The Logic and Limits of Bankruptcy Law, Washington D.C.: Beard Books, 2001, p.7

[21] Ten Wolde, Mathijs, The relativity of legal positions in cross-border situations: The foundations of private interregional law, private intra-community law and private international law, in: A commitment to Private International Law: Liber Amicorum Hans van Loon, Secretary-General Hague Conference. Cambridge: Intersentia, International Law Series, 2013, p.575

[22] [2011] Supreme People's Court Civil Other No. 19

[23] In case otherwise indicated, the Chinese judgments in this dissertation are translated by the author.

the Supreme People's Court used to consider a court of SAR as a foreign factor as well.[24] In practice, the lower courts have followed this approach.[25] It is beyond doubt that no judges of the Mainland want to jeopardize the sovereignty of their motherland. Why then do they keep considering SARs as foreign-related in adjudicating the SAR-related cases? What is the real meaning of "foreign-related"?

1.08 The current confusion in essence reflects a continuing dilemma regarding the status of the SARs in matters of cross-border civil and commercial judicial interaction in China. Although Hong Kong has politically returned to P.R.C., a comprehensive legislative and judicial approach is still lacking. In the aforementioned Reply of the Supreme People's Court, recognition of the civil and commercial judgments rendered in Hong Kong is limited to some particular legal relationship as stated in a bilateral arrangement, which refers to a civil or commercial contract between the parties concerned, excluding a contract of employment or a contract to which a natural person is involved as a party for purposes of personal consumption, family affairs or other non-commercial purposes (the Mainland-HK Arrangement).[26] The insolvency proceedings are still not included. Therefore, it is lack of legal basis for the courts to make decision.[27] Those foreign-related rules were thus borrowed as alternatives to solve the problems. However, the Reply of the Supreme People's Court in 2011 seems to set the tone that they can no longer be deemed as effective legal basis in dealing with recognition of cross-border insolvency proceedings between the two regions from the perspective of the Mainland.

1.09 The scope of the arrangement concerning the mutual recognition and enforcement of judgments between the Mainland and Macao[28] is much wider. It covers the civil and commercial cases, including the labor disputes.[29] Although the insolvency proceedings are not literally excluded, Arrangement Between the Mainland and the Macao Special Administrative Region on the Mutual

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[24] In the case of *Bank of China (Hong Kong) Limited versus Shantou Hongye (Group) Co., Ltd*,([2002] Supreme People's Court Final Civil Division IV No. 6), the Supreme People's Court stated ". . . as the HKSAR and the Mainland of China belong to different jurisdictions, according to Several Opinions of the Supreme People's Court on the Implementation of the General Rules of the Civil Code of People's Republic of China, Article 194, when the ***foreign-related*** (bold and italics added by the author) party to the contract makes a choice of the application law, the mandatory or prohibitory laws and regulations of P.R.C. can not be circumvented. . ."

[25] *Gu Laiyun and others versus Nardu Company Limited* [2006] Guangzhou Intermediate People's Court Civil Division IV First Instance No. 44, see also *Yong Zhe Express Service versus Hong Kong Woolworths Group (Asia) Ltd.,* [2009] Shanghai No.1 Intermediate People's Court Civil Division V (Commercial) First Instance No. 32

[26] 2006 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 Pursuant to Choice of Court Agreements between Parties Concerned, article 3

[27] Gong, Xinyi, When Hong Kong Becomes SAR, Is the Mainland Ready? – Problems of Judgments Recognition in Cross-border Insolvency Matters, in: International Insolvency Review, Wiley-Blackwell, Vol. 20, Issue 1, 2011, pp. 59.

[28] Macao is spelled Macau in Portuguese. According to UN database, the official English version shall be Macao. Please visit http://data.un.org/CountryProfile.aspx?crName=China,+Macao+SAR (last visited on 14 June 2016)

[29] Arrangement Between the Mainland and the Macao Special Administrative Region on the Mutual Recognition and Enforcement of Civil and Commercial Judgments, article 1

Recognition and Enforcement of Civil and Commercial Judgments (the Mainland-Macao Arrangement) provides no specialized rules in dealing with recognition of the cross-border insolvency proceedings, which will cause problems because in accordance with the Article 20 of the Civil Procedure Code of Macao, the Macao courts shall have exclusive jurisdiction over the lawsuits concerning the bankruptcy or insolvency of legal persons, whose domicile is within Macao. In accordance with Article 11 of the Mainland-Macao Arrangement, if the matter verified in the judgment according to the laws of the requested region shall be subject to the exclusive jurisdiction of the requested court, the requested court should refuse to recognize it.[30] Therefore, the insolvency proceedings are in fact excluded from the bilateral recognition arrangement regime between the Mainland and Macao SAR.

1.10 Taiwan is a politically disputed territory. On the scenario of cross-strait legal cooperation, each side stipulated specialized rules in matters of recognition and enforcement of civil and commercial cases, which are parallel to the rules applicable to the foreign cases. In the Mainland, the judicial interpretations[31] issued by the Supreme People's Court serve as the legal basis of recognition of Taiwan civil and commercial judgments. In Taiwan, the Mainland civil and commercial judgments are recognized based on Act Governing Relations between the People of the Taiwan Area and the Mainland Area.[32] In 2009, the Mainland and Taiwan entered into the Agreement between Both Sides of the Taiwan Strait on Jointly Fighting against Crimes and Mutual Judicial Assistance. It is a general legal cooperation agreement that covers mutual judicial assistance in matters of criminal cases, service of documents, taking evidence as well as recognition and enforcement of civil cases and arbitral awards, in which rules concerning recognition of cross-strait insolvency proceedings have not been specified.

1.3 Main Research Questions

1.11 In pursuit of the solutions to China's inter-regional insolvency cooperation, the dissertation is mainly composed of five Parts that correspond to the following five research questions:

1.12 Question I: Why is it necessary to address the issue of cross-border insolvency in China?

After resumption of its sovereignty over Hong Kong and Macao as well as the uncertain cross-strait relationship between the Mainland and Taiwan, China becomes a country composed of peculiar political compounds, which results in

[30] Arrangement Between the Mainland and the Macao Special Administrative Region on the Mutual Recognition and Enforcement of Civil and Commercial Judgments, article 11 (1)

[31] 1998 The Supreme People's Court The Provisions on the People's Court's Recognition of the Verdicts on Civil Cases Made by Courts of Taiwan Province, ([1998] Supreme People's Court Interpretation No.11); 2009 Supplementary Provisions of the Supreme People's Court on the People's Courts' Recognition of Civil Judgments of the Relevant Courts of the Taiwan Region, ([2009] Supreme People's Court Interpretation No.4).

[32] The Mainland Act, article 74

four independent jurisdictions. That makes inter-regional legal cooperation a complicated but also a must topic. In Part I Introduction, the lack of rules regulating inter-regional cross-border insolvency and the possibility of cooperation has been sketched out.

1.13 Question II: What is the "one country, two systems" policy and its influences on inter-regional legal cooperation in China

By introducing the political and economic cooperation background, Part II illustrates birth and development of the "one country, two systems" policy and provides a general overview of the peculiar "four Chinas" composition. Further, it demonstrates the current arrangements of the legal cooperation in particular concerning civil and commercial cases among the four regions, from which insolvency is excluded. As settled consensus, their contents and development furnish indispensable references for further discussion on inter-regional cross-border insolvency cooperation in China.

1.14 Question III: What are the current cross-border insolvency systems among the four regions?

Part III introduces the cross-border insolvency legislation region by region. To make the introduction in a more systematic way, each of them will start with an overview of the general insolvency system. Further, it is to be followed by more detailed introduction of the individual cross-border insolvency system, which is mainly combined with the cases study and analysis. In the end, the individual features of the cross-border insolvency systems among the four regions will be compared and summarized and a comparative table (Annex III) is attached for a general overview of the cross-border insolvency system in the four regions.

1.15 Question IV: What is the difference between the Regulation and the Model Law on their key aspects?

Part IV conducts a comparative research between the Regulation and the UNICTRAL Model Law by laying emphasis on the key aspects, including jurisdiction (especially COMI), recognition and reliefs, enterprise groups as well as cooperation and communication. After having been operating over ten years, both the EC Regulation and the UNICTRAL Model Law are undergoing changes. In particular, the EC Regulation has been repealed through new substantive amendments, which brings in a recast EU Regulation. Meanwhile, the UNICTRAL Model Law has also been gradually developed by guides. Especially in 2013, the Guide to Enactment of the Model Law has been revised and retitled as Guide to Enactment and Interpretation. Therefore, the comparative research of the two international regimes will be conducted in the way of abundant literature review and cases analysis so that their similarities and differences in development can be explored in detail. In addition, a table of comparison (Annex IV) is attached to better illustrate the difference of the two regimes.

1.16 Question V: How to tailor those two international models into China's context?

By referring to the current practice in China, Part V will attempt to find a balanced way between the Regulation and the Model Law and then tailor them into China's context, which is composed of ten recommendations attached with comments. Based on the result of the first round of comparison between the Regulation and the Model Law, I will conduct the second round of comparison in this part in order to further examine compatibility of the results with the Mainland and the SARs to check out which one better fits into China's situation or whether China should establish something new for its own regional regime. The range of the regional arrangement covers the guiding principle, the overriding objective, form and scope, recognition and reliefs, public policy, cooperation and communication (single debtor and enterprise groups), cross-border insolvency agreements, functional dispute settlement mechanism, inter-regional case register and a separate arrangement for cross-strait insolvency cooperation (between the Mainland and Taiwan), which is independent intermediaries.

1.4 Research Methodology

1.17 In search of the solutions, the following research methods have been applied:

Literary search:

The literary search encompassed exploration of relevant regional (including four regions in China) and international legislations as well as scientific and professional literature. In particular, for the recent developments in the related legislations both in China and in the EU, the relevant proposals and working documents have been examined.

Case study:

Both regional and international cases were collected to facilitate the research. On international level, they are mainly collected through both official case law databases, such as InfoCuria (case law database of the CJEU) and CLOUT (Case Law on UNCITRAL Texts information system), and specialized databases maintained by professional international organizations, such as European Insolvency Regulation Case Register of INSOL Europe and E-Library of International Insolvency Institute, which both contribute to sufficient sources of case law in matters of cross-border insolvency.

On regional level in China, it is more difficult to obtain the relevant information, in particular in the Mainland. On the one hand, there are no specialized case law databases with regard to cross-border insolvency or even insolvency. On the other hand, publicity of judgments is still at the primary stage in the Mainland. It was not until 1 January 2014 that the courts are mandatorily required to publish

their judgments on the internet in the Mainland.[33] The Supreme People's Court also established an internet portal as a central public access to the judgments of all levels,[34] on which the search engine can only trace cases from 1 January 2014. Besides, owing to complicated factors as to be explained in Part II, the amount of domestic insolvency cases is declining in general. I have personally attempted to look for insolvency cases on the central portal provided by the Supreme People's Court and found that the insolvency cases merely amounted to 0.4% of the total civil and commercial cases published on that portal and insolvency cases with cross-border factors are far rarer.

Despite of lack of or limited access to the related sources, efforts have been made by searching for additional supporting documents, such as articles published by the judges, as well as by analyzing the case law available from the counterpart courts, which involved in the parallel insolvency proceedings.

[33] The predecessor of the 2013 interpretation used to be Provisions on the Issuance of Judicial Documents on the Internet by the People's Courts, [2010] Judicial Interpretation No.48, which was passed by the Supreme People's Court in 2010. By then, it was stated that the courts may issue judgments on the internet ([2010] Judicial Interpretation No.48, Article 2). Now it has been replaced by the 2013 Interpretation, which provides that the courts should issue judgments on the internet. ([2013] Judicial Interpretation No.26, article 4).

[34] [2013] Judicial Interpretation No.26, Article 2; for the central internet portal, please visit: http://www.court.gov.cn/zgcpwsw/zscqhz/ (Last visited on 14 June 2016)

Part II China's Special Political Regime and Current Regional Cross-border Legal Cooperation

Introduction

2.01 This part is composed of three chapters. I will provide a general overview of the political, economic and legal integration among the four regions in China. In particular, the current regional cross-border legal cooperation will be explained in detail.

Ch.1 Political Integration

1.1 The "One Country, Two Systems" Regime

2.02 To resume the exercise of sovereignty over Hong Kong[35] and Macao[36] after their colonial relationships fell due[37], the Mainland[38] has adopted the "One Country, Two Systems" policy, which was decided as the basic policy in the Sino-British Joint Declaration[39] and Sino-Portuguese Joint Declaration.[40]

2.03 The policy has created a special political regime. First of all, "one country" is the prerequisite for "two systems". The central government of P.R.C. is the sole authority governing the Mainland and the SARs. Secondly, the degree of

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[35] Hong Kong SAR, at the south-eastern China, covers 1,104 square kilometers, including Hong Kong Island, Lantau Island, the Kowloon Peninsula and the New Territories. Hong Kong SAR's population was approximately 7.15 million in 2012. People of Chinese descent comprise the vast majority of the population, with foreign nationals comprising 5%. For more information about HKSAR, please visit: http://www.gov.hk/en/about/abouthk/facts.htm (last visited on 14 June 2016)

[36] Macao SAR consists of the Macao peninsula and the two islands of Taipa and Coloane and covers an area of 29.2 square kilometers. The population of Macao is estimated to be around 607,500 in 2013. More than 95% of the population speaks Chinese. Portuguese is spoken by about 0.6% and the remainder speaks English, Filipino or other languages. For more information, please visit: http://www.gcs.gov.mo/files/factsheet/geography.php?PageLang=E (last visited on 14 June 2016)

[37] Under The Convention for the Extension of Hong Kong Territory, which was a lease signed between Qing Dynasty and the United Kingdom in 1898, the territories north of Boundary Street and south of the Sham Chun River, and the surrounding islands, later known as the "New Territories" were leased to the United Kingdom for 99 years, expiring on 30 June 1997 and became part of the crown colony of Hong Kong. For more information, see Ghai, Yash P., Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law, Hong Kong: HK University press, 1999.

[38] In this whole dissertation the Mainland (China) purely serves as a geographic term to describe the geopolitical area under the jurisdiction of the People's Republic of China (P.R.C.), generally excluding the P.R.C. Special Administrative Regions of Hong Kong and Macao. The Mainland is located in the east of the Asian continent covering 9,600,000 square kilometers. The population is over 1.33 billion in 2010 according to the sixth national population census, which is the latest population census so far. For more general information, please visit: http://www.gov.cn/english & http://www.stats.gov.cn (Last visited on 14 June 2016)

[39] For full text of Sino-British Joint Declaration, please visit http://english.gov.cn/2007-06/14/content_649468.htm (Last visited on 14 June 2016)

[40] For full text of Sino-Portuguese Joint Declaration, please visit http://bo.io.gov.mo/bo/i/88/23/dc/en/ (Last visited on 14 June 2016)

autonomy enjoyed by the SARs is even higher than the states under a federal model, like the United State, in particular involving independent judicial power including that of final adjudication.[41] Thirdly, the Mainland and the SARs are mutually restrained by the Basic Law, the constitutional document, which can only be enforced within the SARs, whereas not every article of the Constitution of P.R.C has the effect in the SARs.[42]

1.2 The Legal Foundation: the Basic Law

2.04 The policy of "One Country, Two Systems" is well defined by the Basic Law[43] which functions as a treaty signed between the central government and the SARs as a result of political integration. The mainline of the Basic Law is to keep everything unchanged as much as possible after the reunification. First of all, although China still has its unitary political system, China's central government cannot interfere with the affairs in those two regions except for foreign and defense affairs as well as other matters outside the limits of the autonomy of SARs.[44] Secondly, the laws in force in the SARs will basically remain the same and most of the laws in the Mainland will not be enforced in the SARs.[45] Thirdly, the SARs shall be vested with executive power, legislative power and independent judicial power, including that of final adjudication.[46] Fourthly, the social and economic systems in the Mainland and the SARs operate in the same way respectively as they used to be.[47]

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[41] Attention should be paid to the word "independent" that only occurs in front of the judicial power under both Basic Laws (art.19 HK Basic Law & art.19 Macao Basic Law). The independency of the courts in SARs is mainly reflected in establishment of the Court of Final Appeal in both SARs, which is vested with the power of final adjudication in the SARs. (art. 81 HK Basic Law & art.84 Macao Basic Law) Besides, the courts of the Special Administrative Region may also interpret other provisions of the Basic Law in adjudicating cases, except for the affairs that are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region. (HK Basic Law, article158 & Macao Basic Law, article143)

[42] The effect of the constitution of P.R.C in the SARs was in debate when drafting the Hong Kong SAR Basic law and is still controversial in China. See Wang Shuwen, Introduction to the Hong Kong SAR Basic Law (in Chinese), Beijing: Central Committee of the CCP Party School Press, 1997; Jiao Hongchang, Studies of Macao SAR Basic Law (in Chinese), in 1 Tribune of Political Science and Law, 1999; Wang Zhenmin, The Analysis of the Constitutional Issues in the Implementation of the "One Country, Two Systems" Policy (in Chinese), in: 4 Studies in Law and Business, 2000, 3; Xiao Weiyun, The Relationship of the Constitution of P.R.C. and the HKSAR Basic Law (in Chinese), in: Xiao Weiyun, Theories of Hong Kong Basic Law, Beijing: Peking University Press, 2003.

[43] Both SARs (HK and Macao) have their own Basic Law, which are generally the same in structure and contents.

[44] The expression "outside the autonomy of SAR (which occurs in Article 18 in both Basic Laws) is troublesome, because the Basic Laws do not specify clearly the limits of SAR' s autonomy.

[45] The Basic Law of HKSAR, article 8, 18; the Basic Law of Macao SAR, article 8, 18

[46] The Basic Law of HKSAR, article16, 17,19; the Basic Law of Macao SAR, article 16, 17, 19

[47] The high degree of autonomy has been maintained by the Basic Law in a comprehensive way. For example, the SAR has its own independent finances. The Central People's Government shall not levy taxes from the SAR. Furthermore, the SAR shall use its financial revenues exclusively for its own purposes. The SAR is still allowed to issue its own currency, the HK dollar or Macao Pataca . The HKSAR remains the status of a free port and a separate customs territory. As for Macao, gambling and tourism are both the pillar industries of the Macao SAR. Therefore, special provisions, have been made to keep the promise that the previous way of life will remain

2.05 However, the Basic Law is different from the treaties establishing the European Union. First of all, the EU is not built upon a single plan but through concrete and continuous development,[48] whereas the Basic Law is a primary attempt between the Mainland and the SARs, which is tentatively conducted for 50 years.[49] Secondly, the treaties gradually set up a political union in competition with the nation-state,[50] which requires the latter to limit its sovereign rights for the benefit of the union. The Basic Law set the tone for "one country" as the ultimate goal,[51] according to which the Mainland as Central Authority has to restrain its sovereign rights from interfering the high degree autonomy enjoyed by the SARs. Thirdly, the treaties constitute a new legal order of international law, which not only binds the government but also the peoples of Europe.[52] The Basic Law is only applicable within the SARs.[53] As for the regional legal order that addresses the issues arising from the interplay between the Mainland and the SARs, it is mainly established on the basis of bilateral arrangements, which is to be discussed in the Ch.3.

Ch.2 Economic Integration

2.1 Closer Economic Partnership Arrangement (CEPA)

2.06 To strengthen the inter-regional economic cooperation, the Mainland and the SARs signed the CEPA respectively in 2003. Each CEPA contains a main text, six annexes, and annually signed supplementary agreements[54]. The cooperation covers trade in goods, trade in services and trade and investment facilitation.

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unchanged in Macao SAR. In addition, the unique consultative co-ordination organizations composed of representatives from the government, the employers' organizations and the employees' organizations, which were set up in 1987, have been maintained in the Macao SAR. These kinds of organizations aim at reducing friction, improving mutual understanding and finally reaching the agreement through the reconciliation between the employers and the employees. They also help to promote the substantial improvement of the labor legislation and the economy in Macao. Fourthly, SAR may on its own, using the name "Hong Kong, China" or "Macao, China", conclude and implement agreements with foreign states and regions and relevant international organizations in the appropriate fields, including the economic, trade, financial and monetary, shipping, communications, tourism, cultural and sports fields. Please refer to the Basic Law of HKSAR, article 106, 111,114,116,151; the Basic Law of Macao SAR, article 104, 106, 108, 115, 118.

[48] The Treaty of Paris (European Coal and Steel Community, 1951); the Treaties of Rome (Euratom, EEC, 1957); the Treaty of Maastricht (the EU Treaty, 1992); the Treaty of Amsterdam (1997); the Constitutional Treaty (not entered into force, 2004); the Lisbon Treaty (TEU, TFEU, Charter, Euratom, 2007)

[49] Basic Law of HKSAR, article 5; Basic Law of Macao SAR, article 5

[50] Chalmers, Damian, Davies, Gareth & Monti, Giorgio, European Union Law (2nd ed.), Cambridge University Press, 2010, p.9

[51] Basic Law of HKSAR, article 1; Basic Law of Macao SAR, article 1

[52] Case C-26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration,* [1963] ECR 1

[53] Basic Law of HKSAR, article 2; Basic Law of Macao SAR, article 2

[54] The supplementary agreements of CEPA are signed annually by the Mainland with each SAR. The texts of CEPA between the Mainland and HKSAR (in English), please visit http://www.tid.gov.hk/english/cepa/ ((Last visited on 14 June 2016); the text of CEPA between the Mainland and the Macao (in English), please visit http://www.cepa.gov.mo/cepaweb/front/eng/index_en.htm (Last visited on 14 June 2016)

The most substantial part of the cooperation in trade in goods is that by January 1, 2006, the Mainland shall apply a zero import tariff to all imports from Hong Kong SAR and Macao SAR. With regard to trade in service, according to Article 11 of each arrangement, the Mainland has promised to gradually ease and ultimately eliminate restrictions on the services provided by Hong Kong SAR and Macao SAR businessmen. Upon the request of either side, the Mainland and the SARs may, through consultation, pursue further liberalization of trade in services between them.[55] Besides, the Mainland, Hong Kong SAR, and Macao SAR have agreed to further promote their investment facilitation in various areas, such as trade and investment promotion, especially including transparency in laws and regulations.

2.2 Cross-strait Economic Cooperation Framework Agreement (ECFA)

2.07 Regardless of the divergent opinions on sovereign issues, an active tie between the Mainland and Taiwan, which is the cross-strait economic interaction, is growing. In 2010, the conclusion of the Cross-strait Economic Cooperation Framework Agreement (ECFA) embarked on a new era of the economic interaction between the two sides. This agreement is a preferential trade agreement between the governments of the Mainland China and Taiwan that aims to reduce tariffs and commercial barriers between the two sides. With accession to the ECFA, it can be noticed that more investment flows across the strait from each side. (Please refer to Table I below)

Table I

Table of Outflow and Inflow between Taiwan and the Mainland				
Statistics on Approved Taiwan Investment in the Mainland			Statistics on Approved Mainland Investment in Taiwan	
Year	Case	Amount (unit: $1000)	Case	Amount (unit: $1000)
2009	249	6,058,497	23	37,486
2010	518	12,230,146	79	94,345
2011	575	13,100,871	102	43,736
2012	454	10,924,406	138	328,067
2013	440	8,684,904	141	360,884
2014	388	9,829,805	136	334,631
2015	321	10,398,224	170	244,067

(Data collected from http://www.moeaic.gov.tw)

2.08 However, the further cross-strait economic relationship is not developed without controversies. It is reported that dozens of activists, mostly students broke in the debating chamber of the Legislative Yuan, Taiwan's parliament, in Taipei on 18 March 2014 in order to resist an agreement on opening up services trade with the Mainland. The students continued to occupy the chamber till 10 April 2014.[56]

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[55] These services, around 38 in total, include law, accounting, insurance, banking, securities, construction and real estate, medical and dental, advertising, trade mark agents, patent agents, employment agencies, personnel intermediary and tourism etc.

[56] Banyan, Students in the House, in: the Economist, 20. Mar. 2014.

2.3 Dispute Settlement Mechanisms under the Economic Arrangements

2.3.1 CEPA

2.09 In order to solve the possible legal conflicts generated from the CEPA framework, a dispute settlement mechanism, the Joint Steering Committee, has been set up. This committee aims at settling disputes arising from the interpretation or implementation of the "CEPA".[57] This committee will comprise senior representatives or officials designated by the Mainland and SAR. Liaison Offices is to be set up under the Steering Committee. Besides, working groups may be set up as the need arises. The way the committee will utilize to solve the conflicts is the consultation in the spirit of friendship and cooperation.[58] The Steering Committee should make its decisions upon consensus. CEPA is an experiment in developing China's regional economic cooperation. Its legal status is still under debate.[59] The existing dispute settlement mechanism of CEPA is not mature enough and merely intergovernmental. However, it is a growing-up arrangement, which can be traced from its annually refreshed supplementary agreements to solve the new problems out of the practice of the cross-border trade contact. It is possible that CEPA may give birth to a dispute settlement mechanism of the cross-border commercial conflicts.

2.3.2 ECFA

2.10 In accordance with the article 10 of the ECFA, an appropriate dispute settlement mechanism, the Cross-strait Economic Cooperation Committee, shall be set up, which serves as the organ to deal with the disputes through consultancy and negotiation.[60] The duty of the Committee also includes promotion of continuous economic cooperation between the two sides on the basis of ECFA.[61] Pursuant to ECFA, the Committee will convene a regular meeting on a semi-annual basis.[62] Till April 2012, three regular meetings have been held,

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http://www.economist.com/blogs/banyan/2014/03/politics-taiwan (Last visited on 14 June 2016)

[57] CEPA, article 19, the functions of the Steering Committee include: (1) supervising the implementation of the "CEPA"; (2) interpreting the provisions of the "CEPA";(3) resolving disputes that may arise during the implementation of the "CEPA"; (4) drafting additions and amendments to the content of the "CEPA"; (5) providing steer on the work of the working groups; (6) dealing with any other business relating to the implementation of the "CEPA".

[58] CEPA HK, article 19 (5); CEPA Macao, article 19 (5)

[59] Most people hold that CEPA is a regional free trade agreement. Someone, however, has doubt in CEPA's legitimacy and argued that CEPA, if it was a treaty or agreement, should be concluded between the mainland and other foreign states pursuant to the laws of the mainland and the Basic Law of HKSAR also failed to provide the legal basis that the mainland and HKSAR could sign a trade agreement with each other. The legal vacuum makes the CEPA de jure invalid, although it is de facto effective. See Wang Wei, CEPA: A Lawful Free Trade Agreement under "One Country, Two Customs Territories?", in: 10 Law & Bus. Rev. Am. 647, 2004, 649

[60] *The* Cross-strait Economic Cooperation Committee has been set up on 6 Janauray, 2011.

[61] ECFA, article 11: The Committee shall be responsible for handling matters relating to this Agreement, including but not limited to (1) concluding consultations necessary for the attainment of the objectives of this agreement.

[62] ECFA, article 11

in which negotiation with respect to trade of goods, services and dispute settlement was carried out. After the third regular meeting, the economic and trade organizations from each side are allowed to set up offices across the Taiwan Strait.[63]

Ch.3 The Current Legal Cooperation within the Four Regions

2.11 The current regional legal cooperation in civil and commercial matters is conducted by means of bilateral arrangements. As for issues that fall outside of the scopes of those bilateral arrangements, they are governed by the local rules of each region.

3.1 The Mainland and SARs

3.1.1 Bilateral Arrangements

2.12 After reunification, the Mainland and SARs have entered into a set of legal cooperation arrangements in matters of service of documents, recognition and enforcement of arbitral awards as well as recognition and enforcements of judgments in civil and commercial matters. (Please refer to Annex I) In this section, I will discuss about the arrangements concerning recognition and enforcements of judgments in civil and commercial matters in detail. I will get back to the rest of the arrangements later in Recommendation 6 of Part V.

2.13 In 2006, the Mainland and HKSAR entered into 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 Pursuant to Choice of Court Agreements between Parties Concerned (hereinafter, the Mainland-HK Arrangement).[64] In line with the Mainland-HK Arrangement, it applies to an enforceable final judgment requiring payment of money in a civil and commercial case pursuant to a choice of court agreement in writing.[65] The payment of money requirement entails that the Mainland-HK Arrangement only governs a particular legal relationship for commercial purposes. That means, employment contracts and contracts to which a natural person acting for personal consumption, family or other non-commercial purposes is a party will be excluded.[66] Besides, there must be a contract in the written form, in which parties concerned expressly agree that the court in the

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[63] On 18 April 2012, Ministry of Commerce of P.R.C. and Ministry of Economic Affairs of Taiwan declared the implementation measures of establishment of offices across the Taiwan Strait, http://www.moeaic.gov.tw/system_external/ctlr?PRO=PrintFriendlyNews&id=823 (Last visited on 14 June 2016)

[64] The Mainland-HK Arrangement is incorporated into the Mainland legal system in the form of judicial interpretation, which is the Interpretation by the Supreme People's Court on the 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 Pursuant to Choice of Court Agreements between Parties Concerned. Meanwhile, the Mainland-HK Arrangement is adopted by HKSAR through the Mainland Judgments (Reciprocal Enforcement) Ordinance of Hong Kong (the Mainland Judgments Ordinance).

[65] The Mainland-HK Arrangement, article 1

[66] The Mainland-HK Arrangement, article 3

Mainland or the court in HKSAR has the exclusive jurisdiction over the disputes of a specific legal relation.[67] In addition, the judgment seeks recognition and enforcement should be final and conclusive. It is noteworthy that the court of HKSAR holds quite different criteria of finality from the Mainland court. It is stipulated under the Civil Procedure Law of P.R.C.[68] that all judgments and written orders of the Supreme People's Court, as well as judgments and written orders that may not be appealed against according to the law or that have not been appealed against within the prescribed time limit, shall be legally effective.[69] The procedure of trial supervision is also stipulated in the Civil Procedure Law, which allowing the original judgment with the legal effect to be reheard all over again under certain circumstances.[70] Accordingly, a Mainland judgment may not be considered final because of the procedure of trial supervision.[71] Nevertheless, that holding was overturned later in *Lee Yau Wing v. Lee Shui Kwan*.[72]

2.14 In *Lee Yau Wing v. Lee Shui Kwan*, the defendant failed at first instance and on appeal to a People's Courts in the Mainland, and the plaintiff sought summary judgment against the defendant in a Hong Kong court based on the Mainland appeal judgment. The defendant argued that the Mainland judgment was not final and conclusive due to the existence of the Mainland "trial supervision" system and therefore not enforceable in Hong Kong. After consulting the opinions of legal experts, the Court of Appeal held that a Mainland judgment cannot be deemed as inconclusive and not final simply because of the existence of the "trial supervision" system under PRC law *per se.*[73] Later in *Shenzhen City Liangzi Jingshun Investment Management Co., Ltd. v. Huang Binghuang and Another*,[74] the Plaintiff was a Mainland company, who filed the petition against Huang and HK Zhongxing (a Hong Kong company) to resolve contract disputes. Meanwhile, there were also parallel proceedings between the Plaintiff and the defendants in the Mainland and the Plaintiff petitioned to the High People's Court of Guangdong Province for re-trial of the Mainland appeal, who thus claimed that the Mainland judgment was not final and conclusive and therefore

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[67] The Mainland-HK Arrangement, article 3
applies when the judgments meet the following requirements: (a) require payment of money in business-to-business cases. That is, employment contracts and contracts to which a natural person acting for personal consumption, family or other non-commercial purposes is a party will be excluded; (b) relate to disputes in which the parties concerned have agreed in written form to designate a people's court of the Mainland or a court of the HKSAR as the forum to have sole jurisdiction for resolving such dispute; and (c) are final, conclusive and enforceable. (see CAP 597, s5 of the Mainland Judgments Ordinance)

[68] Please note that the Civil Procedure Law of the P.R.C. has been revised in 2007 and 2012. The version in effect at that time was Civil Procedure Law of the P.R.C. (1991).

[69] Civil Procedure Law of the P.R.C. (1991), article 141

[70] Civil Procedure Law of the P.R.C. (1991), Chapter 16, article 177,178,185

[71] *Chiyu Banking Corporation Ltd. v Chan Tin Kwun* [1966] 1 HKLR 395; *Tan Tay Cuan v Ng Chi Hung*, unrep. HCA 5477/2000 (5/2/2001)
; *Wu Wei v. Liu Yi Ping* HCA 1452/2004

[72] *Lee Yau Wing v. Lee Shui Kwan* [2005] HKCA 657, at 77

[73] *Lee Yau Wing v. Lee Shui Kwan* [2005] HKCA 657, at 75

[74] *Shenzhen City Liangzi Jingshun Investment Management Co., Ltd. v. Huang Binghuang and Another* [2011] HKCFI 70

not enforceable in Hong Kong. Her Honour Judge Marlene NG referred to the judgment in *Lee Yau Wing v. Lee Shui Kwan*, holding

"[I]n my view, the legal effect of the PRC Judgment is not a simple matter and should not be dealt with in summary way. Given (a) PRC law is a matter of fact to be proved by PRC legal experts, (b) there is fundamental conflict between the PRC expert opinion adduced by the Plaintiff and that by HK Zhongxing as to the effect of re-trial on the PRC Judgment and on the assignment of the HK Zhongxing Debt, (c) the guidance in the above authorities that such issue should be resolved at trial, (d) the dissenting judgment of Chung J in *Lee Yau Wing* to the effect that the trial supervision or re-trial system under PRC law did not undermine the final and conclusive nature of any PRC appeal judgment under the two-tier court system, I am convinced that HK Zhongxing's assertion of there being a valid and effective assignment of the HK Zhongxing Debt in its favour to buttress the defence of set-off has real prospect of success and should be left to trial."

2.15 It seems that from the judicial points of view in Hong Kong, the "trial supervision" system under the Mainland law *per se* should not render a Mainland judgment inconclusive and not final. Furthermore, given the fact that the discrepancy of the concept of finality between the two sides is crucial to the system of recognition of cross-border judgment, a compromise has been made in signing the Mainland-HK Arrangement, in which the term "final and conclusive" is avoided; instead the concept of "final judgment with enforceability" is used. In the Mainland Judgments Ordinance,[75] instead of applying the term "final judgment with enforceability", being final and conclusive is still set out as a compulsory condition for enforcing Mainland judgments. Although some scholars cast some doubts,[76] Ms. Tsang of the Department of Justice took the view that "under the Ordinance a Mainland judgment is final and conclusive if it falls into the enumerated list where no appeal is allowed or the time limit for appeal has expired or it is the decision of the second instance".[77] Accordingly as for civil and commercial disputes covered by the Mainland-HK Arrangement, the existence of the trial supervisory system will not prevent Mainland judgments from being recognized and enforced in Hong Kong, although they may not strictly fit the common law concept of finality. As for the judgments stay out of the regime, uncertainty is still awaiting.

2.16 In 2006, the Mainland and Macao SAR also entered into Arrangement Between the Mainland and the Macao Special Administrative Region on the Mutual Recognition and Enforcement of Civil and Commercial Judgments (hereinafter, the Mainland-Macao Arrangement). Compared to the Mainland-HK Arrangement, the Mainland-Macao Arrangement improves cooperation of mutual recognition and enforcement of the civil and commercial judgments in a

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[75] The Mainland-HK Arrangement is incorporated was voted and passed by the Legislative Council of HKSAR in the form of ordinance, i.e. the Mainland Judgments (Reciprocal Enforcement) Ordinance of Hong Kong (hereinafter the Mainland Judgments Ordinance).

[76] Smart, Philip, Finality and the Enforcement of Foreign Judgments under the Common Law in Hong Kong, 5 Oxford University Commonwealth Law Journal, 2005, p.315; Zhang Xianchu, A New Stage of Regional Judicial Assistance in Civil and Commercial Matters: Implementation of the Mainland Judgments Ordinance and Certain Issues Beyond, in: 39 HKLJ 3, 2009, p.9

[77] Tsang, Michelle, A New Chapter in Reciprocal Enforcement of Judgments between the Mainland and Hong Kong, Hong Kong Lawyer, July 2008, p.61.

more advanced way. First of all, the scope of the mutual recognition and enforcement between the Macao SAR and the Mainland is much wider, which is not limited to commercial purposes, including the labor disputes and the compensation judgments or verdicts of the criminal cases.[78] Secondly, there is no choice of court agreement requirement. The courts of Macao SAR and the Mainland with competent jurisdictions can recognize and enforce the judgments in civil and commercial matters of each other upon the request of the applicant.[79] As for the trial supervision system in the Mainland, it did not cause any problem with respect to the finality requirement under the Mainland-Macao Arrangement. Moreover, in a case handed down by the Court of Final Appeal of Macao SAR, a Mainland judgment was granted recognition although it was being subject to the supervision trial procedure in the Mainland. [80]

3.1.2 Recognition in Accordance with the Local Rules

2.17 Given the limited scopes of the bilateral legal cooperation arrangements, each region still has its own local rules concerning recognition and enforcement of inter-regional civil and commercial judgments.

3.1.2.1 The Mainland

2.18 In 2008, the Supreme People's Court released a judicial interpretation, Notice of the Supreme People's Court on Issuing the Minutes of the Symposium on the Trial of Commercial Cases involving Hong Kong or Macao by Courts Nationwide.[81] In accordance with that judicial interpretation, adjudication of civil and commercial cases involving HKSAR and Macao SAR should refer to Part IV of Civil Procedure Law of the P.R.C., which deals with special rules on foreign-related civil proceedings, and Provisions of the Supreme People's Court Concerning the Jurisdiction Problems of Foreign-related Civil and Commercial Cases. Nevertheless, after the reunification, it is a bit ironic to continue to apply foreign-related rules to SARs, which reflects a continuing dilemma regarding the status of SARs in the area of cross-border civil and commercial judicial interaction in China. Despite of the political and economic integration, a corresponding legislative and judicial approach is still lacking, which incurs uncertainty in the course of legal cooperation.

3.1.2.2 Hong Kong SAR

2.19 Before July 1st 1997, the legal system of Hong Kong was characteristic of British style. It had been transplanted with the common law system, which has deeply rooted in Hong Kong over 150 years. From 1 July 1997, the legal framework of HKSAR has been rebuilt on the ground of the Basic Law. Pursuant to the Basic Law, the previous common law system has been preserved.[82] Like

[78] The Mainland-Macao Arrangement, article 1, 3
[79] The Mainland-Macao Arrangement, article 3
[80] Case 6/2010 of CFA, Macao SAR
[81] [2008] Judicial Interpretation No.8
[82] The Basic Law of HKSAR, art.8: The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained

Ghai once said, the common law system has developed into the cornerstone of the entire legal and judicial system of Hong Kong. The courts of the HKSAR may refer to precedents of other common law jurisdictions in adjudication of cases[83]. Judges and other members of the judiciary of the HKSAR may be recruited from other common law jurisdictions.[84]

2.20 The scope of the Mainland-HK Arrangement is limited and shall be applied with restrictive conditions. Therefore, recognition of most of the civil and commercial Mainland judgments, including the insolvency proceedings, which fall out of the ambit of the Mainland-HK Arrangement, is subject to the common law as also applicable to recognition of the foreign judgments. To enforce the judgment under common law, the judgment creditor may commence an action by writ, pleading the "foreign" judgment, as long as the "foreign" court was a court of competent jurisdiction, the judgment is final and for a definite sum of money.[85] Since a new proceeding has to be opened, uncertainties probably rise when dealing with a "foreign" jurisdiction with very different substantive and procedural rules. Moreover, it could be a rather cumbersome and expensive procedure under common law and there is no guarantee for enforcement. It's difficult to conclude what kind of specific requirements have to be satisfied for a foreign judgment to be given binding effect under the common law because it shall depend on the individual cases.

2.21 For instance, there was a HK matrimonial case, *ML v. YJ*, which is beyond the scope of the Mainland-HK Arrangement and involved parallel proceedings in the Mainland and HKSAR.[86] The husband and wife are Chinese nationals from the Mainland. They have acquired the right of abode as permanent residents in Hong Kong and kept matrimonial homes and assets in the Mainland and in Hong Kong. On 18 May 2006, the wife filed a petition for divorce in Hong Kong and the husband participated in the Hong Kong proceedings. On 23 October 2006, the Husband initiated the divorce proceedings in the Mainland. Prior to the Hong Kong proceedings, the Mainland court handed down its decision on 14 November 2007 and the husband applied for striking out the Hong Kong

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has been mentioned before, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region; also see the Basic Law of HKSAR, art.160 and the Decision of the Standing Committee of the National People's Congress Concerning the Handling of the Laws Previously in Force in Hong Kong in Accordance with Article 160 of the Basic Law of the Hong Kong Special Administrative Region of the P.R.C., http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383899.htm (Last visited on 14 June 2016)

[83] The Basic Law of HKSAR, article 84

[84] The Basic Law of HKSAR, article 92

[85] Smart, Philip, "Enforcement of Foreign Judgments" (Ch. 13) in Christine N Booth (ed), Enforcing Judgments in Hong Kong, Hong Kong: LexisNexis, 2004, p.357. See also Dicey, Morris & Collins, The Conflict of Laws, (14th Ed), UK: Sweet & Maxwell, 2010, p. 618. "A foreign judgment which is final and conclusive on the merits and not impeachable under any of rules 42 to 45 is conclusive as to any matter thereby adjudicated upon, and cannot be impeached for any error either of fact or of law…Closely parallel to this rule is the rule that the party must take all available defenses in the foreign court, and that if he does not do so, he cannot be allowed to rely on them subsequently in the domestic court."

[86] *ML v. YJ* [2010] HKCFA 85; (2010) 13 HKCFAR 794; [2011] 1 HKC 447; FACV20/2009 (13 December 2010)

proceedings. The reason of opening the Mainland proceedings given by the husband was that he needed a divorce decision rendered by the Mainland court in any event given the lack of recognition of a Hong Kong divorce in the Mainland.[87] In accordance with the matrimonial law of HK at that time, recognition of an oversea divorce judgment would prevent a decree absolute divorce and thus the HK court could not make any relevant ancillary relief orders. The preliminary issue arose whether the husband manipulated the proceedings to his unfair advantage against the fundamental notions of justice. The majority of the Court of Final Appeal of HKSAR (3:2) considered that

"It is difficult to see how these views can be reconciled with the conclusion that the husband had "manipulated" the court's procedures such that recognition of the Shenzhen divorce would be manifestly contrary to public policy."[88]

2.22 Further, the majority agreed with the Court of Appeal that the husband had legitimate reason to litigate in the Mainland.[89]

"The husband chose Shenzhen because of the doubt whether a Hong Kong divorce would be recognized there. The Judge accepted that the husband cannot be criticized for applying for the Shenzhen divorce because of such a doubt."[90]

2.23 Without a regional cross-border legal cooperation arrangement, it is observed that the uncertainty about recognition can influence both sides, in particular the interests of the parties concerned since the uncertainty can even be deemed as the legitimate reason for opening parallel civil proceedings.

3.1.2.3 Macao SAR

2.24 Before reunification, Macao had a dual legal system in the style of civil law. One part contained the laws made by the Portugal government.[91] The other part was the laws made by the local legislative council and the Governor of Macao after 1974,[92] which was relatively in a small proportion. All the laws were made and promulgated exclusively in the Portuguese language, which greatly weakened the impact of the laws since most of the local people are only able to

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[87] *ML v. YJ* [2008] HKCFI 367; [2008] 3 HKLRD 412; [2008] 3 HKC 362; HCMC13/2006 (20 March 2008),

[88] *ML v. YJ* [2010] HKCFA 85; (2010) 13 HKCFAR 794; [2011] 1 HKC 447; FACV20/2009 (13 December 2010), para.155

[89] *ML v. YJ* [2010] HKCFA 85; (2010) 13 HKCFAR 794; [2011] 1 HKC 447; FACV20/2009 (13 December 2010), para.157

[90] *ML v. YJ* [2009] HKCA 230; [2010] 1 HKLRD 1; CACV89/2008 (17 June 2009), para.140

[91] They were mainly the Civil Code, the Criminal Code, the Commercial Code, the Criminal Procedure Code and the Civil Procedure Code.

[92] A major reversal of Portuguese policies occurred in 1974 when the Portuguese Military Forces Movement exploded. A constitutional amendment in 1974 proclaimed the right of self-determination, with the consequent independence, of all Portuguese colonies. As a result, in 1976 the Governor of Macao and the legislative council (the former legislative committee) were authorized the independent legislative power, besides the legislative power of the Portugal government.

speak Cantonese (a kind of dialect, the same in Hong Kong) and write Chinese.[93] After the reunification, the Macao SAR has reorganized its judicial system according to its civil pattern and the provisions of the Basic Law. It formally established a three-level court system, the primary courts, intermediate courts and one Court of Final Appeal. Nevertheless, owing to the late independency of the local judicial system and the monopoly of the Portuguese in the judicial system, the efficiency problem of the judicial system in Macao has been complained for a long time and Macao is short of the local legal professions.[94]

2.25 In practice, it has been observed by one scholar that Macao courts usually do not refuse to recognize the judgments rendered in the Mainland but usually not on the basis of the Mainland-Macao Arrangement.[95] According to Tu, "the Mainland-Macao Arrangement has been totally ignored by some judges and largely not applied by Macao courts as a whole."[96] Recognition of the civil judgments is regularly governed by the article 1200-I of Civil Procedure Code of Macao (CPCM). The challenge a foreign judgment could meet when seeking recognition in Macao SAR is that the possibility of substantial review of the judgment, which involving the review of the merits of a foreign judgment. The substantial review shall be initiated by a proper objection if a new critical evidence refers to one that was unknown to parties or has not been used in the judgment-rendering proceeding but can change the existing judgment into one more favorable to the losing party.[97] However, it rarely happens in practice. This is probably because the respondent has to respond to a judgment recognition and enforcement application within fifteen days,[98] who might not have sufficient time to find some critical new evidence. The other possibility to cause substantial review is when a judgment is against a Macao resident, according to Macao conflict of laws, Macao substantive law should have been applied to solve the dispute, and the application of Macao substantive law leads to a judgment more favorable to the Macao resident compared to the foreign judgment.[99] This article reflects Macao's protectionism towards its residents. The underlying policy is that, the Macao resident, who is the losing party, should receive the same treatment in the judgment-rendering court as he or she would receive in the Macao court if the action took place in Macao.

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[93] The population of Macao SAR can be divided into: Portuguese at the senior levels; Mecanese (descendants principally of marriages or liaisons between Portuguese and Chinese) at the middle level; these two groups make up around 3% of the total population in Macao and the rest are the local Chinese, who had been excluded from any role in policy or administration.

[94] For instance, there are 29 judges in the primary courts, 10 in the intermediate courts, and 3 in the Court of Final Appeal. Piles of cases were waiting for these judges to make decisions, especially after the reunification. In 1999, there were over 300 cases heard by the intermediate courts. In 2014, there were about 19,535 cases. Source: from the annual report made by the director of the Court of Final Appeal, http://www.court.gov.mo/zh/subpage/annual (Last visited on 14 June 2016)

[95] Tu Guangjian, Recognition and Enforcement of Non-local Judgments in Civil and Commercial Matters in Macau - A Critical Review, 42 HKLJ 2012, p.633

[96] Tu Guangjian, Arrangement on Mutual Recognition and Enforcement of Judgments in Civil and Commercial Matters between China and Macau: Inherent Problems, Six Years' Experience and the Way Forward, 43 HKLJ, 2013, p 361

[97] Macao Civil Procedure Code, article 1202-I

[98] Macao Civil Procedure Code, article 1202-I

[99] Macao Civil Procedure Code, article 1202-II

3.2 The Mainland and Taiwan

3.2.1 Bilateral Arrangement

2.26 In 2009, the Mainland and Taiwan entered into Agreement between Both Sides of the Taiwan Strait on Jointly Fighting against Crimes and Mutual Judicial Assistance (the Mainland-Taiwan Agreement). The Mainland-Taiwan Agreement contains 24 articles and lays more emphasis on cooperation related to criminal cases. It merely provides one article (Article 10) with respect to recognition and enforcement of civil judgments and arbitral awards, which shall be granted based on the principle of reciprocity without violating the public order or good morals.

3.2.2 Recognition in Accordance with the Local Rules

3.2.2.1 The Mainland

2.27 On 29 June 2015, the Supreme People's Court issued a judicial interpretation concerning recognition and enforcement of civil judgments rendered by Taiwan courts.[100] That judicial interpretation replaced the former four related judicial interpretation in matters of cross-strait legal cooperation.[101] The current judicial interpretation has more extensive scope concerning the judgments that can request for recognition before the Mainland court, including the effective judgments, verdicts, mediation agreements and orders to pay as well as the judgments and the verdicts of civil damages compensation involved in criminal cases.[102] To facilitate the applicant to file a petition, the current judicial interpretation also allows more competent Mainland courts to seize the request, including the intermediate courts or specialized courts either at the domicile or habitual residence of the respondent or at the place where the asset is located.[103] The civil judgments that request for recognition should be verified as genuine and effective. The current judicial interpretation provides two means of verification. The applicant can request the Mainland court to verify the Taiwan judgment through the channel of cross-strait mutual judicial assistance in terms of serving legal documents, investigation and evidence collection. The Mainland court can ex officio verify the Taiwan judgment through the same channel.[104] If recognition of the civil judgments will violate the fundamental principles of the

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[100] [2015] Judicial Interpretation No.13

[101] The repealed four judicial interpretations are: the Provisions of the Supreme People's Court on the People's Court's Recognition of the Verdicts on Civil Cases Made by Courts of Taiwan [1998] Judicial Interpretation No.11; the Reply of the Supreme People's Court on whether the People's Court should Accept the Application for Recognition of Mediation Agreement Rendered by the Taiwan Court or the Authorities Concerned [1999] Judicial Interpretation No.10; the Reply of the Supreme People's Court on whether the People's Court should Accept the Application for Recognition of Orders to Pay Rendered by the Taiwan Court [2001] Judicial Interpretation No.13; Supplementary Provisions of the Supreme People's Court on the People's Courts' Recognition of Civil Judgments of the Relevant Courts of the Taiwan Region [2009] Judicial Interpretation No.4

[102] [2015] Judicial Interpretation No.13, article 2

[103] [2015] Judicial Interpretation No.13, article 4

[104] [2015] Judicial Interpretation No.13, article 9

national laws, including the one country principle, or be detrimental to socio public interests, the people's courts shall refuse to grant recognition.[105]

3.2.2.2 Taiwan

2.28 The main components of the current Taiwan legal system are the basic codes of laws,[106] bylaws,[107] the legal precedents and the interpretation of the Judicial Yuan[108], which is the supreme judiciary in Taiwan[109]. Against the aforementioned complicated historical, political and economic background, diverse legal arrangements were established in Taiwan for recognition of the civil judgments of different origins. The Mainland judgments shall be recognized pursuant to the Act Governing Relations between Peoples of the Taiwan Area and the Mainland Area (the Mainland Act),[110] whereas the judgments of HKSAR and Macao SAR shall be recognized in accordance with the Act Governing Relations with Hong Kong and Macao (the HK and Macao Act)[111].

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[105] [2015] Judicial Interpretation No.13, article 15

[106] The codes of laws, known as "the Complete Literatures on Six Laws" or "Six Codes", which are the constitution law, the civil law, the criminal law, the civil procedure law, the criminal procedure law.

[107] The related bylaws are made in the form of regulations, orders etc., to supplement their respective codes of laws.

[108] The precedents of the Supreme Court in accordance with the constitution law, the court organization act and the law of the Council of Grand Justice etc., could be recognized as the ground of the decision after certified by the Judicial Yuan. On the ground of the Court Organization Act (art. 57), the Supreme Court of Taiwan has made the Main Points of the Selection and Modification of the Legal Precedents, which later helped to foster the legal precedent system in Taiwan. To be a legal precedent, there are several requirements. Firstly, it must be the judgment from the Supreme Court. Secondly, it is just the legal opinion of the Supreme Court, instead of the entire content of the judgment. Thirdly, the cases must go through certain procedures for selection. Therefore, not all of the judgments from the Supreme Court can become the legal precedent.

[109] The Judicial Yuan is a rare phenomenon and also an inheritance. In 1928 the former government of the Republic of China established five governmental departments, including the Executive Yuan, the Legislative Yuan, the Judicial Yuan, the Examination Yuan, the Control Yuan, also known as "Five Yuans" structure. Taiwan keeps the former governmental organizations till now. The status of the Judicial Yuan, whether it is a court or a judicial executive organ, is still under debate. Pursuant to the Constitution Code (art. 77), the Judicial Yuan is the supreme judiciary, in charge of the civil, criminal and administrative trials and the civil service disciplinary. However, in accordance with the Organization Law of the Judicial Yuan, there is no direct access for the Judicial Yuan to these trials. In 2008, the Judicial Yuan assembly passed the draft of the amendment of the Organization Law of the Judicial Yuan to promote the reform. But till now, the Judicial Yuan still does not interfere with the civil or criminal trials of courts at different levels. The internal agencies of Judicial Yuan mainly including the Council of Grand Justices, which has the power of judicial interpretation and the establishment of the constitutional tribunal to commit the constitutional examination. The agencies subject to the Judicial Yuan are mainly composed of the courts of all levels.

[110] In order to make up for the legal blank generated in the process of the cross-strait economic cooperation, in July 1992, the Legislative Yuan of Taiwan (the legislature of Taiwan) after the third reading, passed the Act Governing Relations between Peoples of the Taiwan Area and the Mainland Area (hereinafter the Mainland Act). Due to the political uncertainty, frequent economic interaction and legal difference, till 2015 the Mainland Act has been amended for 16 times.

[111] The return of Hong Kong and Macao to China also influenced the lawmaking of Taiwan. The shift of the political status of the two regions resulted in the reconsideration of the Taiwan-Hong Kong and Taiwan-Macao relationship by the Taiwan government. One of the important problems

3.2.2.2.1 The Mainland Approach

2.29 Pursuant to the article 74 of the Mainland Act[112], an application must be filed to a Taiwan court for a ruling to recognize the Mainland judgment. Meanwhile, two principles shall be applied for recognition, one is the reservation of public order or good morals (art. 74-1) and the other is the principle of reciprocity (art 74-3).

2.30 The public order or good morals is a vague concept. Someone fears that its flexibility and the uncertain relationship between the Mainland and Taiwan will probably bring unpredictability to the recognition and enforcement of the court judgment from the Mainland.[113] In practice, however, the reservation of the public order or good morals seems to have been rarely applied.[114]Amounts of recognition application submitted to Taiwan's courts are related to the divorce judgments. The courts tend to recognize a divorce judgment ever though the parties concerned filed against the Mainland decisions based on "fraud marriage",[115] "not in accordance with Taiwan's Civil Code",[116] "protectionism of the Mainland courts"[117] and etc. On the contrary, if the parties concerned have not been given the opportunity to take part in the proceeding and failed in the Mainland cases, the court will probably refuse to recognize the divorce judgments. For example, the party concerned was in prison and not able to attend the hearing in the Mainland court or the address of the party concerned was not absolutely unclear, therefore the Mainland court could not inform him

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was whether to apply the Mainland Act to those two regions due to its reunification with China. To solve this problem, on April 2, 1997 the Act Governing Relations with Hong Kong and Macao (hereinafter the Hong Kong and Macao Act) was promulgated by Presidential Order and the provisions pertaining to Hong Kong Implemented by Order of the Executive Yuan on 19 June 1997 to take effect on 1 July 1997.

[112] The Mainland Act, article 74 states:

To the extent that an irrevocable civil ruling or judgment, or arbitral award rendered in the Mainland Area is not contrary to the public order or good morals of the Taiwan Area, an application may be filed with a court for a ruling to recognize it.

Where any ruling or judgment, or award recognized by a court's ruling as referred to in the preceding paragraph requires performance, it may serve as a writ of execution.

The preceding two paragraphs shall not apply until the time when for any irrevocable civil ruling or judgment, or arbitral award rendered in the Taiwan Area, an application may be filed with a court of the Mainland Area for a ruling to recognize it, or it may serve as a writ of execution in the Mainland Area.

[113] Chen Li, Mutual Recognition and Enforcement of the Cross-Strait Civil Judgments: Difficulty and Solution (in Chinese), in: The Rule of Law Forum, Vol. 17, issue 5, p. 63, 2002; Liu Renshan, Current Situation, Problems and Thinking regarding the Recognition and Enforcement of the Commercial Judgments between the Mainland and Taiwan (in Chinese), in: Wuhan University Journal (Philosophy & Social Sciences), vol. 62, issue 6, p. 737, 2009; Yu Fei, The Appropriate Application of the Reservation of Public Order (in Chinese), in: Taiwan Research Journal, p.11, issue 3, 2010.

[114] Huang Kuo-Chang, A Beautiful Mistake: Has the Recognized Mainland Judgment Res Judicata? (in Chinese) , in: Taiwan Law Review, issue 167, 2009, p. 193.

[115] Taiwan High Court Family Appeal from Ruling No.316 [2003]; Taiwan High Court Family Appeal from Ruling No.268 [2001]; Taiwan High Court Family Appeal from Ruling No.179 [2001]

[116] Taiwan High Court Tainan Branch Court Family Appeal from Ruling No. 63 [2004]

[117] Taiwan High Court Tainan Branch Court Family Appeal from Ruling No. 31 [2001]

via service of notice by publication.[118] It can be concluded from the aforementioned cases that in general the Taiwan's courts follow the formal examination on the Mainland judgment recognition. In practice the courts in Taiwan incline to utilize the reservation of public order or good morals as the shield to safeguard the due process rather than interfering with the substantial controversies.

2.31 The principle of reciprocity (article 74-3) was amended into the article 74 of the Mainland Act on May 14, 1997 and was implemented from July 1, 1997 by the Order of the Executive Yuan.[119] In the Supreme Court judgment No. 2644 (1997), Taiwan Supreme Court partly reversed the original judgment and remanded the case back to the original court, holding that besides the check of the public order or good morals, before giving recognition to a Mainland civil judgment, the lower court shall also take into necessary consideration on whether the judgment made by a court in Taiwan may be recognized by the Mainland court in accordance with article 74-3 of the Mainland Act. This is a typical mode of "you scratch my back and I scratch yours" reciprocity, which has been criticized even by the local scholars for a long time.[120] However, it's not hard to understand because in the year of 1997, the cross-strait judicial interaction was still in its childhood. The reason of the amendment was written in the Order of the Executive Yuan, in which it clear stated that the irrevocable civil ruling or judgment, or arbitral award rendered in the Taiwan Area still failed to receive recognition from the Mainland courts and it was unfair to grant recognition to the Mainland judgments on the basis of mutual benefit. Therefore, the item 74-3 was amended into the Mainland Act in order to make the Chinese Authority aware of the issues of the cross-strait judicial assistance, find out the solutions in good faith and protect the legal systems from both sides in favor of the individuals' interests.[121]

2.32 Later on the Mainland government began to make efforts on the cross-strait judicial cooperation. In 1998, the Supreme People's Court issued the Provisions on the People's Court's Recognition of Civil Judgments of the Relevant Courts of the Taiwan Region. The Several Provisions of the Supreme People's Court on the Service of Litigation Documents in Taiwan-related Civil Matters (hereinafter the Several Provisions) came into effect in 2008. The Several Provisions applies to the service of documents to the litigant whose domicile is in Taiwan, or upon the request of the relevant courts of the Taiwan region, to the litigant whose domicile is in the Mainland. There are several ways to commit the service of litigation documents, some of which are first time applied in cooperation of the

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[118] Huang Kuo-Chang, A Beautiful Mistake: Has the Recognized Mainland Judgment Res Judicata? (in Chinese) , in: Taiwan Law Review, issue 167, 2009, p. 193-194.

[119] For detailed information, please visit http://www.mac.gov.tw/ct.asp?xItem=90541&ctNode=5914&mp=3 (Last visited on 14 June 2016)

[120] Chen Rongzong, Legal Issues of International Civil Procedural Law (in Chinese), in: China Law Journal, issue 162, 1996, p.10; Chen Qichui, Recognition and Enforcement of the Foreign Judgments (in Chinese), in: Journal of New Perspectives on Law, issue 75, 2001, p.156,

[121] For the reason for the amendment article 74-3, please visit: http://www.rootlaw.com.tw/lawsystem/showmaster.aspx?LawID=A040310000000600-19970514 (Last visited on 14 June 2016)

trans-regional service of documents. The People's Court is allowed to commit the service by leaving the documents at the place of the litigant or the agent entrusted to accept the documents[122], if they refuse to sign or seal on the service receipt. In addition, due to the three direct links,[123] if the litigant has a definite address in Taiwan, now the documents can be served directly to Taiwan by mail. Furthermore, if the litigant has a definite fax number or e-mail address, the documents can be served by fax or by e-mail. In 2009, the Supreme People's Court promulgated the Supplementary Provisions of the Supreme People's Court on the People's Courts' Recognition of Civil Judgments of the Relevant Courts of the Taiwan Region (hereinafter the Supplementary Provisions). The Supplementary Provisions firstly states that the civil judgments rendered in Taiwan which have been recognized by the People's Courts have the same effect as those made by the People's Courts. If the execution applicant applies for the enforcement of the recognized civil judgment, the People's Court should accept the application, which means, from then on, the civil judgments made by the courts of Taiwan can be enforced in the Mainland.

2.33 With efforts made by both sides, the cross-strait judicial assistance is promoted to move forward. In the case of Taiwan Taipei District Court Application No. 2507 (2005), the court held that the judgment made by the High People's Court of Beijing Municipal did not violate the public order or good morals and irrevocable civil ruling or judgment, or arbitral award rendered in the Taiwan Area were already able to be accepted for the recognition to the Mainland courts. Therefore, the court finally recognized the judgment. Later the same parties concerned in the case got involved in the rehearing procedure of the former case in Beijing. After the High People's Court of Beijing Municipal reheard the case, the litigant came back to the Taipei District Court again and applied for recognition of the Mainland judgment. The court recognized the judgment for the same reason.[124] The case was appealed to the Taiwan High Court. High Court agreed with the lower court and turned down the appeal.[125]

2.34 Nevertheless, article 74 of the Mainland Act does not clarify what kind of effect will be generated after an irrevocable judgment rendered in the Mainland Area has been recognized in Taiwan, which resulted in controversies in theory in Taiwan. Someone argued that res judicata was not stimulated in the People's Civil Procedural Law promulgated on April 9, 1991 in the Mainland. Therefore, it was questionable whether the courts of Taiwan should recognize *res judicata* of

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[122] They are (a) the litigant, if the litigant is living in the Mainland; (b) to the lawsuit agent; (c) the person designated to receive the documents; (d) the representative agent, or the branch, the person entrusted to do the business in the Mainland who has been authorized to receive the service.

[123] Taiwan used to allow limited postal, transportation, and trade links between the Fujian province cities of Xiamen, Mawei and Quanzhou of P.R.C, and the islands of Kinmen and Matsu, which are administered by Taiwan (known as the three mini-links). On December 15, 2008, the Mainland and Taiwan, giving in due to the economic benefits and the actual needs of their peoples, agreed to enforce the "three direct links", including the opening up of the direct flights, direct shipping and direct post to each other.

[124] Taiwan Taipei District Court Application No. 2146 [2007]

[125] Taiwan High Court Non-Ruling Appeal No. 76 [2008]

the Mainland judgment.[126] Someone held the positive opinion, which is, if the parties concerned have been given complete procedural guarantee in the Mainland Area, the related judgment shall have the legitimacy to be recognized as *res judicata*.[127] In practice the point was made clear in 2007 when Taiwan Supreme Court made decisions regarding this issue in the case between Zhejiang Textiles Import & Export Group Co., Ltd. (Zhejiang Textiles) v. Evergreen International Storage and Transport Corp. (Evergreen) Zhejiang Textiles filed petition against Uniglory Marine Corporation (which was later merged into Evergreen) in Shanghai. Zhejiang Textiles won after the second instance and received the irrevocable judgments in Shanghai and came to Taiwan for recognition. There were a series of judgments regarding the same dispute between the same parties concerned made by the Taiwan courts.[128] It is noteworthy that the Supreme Court clearly held that

> "In accordance with the article 74 of the Mainland Act, where an irrevocable civil ruling or judgment rendered in the Mainland Area recognized by a court's ruling requires performance, it may merely serve as a writ of execution, <u>whereas it is not specified in the article that the irrevocable civil ruling or judgment rendered in the Mainland Area shall be considered the same validity as irrevocable civil ruling or judgment rendered in Taiwan</u>… However, the irrevocable civil ruling or judgment rendered in the Mainland Area shall only be recognized by the way of the ruling of Taiwan courts and shall only have the effect of execution instead of the same validity as irrevocable civil ruling or judgment rendered in Taiwan."[129] (Underlines added by the author)

2.35 After this Supreme Court decision, this case was turned all over again. Without recognition of the validity of the Mainland judgments, the Mainland party concerned failed to receive the recognition in Taiwan after having experienced the six tortuous rounds of civil actions. The judgment of Taiwan Supreme Court No. 2531 (2007) is indeed a turning point of the cross-strait legal cooperation. *Res judicata* is the fundamental element of the judgment recognition. If *res judicata* of the judgment is denied, that judgment could hardly be considered as recognized. The denial of *res judicata* of the Mainland judgments in Taiwan could probably leave the effect of the Mainland judgments in uncertainty and its side effect on the cross-strait legal cooperation can be anticipated.

2.36 In 2009 the Mainland and Taiwan entered into Agreement between Both Sides of the Taiwan Strait on Jointly Fighting against Crimes and Mutual Judicial Assistance (the Mainland-Taiwan Agreement). The Mainland-Taiwan Agreement contains 24 articles and lays more emphasis on cooperation related to criminal cases. Article 10 of the Mainland-Taiwan Agreement provides that recognition

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[126] Chen Qi-chui, Recognition and Enforcement of the Foreign Judgments (in Chinese), in: Journal of New Perspectives on Law, issue 75, 2001, p.164

[127] Jiang Shi-ming, Recognition and Enforcement of the Irrevocable Civil Judgments Rendered in the Mainland Area, in: Taiwan Law Journal (in Chinese), issue 123, 2009, p.45

[128] Taiwan Taoyuan District Court Application No. 1032 (2004); Taiwan Taoyuan District Court Re-Action No. 208 [2005]; Taiwan High Court Re-Appeal No. 175 [2007]; Taiwan Supreme Court No. 2531 [2007]; Taiwan High Court Retrial No. 210 [2007]; Taiwan Supreme Court No. 2376 [2008].

[129] Taiwan Supreme Court Appeal No. 2531 [2007]

and enforcement of civil judgments and arbitral awards shall be granted based on the principle of reciprocity without violating the public order or good morals, which is identical to article 74 of the Mainland Act. So far no relevant decision has been rendered on the basis of the Mainland-Taiwan Agreement.

3.2.2.2.2 Treatment of the SARs

2.37 Parallel to the Mainland civil and commercial judgment recognition system provided for in the Mainland Act, it is stated in article 42 of the HK and Macao Act that

"In determining the conditions for the validity, jurisdiction, and enforceability of civil judgments made in Hong Kong or Macao, Article 402 of the Code of Civil Procedure and Article 4-1 of the Compulsory Execution Law shall apply mutatis mutandis."

2.38 The article 56 of the Hong Kong Act also stimulates that

"Mutual judicial assistance between the Taiwan Area and Hong Kong or Macao shall be conducted on a reciprocal basis."

2.39 The article 402 of the Taiwan Code of Civil Procedure[130] stipulates recognition of the final and binding judgment rendered by a foreign court and the article 4-1 of the Compulsory Execution Law[131] deals with the application for the writ of execution to enforce the foreign judgment or ruling. Therefore, it is obvious that the rules applied to recognition of the decisions made by the Hong Kong and Macao courts are almost the same as those employed in foreign judgments in Taiwan. The different rules of the parallel judgments recognition result in different procedures. A preliminary proceeding should be initiated for recognition of the Mainland judgments, whereas the irrevocable judgments rendered in SARs enjoy the same automatic recognition procedure as the foreign decisions.[132] It is also clearly stated that the judgments rendered in the SARs

[130] Taiwan Code of Civil Procedure, article 402:
A final and binding judgment rendered by a foreign court shall be recognized, except in case of any of the following circumstances:
1. Where the foreign court lacks jurisdiction pursuant to the R.O.C. laws;
2. Where a default judgment is rendered against the losing defendant, except in the case where the notice or summons of the initiation of action had been legally served in a reasonable time in the foreign country or had been served through judicial assistance provided under the R.O.C. laws;
3. Where the performance ordered by such judgment or its litigation procedure is contrary to R.O.C. public policy or morals;
4. Where there exists no mutual recognition between the foreign country and the R.O.C.
The provision of the preceding paragraph shall apply mutatis mutandis to a final and binding ruling rendered by a foreign court.
[131] The Taiwan Compulsory Execution Law, article 11:
When a final and binding judgment rendered by a foreign court, not contrary to the article 402 of the Code of Civil Procedure, applies for the compulsory enforcement, the Taiwan court shall declare the permission of execution in the form of a judgment.
[132] Chen Qi-chui, Recognition and Enforcement of the Foreign Judgments (in Chinese), in: Journal of New Perspectives on Law, issue 75, p.156, 164, 2001; See also Jiang Shi-ming, Recognition and Enforcement of the Irrevocable Civil Judgments Rendered in the Mainland Area, in: Taiwan Law Journal, issue 123, 2009, p.37

shall be considered as the same validity in Taiwan. In the aforementioned judgment of the Taiwan Supreme Court Appeal No. 2531 (2007), the Supreme Court decided that:

> Pursuant to article 402 of the Code of Civil Procedure, an irrevocable civil ruling or judgment rendered in foreign countries or in Hong Kong, Macao shall follow the mode of automatic recognition, i.e. once meeting the requirement of recognition, the validity of the irrevocable civil ruling or judgment shall be automatically recognized without the recognition ruling. However, the irrevocable civil ruling or judgment rendered in the Mainland Area shall only be recognized by the way of the ruling of Taiwan courts and shall only have the effect of execution instead of the same validity as irrevocable civil ruling or judgment rendered in Taiwan…

2.40 Taiwan's parallel judgment recognition system and its denial of *res judicata* of the Mainland judgments result in the uneven treatment towards the Mainland, HKSAR and Macao SAR, which now belong to one sovereignty. That kind of differentiated arrangement may increase the difficulty of the inter-regional legal cooperation.

Conclusion

2.41 The "one country, two systems" policy enabled China to resume its sovereignty over Hong Kong and Macao. Meanwhile, the two regions are also vested with a high degree of autonomy, which means the SARs, in accordance with the Basic Law, shall be vested with executive power, legislative power and independent judicial power, including that of final adjudication. At the same time, due to the implementation of CEPA, a regional common market in China is emerging. In addition, there is also a politically disputed region, Taiwan, which has its own executive power, legislative power and judicial power but has close economic contacts with the Mainland China.

2.42 After the reunification, China becomes a country with mixed jurisdictions, including both the civil law and the common law, and diverse legal characteristics are also guaranteed by the Basic Law. *A cross-border legal cooperation framework in matters of civil and commercial disputes came into existence. However,* compared to the active economic interaction among the four regions, the legal cooperation system is relatively insufficient. It lacks comprehensive rules concerning recognition and enforcement of the civil and commercial cases throughout the whole regions. *Instead, the cooperation* is conducted in the form of bilateral arrangements. Moreover, those arrangements merely provide cooperation in some selected areas, such as service of documents, recognition and enforcement of arbitral awards as well as civil and commercial judgments. With respect to recognition and enforcement of judgments, the scope is not open to all kinds of civil and commercial cases. As for the civil and commercial matters not covered by the mutual arrangements, the local rules shall apply, which result in uncertainty in the course of cooperation. In particular in Taiwan, the local rules provide different treatment to the civil and commercial judgments rendered in different places.

2.43 Consequently, without a comprehensive regional cross-border legal cooperation regime, in particular, a regional cross-border insolvency system, the cross-border economic participants among the four regions will not be able to assess the possible market risks on a predictable, equitable, and transparent manner,[133] which could jeopardize the long–term economic stability and cooperative relationship.[134]

[133] According to the general objectives set by the IMF, the insolvency proceedings shall be the allocation of risk among participants in a market economy in a predictable, equitable, and transparent manner. IMF Legal Department, Orderly & Effective Insolvency Procedures: Key Issues, 1999, available at http://www.imf.org/external/pubs/ft/orderly/#genobj (Last visited on 14 June 2016)

[134] In January 2015, the Legislative Council released the summary of views and Government's responses on the Companies (Winding Up and Miscellaneous Provisions) (Amendment) Bill 2015. In matters of whether or not to adopt the UNCITRAL Model Law, the Government indicated, "At present, many major trading partners of Hong Kong, have not signed and adopted the UNCITRAL Model Law... We will closely monitor the international development and the attitude of our major trading partners in this regard and will consider how best to take forward the matter." Legislative Council Paper No CB(1)481/15-16(04), 22 January 2016, p.17. In June 2015, the Judicial Yuan of Taiwan issued the Summary Clarification of Amended Draft Taiwan Bankruptcy Act (renamed as Debt Clearance Act, in Chinese), "Due to the internationalization of economic activities and the need of close cross-strait trade relations, in order to guarantee equal treatment among the creditors from all countries and promote cross-border trade and investment, strengthen the timely judicial assistance and cooperation, it is explicitly stipulated that the debt clearance proceedings opened in the foreign countries, the Mainland, Hong Kong and Macao can be applied for recognition." Judicial Yuan of Taiwan, Summary Clarification of Amended Draft Taiwan Bankruptcy Act (renamed as Debt Clearance Act, in Chinese), 2 June 2015, para.19

Part III Diverse Cross-border Insolvency Systems among the Four Regions

Introduction

3.01 The main topic of this part focuses on what the current cross-border insolvency systems among the four regions are. The part is composed of four chapters, in which the individual cross-border insolvency system in each region will be introduced and analyzed. For each region, the introduction will start with a general overview of the local insolvency system. Further, the features and problems of the cross-border insolvency system in each region will be demonstrated in depth through legislation and case law (Please also refer to Annex III, in which the main lines of the insolvency systems among the four regions have been briefly outlined and summarized comparatively in the form of table.). In the end, comparison and summary of the cross-border insolvency systems among the four regions will be presented in the pre-conclusion.

Ch. 1 The Mainland Approach

3.02 In the Mainland, the development of cross-border insolvency law is interrelated to the reform of local insolvency system. In this chapter, the corporate insolvency system of the Mainland is reviewed at first, including the history of the corporate insolvency system and a general description of the current insolvency system. Further, the development of cross-border insolvency system is also briefly addressed. The current cross-border insolvency system is based on one article, the key elements of which are to be analyzed in detail by referring to relevant case law.

1.5 Brief Introduction into National Bankruptcy Law

3.03 In this section, the former corporate insolvency system is briefly reviewed, which was a dual national bankruptcy system according to different types of debtors. It represented struggles between the government control and market economy demand, the national efforts and the local initiatives. With new EBL's entry into effect in 2007, a comprehensive corporate insolvency system was built up and an era of separate legislation on state and non-state owned corporation insolvency was over.

1.5.1 Corporate Insolvency System of P.R.C. in History

3.04 From 1986 to 2006 the bankruptcy legal system in the Mainland China was composed of

(1) Enterprise Bankruptcy Law (for trial implementation)[135];
(2) Civil Procedure Law and Companies Law;
(3) Related judicial interpretations;
(4) Policy decrees and administrative regulations;
(5) Local rules and regulations.

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[135] Hereinafter, the 1986 EBL

3.05 These five components disclosed that China's former bankruptcy law system was not in a uniform way. Before 1986 there was no bankruptcy law in China. Due to the highly centralized planned economy, the state-owned enterprises (hereinafter SOE), which existed and grew under the control of the government, were the main form of economic entity during that period. If a SOE did not do its business well, the government subsidized it to facilitate continued operations[136]. Therefore it is not surprising that the enterprises at that time had no idea about bankruptcy because it hardly happened.[137] Nevertheless, the government realized that it was not a long-term solution to keep rescuing the SOEs with the state finance.[138]

3.06 On 12 December, 1986, the 1986 EBL, the first bankruptcy law of P.R.C. was adopted, which was a remarkable commencement and a special insolvency legal regime against China's economic background at that moment. First of all, considering the economic structure at that time, the 1986 EBL only applied to the state-owned enterprises.[139] Secondly, pursuant to the 1986 EBL, the government played a significant role in the bankruptcy proceedings. For instance, a debtor can only apply for bankruptcy upon the government approval.[140] Besides, the government was in charge of the whole reconciliation-readjustment procedure.[141] In addition, the government was the statutory member of the liquidation committee.[142] Last but not the least, the employees of the insolvent debtors were highly protected by the 1986 EBL. It was stated in the 1986 EBL that the government should arrange new jobs through various channels for the workers of the bankrupt enterprises and guarantee their basic living necessities before they were reemployed.[143]

3.07 With the development of economic reform in the Mainland,[144] the non-state-owned enterprises were gradually incorporated into the bankruptcy

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[136] Stevens, Neal, Confronting the Crisis of Insolvency in China's State-owned Enterprises: Can the Proposed Bankruptcy Law Erase the Red Ink?, in: Wisconsin International Law Journal, 1998, 554.

[137] It was not until on August 3, 1986, was Shenyang Province Explosion-proof Equipment Factory the first bankrupt enterprise in China just before the 1986 EBL was adopted. It is so-called an administrative bankruptcy in accordance with the local government decree (1985 No. 24 Shenyang Government) and in the form of the recall of business license by the local administrative department for industry and commerce.

[138] Peng Zhen (the former chairman of the Standing Committee of the National People's Congress - China's legislature), The Bankruptcy Law is also the Promotion Law (in Chinese), in: People's Daily, 30/11/1986, 01.

[139] The 1986 EBL, article 2: This law applies to the enterprises owned by the whole people. In pursuant to the Constitution Law of P.R.C., article 7: The State-owned economy, namely, the socialist economy under ownership by the whole people. Therefore, 1986 EBL actually applied to the state-owned enterprises alone.

[140] The 1986 EBL, article 8.

[141] The 1986 EBL, Chapter 4 Reconciliation and Readjustment

[142] The 1986 EBL, article 24

[143] The 1986 EBL, article 4

[144] The bulk of the change in ownership structure in the Chinese economy occurred through the growth of non-state producers, including collective, private and foreign invested firms. Chronic loss-making enterprises were closed down or sold off. The total number of industrial SOEs dropped from 120,000 in the mid-1990 to only 31,750 in 2004. See Naughton, Barry, Growing

system. Adopted on April 9, 1991, the Civil Procedure Law embraced one new chapter (Chapter XIX), entitled Procedure for Bankruptcy and Debt Repayment of Legal Person Enterprises, which provided the general legal foundation for bankruptcy of the non-state-owned enterprises. In addition, pursuant to Chapter VIII of the Companies Law,[145] in which difference of ownership was no longer emphasized,[146] it was required that once the liquidation committee discovered the insolvency, it should apply to the court for a declaration of bankruptcy of the company. If the court declared that the company was bankrupt, the liquidation committee should hand over the liquidation affaires to the court.[147]

3.08 The Supreme People's Court of P.R.C. attempted to address these problems in practice by issuing several judicial interpretations.[148] In particular, the 2002 Provisions on Bankruptcy Cases[149], with 106 articles (almost three times as long as the bankruptcy law itself), was a very comprehensive interpretation with respect to the 1986 EBL. The highlight of the 2002 Provisions on Bankruptcy Cases was that it applied to both SOEs and non-SOEs,[150] which appearred to be an attempt by the Supreme People's Court to set uniform rules that govern the both.[151]

3.09 The government also promulgated number of policy decrees and administrative regulations. Those decrees and administrative regulations mainly

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out of the Plan: Chinese Economic Reform, 1978-1993, Cambridge University Press, 1995, p. 137-168; Naughton, Barry, The Chinese Economy: Transitions and Growth, The MIT Press, 2006, p. 105-106.

[145] The Companies Law was adopted on December 29, 1993, revised on December 25, 1999, 2005 and 2013.

[146] The Companies Law (1993), article 1, 7

[147] Id.

[148] In China the legal effect of the judicial interpretations used to be not very clear in theory but quite obvious in practice. . Pursuant to the Rules of Supreme People's Courts on the Judicial Interpretation, issued on June 23, 1997, revised on March 23, 2007 (No.12 [2007] of the Supreme People's Court), the judicial interpretation is made by the Supreme People's Court when people's courts meet the problems of application of laws in the trial. It also stimulates that the judicial interpretations have the same effect as laws. The judges simply apply the judicial interpretations in making decisions without doubting their effects. According to the former Legislation Law of P.R.C. (article 42 and 43) prescribes that the power of legal interpretation belongs to the Standing Committee of the National People's Congress alone. The Supreme People's Court may request the Standing Committee of the National People's Congress to give legal interpretation. The Supreme People's Court issued a rule itself to justify the legal effect of the judicial interpretations. On 15 March 2015, the Legislation Law was amended, which allows the Supreme People's Court to make interpretations concerning application of laws in the course of adjudication work. The interpretations shall refer to specific articles or provisions of laws in conformity with the objectives, principles and original meaning of laws and shall be reported to the Standing Committee of the National People's Congress for recordation within 30 days of issuance. (2015 Legislation Law, article 104)

[149] 2002 Provisions on Some Issues concerning the Trial of Enterprise Bankruptcy Cases of the Supreme People's Court, Interpretation No. 23 [2002], issued on July 30, 2002. It superseded the earlier interpretations (the 1991 Several Opinions on EBL and the 1992 Several Opinions on CPL) if there was any inconsistency in the formers.

[150] The 2002 Provisions on Bankruptcy Cases, article 4, 5

[151] Chua Eu Jin, The Reform of the P.R.C. Corporate Bankruptcy Law: Slowly but Surely, 16 (8) China Law and Practice, 2002 Oct., p. 19.

focused on the placement of employees,[152] the disposal of the bankruptcy property (especially the right to the use of the land, the secured claims and the bank loans)[153] and rearrangement of the bankrupt enterprises of the state-owned enterprises.[154]

3.10 Some local governments, including provinces and cities, enacted their own local rules and regulations to meet their local needs.[155] For example, the Enterprise Bankruptcy Rules of Shenzhen Special Economic Zone (hereinafter 1993 Shenzhen Rules), which was adopted on November 10, 1993 and was only implemented within the Shenzhen special economic zone.[156]

1.1.2 Current Corporate Insolvency System of the Mainland and Its Problems[157]

1.1.2.1 Brief Introduction into Current Corporate Insolvency System

3.11 Adopted on 27 August 2006, the current bankruptcy system in China is established based on the Enterprise Bankruptcy Law (hereafter the EBL)[158], which replaced the former 1986 EBL and came into force on 1 June 2007. Evolving synchronously with economic reform in China, the EBL provides a unified bankruptcy system, covering all types of incorporated enterprises

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[152] They are mainly: (A) Regulations on the Placement of Surplus Staff and Workers of State-owned Enterprises (1993, Decree No. 111); (B) Regulations on Unemployment Insurance for Staff and Workers of State-owned Enterprises (1993, Decree No. 110); (C) The Notice of Advancing the Problem-solving and the Reemployment of the Enterprise Employees (1997, Decree No. 166); (D) Supplementary Notice of the State Council on the Relevant Issues about the Pilot Implementation of the Merger and Bankruptcy of State-owned Enterprises in Some Cities and the Reemployment of Workers (1997, Decree No. 10); (E) Notice of the Central Committee of the Communist Party and the State Council on the Basic Living Guarantee and the Reemployment of the Laid-off employees of the State-owned Enterprises (1998, Decree No.10).

[153] They are mainly: (A) Rules on the Evaluation and Management of State Assets (1991); (B) Notice of Stopping, Decreasing and Slowing the Return of the Interests of the Loans for the Enterprises which are Suspended Operation for Consolidation, Merged, Dissolved and Bankrupt (1993, Decree No. 113); (C) Notice of Several Issues on the Mortgage of the Right to the Use of the Land (1997, Decree No. 2); (D) Several Opinions on Enhancing the Land Asset Management and Promoting the Reform and Development of the State-owned Enterprises (1999, Decree No. 433).

[154] They are mainly: (A) Interim Measures on Enterprise Mergers (1989, Decree No. 38); (B) Notice of the State Council on the Relevant Issues concerning the Pilot Implementation of Bankruptcy of State-owned Enterprises in Some Cities (1994, No. 59); (C) Notice of the Several Issues on the Pilot Implementation of the Merger and Bankruptcy of the State-owned Enterprises (1996, Decree No. 492)

[155] For instance, from 1993 to 2006, there were 167 local bankruptcy decrees issued by various levels of governments, most of which related to the employee rearrangement. See: www.vip.chinalawinfo.com

[156] As part of its "open door" economic policy, China marked out a number of "special economic zones." These areas each have their own local congress and, within limits, are permitted to enact their own regulatory laws.

[157] Most part of this section has been derived from my publication 'Can the Day Understand the Night? Brief Introduction into Problems of the Current Insolvency System in China, 2015, available at http://iiiglobal.org/iii-prize-in-insolvency.html (Last visited on 14 June 2016)

[158] Official English version is available at:
http://www.npc.gov.cn/englishnpc/Law/2008-01/02/content_1388019.htm (Last visited on 14 June 2016)

regardless of types of the ownership.[159] The current EBL is also a more debtor-friendly regime. In addition to the liquidation proceedings, it provides reorganization mechanisms for the purpose of giving a second chance to those economically viable but distressed businesses, by referring to the eminent models in other jurisdictions, including, Chapter 11 of the US Bankruptcy Code and German insolvency law.[160] The current EBL also introduced a new legal profession, bankruptcy administrators, into China's insolvency system, who are designated to undertake critical administrative functions and supervisory responsibilities.[161] The Supreme People's Court also issued a number of related judicial interpretations (Please refer to Annex II), as important complementary legal references to the problems in practice, which thus play a crucial role in the current insolvency system.

3.12 Nevertheless, according to the data released by the Supreme People's Court in 2014, from 2007 when the current EBL was implemented to 2012, the amount of the requests to open insolvency proceedings seized by the courts continue to decrease at an average rate of 12.23% every year.[162] In 2012, there were 735,000 domestic enterprises in total that were deregistered or cancelled with the government bureau,[163] but only 20.52% of them utilized judicial insolvency proceedings and one decade ago it was 17.09% higher.[164] With more specific and systematic arrangements under the current insolvency system, the reasons that the caseload of insolvency proceedings continues to decline on an annual basis are complicated and multifaceted.

1.1.2.2 Introduction into Current Problems of Insolvency System

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[159] After the new EBL came into effect in 2007, Chapter XIX of the Civil Procedure Law, which was amended on 28 October 2007, was deleted. The bankruptcy part was also removed from the former Chapter VIII of the Companies Law in 2005. Article 190 of 2013 Companies Law: Where a company is declared bankrupt according to law, bankruptcy liquidation shall be conducted in accordance with the enterprise bankruptcy law.
The 1986 EBL still has some influence on the current EBL. Parallel to the normal bankruptcy proceedings, the so-called administrative closure is stipulated in the EBL, which means, certain state-owned enterprises within the period and scope as are prescribed by the State Council before the EBL is put into effect shall be handled according to the relevant regulations of the State Council and therefore are excluded from the EBL (the EBL, Article 133). The State-Owned Assets Supervision and Administration Commission ("SASAC") of the State Council estimated that roughly 2,000 SOEs might take advantage of this "administrative closure". Not until the period for administrative closure expires, will the new law truly harmonize the bankruptcy treatment of all SOEs, including SOEs and non-SOE legal person enterprises. See also Lan Xinzhen, Looking Forward to the New Bankruptcy Law (in Chinese), in: Beijing Review, 21/06/2004, visit: http://www.bjreview.cn/Cn/2004-29/200429-jj2.htm (Last visited on 14 June 2016)
[160] Shi Jingxia, Twelve Years to Sharpen One Sword: The 2006 Enterprise Bankruptcy Law and China's Transition to a Market Economy, 16 Norton Journal of Bankruptcy Law and Practice, Vol. 16, No. 5, October 2007, p.666
[161] The EBL, Chapter III
[162] Ma Jian, Statistic Analysis on Insolvency Cases Accepted by People's Court from 2003-2012 (in Chinese), in: Legal Information, 2014 (03), p.23
[163] State Administration for Industry and Commerce of the P.R.C., Analysis Report on Domestic Enterprises Life Circle (in Chinese), June 2013, p.3, available at: http://www.saic.gov.cn/zwgk/tjzl/zxtjzl/xxzx/201307/P020130731318661073618.pdf (Last visited on 14 June 2016)
[164] Ma Jian, Statistic Analysis on Insolvency Cases Accepted by People's Court from 2003-2012 (in Chinese), in: Legal Information, 2014 (03), p.24

1.1.2.2.1 The Competing System: Participation in Distribution

3.13 The EBL, just like its literal meaning, only applies to an enterprise as legal person (or a legal person enterprise).[165] Liquidation of other organizations (who are not enterprise legal person) as prescribed by other laws, when they go bankrupt, shall be governed, mutatis mutandis, by the procedure as prescribed under this Law.[166] A natural person is excluded from the scope of the EBL. However, it is noteworthy that under Companies Law (adopted in 2005), there is one-person company with limited liability.[167] Pursuant to the article 64 of the Companies Law, where the shareholder of a one-person company with limited liability cannot prove that the property of the company is independent of his own property, he assumes the joint and several liabilities for the debts of the company. Under this circumstance, if this one-person company goes bankrupt and its natural person shareholder has the joint liability for the debts of the company, what will happen if his personal property is not enough to pay off the debts? The EBL does not provide any answer, whereas there is alternative solution in practice.

3.14 In 1992, prior to the current EBL that came into effect in 2007, the Supreme People's Court issued a judicial interpretation, Opinions of the Supreme People's Court on Some Issues Concerning the Application of the Civil Procedure Law of the People's Republic of China (hereinafter the 1992 Opinions),[168] which provides a so-called participation in distribution system.[169] Under the 1992 Opinions, the judgment debtors refer to natural persons and organizations other than the enterprises, which complemented the scope of application under the 1986 EBL. The participation in distribution system can be triggered when the assets of a judgment debtor are found insufficient to satisfy the judgment in the course of enforcement. The other creditors, after filing for petition against the same judgment debtor or having obtained the relevant enforcement basis, can apply for participation in distribution of the judgment debtor's assets seized in

[165] Not all kinds of enterprises are qualified as legal person. In accordance with article 2 of Regulations of the People's Republic of China for Controlling the Registration of Enterprises as Legal Persons (effective as of July 1, 1988), any of the following enterprises which are qualified as legal persons shall register as such in accordance with the relevant provisions of the present Regulations:
(1) enterprises owned by the whole people;
(2) enterprises under collective ownership;
(3) jointly operated enterprises;
(4) Chinese-foreign equity joint ventures, Chinese-foreign contractual joint ventures and foreign-capital enterprises established within the territory of the People's Republic of China;
(5) privately operated enterprises;
(6) other enterprises required by the law to register as legal persons.
The EBL, article 2: Where a legal person enterprise cannot pay off his debts due and his assets are not enough for paying off all the debts, or he apparently lacks the ability to pay off his debts, the debts shall be liquidated according to the provisions of this Law.
[166] The EBL, article 135.
[167] A one-person company means a company with limited liability where there is only one shareholder who is a natural person or a legal person. (the Companies Law, article 58)
[168] The 1992 Opinions, No.22 [1992] of the Supreme People's Court (in Chinese)
[169] The 1992 Opinions (in Chinese), article 297-299

that enforcement proceeding.[170] In 1998, a U-turn occurred after the Supreme People's Court issued the Provisions of the Supreme People's Court on Several Issues Regarding Enforcement of the People's Courts (For Trial Implementation, hereinafter the 1998 Trial Provisions).[171] In accordance with the 1998 Trial Provisions, the participation in distribution system can also apply to those enterprises dissolved, deregistered and shut down without liquidation, whose assets are not sufficient to pay off all the debts.[172] Moreover, in 2004, Provisions of the Supreme People's Court on Multiple Creditors that Participate in Distribution (Draft for Public Consultation) was released. Till now that judicial interpretation still has not come into effect and one of the key reasons is that it is difficult to achieve a consensus on the participation in distribution system within the Supreme People's Court.[173]

3.15 Pursuant to the current EBL, only the creditors and the debtor can apply for bankruptcy. In practice, as pointed out by Wang and Xu there are creditors who decline to file a bankruptcy petition but take advantage of the participation in distribution system in order to obtain more assets than that they can receive through the insolvency proceedings.[174] This is contradictory with the core function of bankruptcy law, which is, as remarked by Jackson, "a collective debt-collection device".[175] Instead, it encourages the creditors to individually grab the assets under no obligation to "share with other creditors, who maybe slower to take action".[176] That can lead to unfair distribution among all the creditors as a whole. In addition, unlike the strict notice procedures as required under the EBL, some of the creditors cannot even know about the proceeding and then lose the opportunity to make claims. Besides, if the court seized the application for the opening of insolvency proceedings, the whole enforcement procedure can be stayed[177] and the participation in distribution can be stayed accordingly. If the debtor is declared bankruptcy, the court should terminate the enforcement procedure.[178] Nevertheless, in accordance with article 16 of the EBL, only payment to individual creditors that is done after the people's court seizes a request for bankruptcy shall be deemed as invalid. Therefore, even if the debtor or some creditors petition for opening of bankruptcy proceedings later, the assets that have been enforced through the participation in distribution system cannot be ordered to return because neither the EBL nor other legislations provide such a legal basis to revoke a legitimate action.

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[170] The 1992 Opinions (in Chinese), article 297

[171] The 1998 Trial Provisions, No.22 [1992] of the Supreme People's Court (in Chinese)

[172] The 1998 Trial Provisions (in Chinese), article 96

[173] Chen Zhixin, Dilemma and Way Out of Civil Participation in Distribution System, in: Journal of Shanghai University of Political Science and Law (The Rule of Law Forum)(in Chinese), Vol.29, No.6, Nov. 2014, p.84

[174] Wang Xinxin, Xu Yangguang, Dilemmas and Solutions to China's Bankruptcy Law: Reasons of Decrease on the Numbers of Acceptance of Bankruptcy Cases and the Relevant Treatment (in Chinese), 19 Nov. 2014, available at http://www.chinaqingsuan.com/news/detail/7702/page/2 (Last visited on 14 June 2016)

[175] Jackson, Thomas H., The Logic and Limits of Bankruptcy, Washington D.C.: Beard Books, 2001, p.8

[176] Bartell, Laura B., Visualizing Bankruptcy, U.S.: Lexis Nexis, 2011, Chapter 1 [1/2]

[177] The 1998 Trial Provisions (in Chinese), article 102(1)

[178] The 1998 Trial Provisions (in Chinese), article 105

3.16 Further, it will result in no possibility of rescue. Under the participation in distribution system, the courts do not have to take into consideration the conditions of the enterprise business but simply determine whether the debt is due. Plus, individual collection can consume the exhaustible assets of the debtors in an inefficient way, which leaves no resources to replenish the estate of the debtor. Therefore, the coexistence of the participation in distribution system is considered by most of the judges and the academics as a leeway from formal insolvency proceedings and provokes threat to the sound development of the current EBL.[179]

3.17 The problem was partly solved on 4 February 2015 when the latest judicial interpretation concerning application of Civil Procedure Law issued by the Supreme People's Court came into effect.[180] In accordance with the new judicial interpretation, the court, upon the agreement of one of the applicants for enforcement or the respondent against whom the enforcement is sought, should stay the enforcement proceeding and transfer the case to the court at the domicile of the respondent, if the respondent, as enterprise legal person, meets the conditions set up under Article 2(1) of the EBL.[181] If the court at the domicile of the respondent accepts the insolvency case, the preservation measures on the property should be lifted. If the court at the domicile of the respondent orders the respondent bankrupt, the enforcement proceeding shall be terminated.[182] The new judicial interpretation establishes a link between the enforcement procedure and initiation of insolvency proceedings so that the access to the corporate debtors' assets through the participation in distribution system is blocked.

3.18 Nevertheless, it is noteworthy that Article 2 of the EBL is composed of two provisions. Article 2(1) stipulates the conditions concerning liquidation of debtor [183] and Article 2(2) provides the conditions of reorganization. [184] Compared to Article 2(1), Article 2(2) includes a less restrict trigger condition

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[179] Liu Guixiang, Distribution of Functions of Participation in Distribution System and Insolvency System, in: People's Court Daily, 30 April 2014, at 8; Wang Guanghua, Participation in Distribution System and Insolvency System are Different in Nature (in Chinese), in: People's Court Daily, 30 April 2014, at 8; Chen Zhixin, Dilemma and Way Out of Civil Participation in Distribution System, in: Journal of Shanghai University of Political Science and Law (The Rule of Law Forum)(in Chinese), Vol.29, No.6, Nov. 2014, p.82-87; Wang Xinxin, Participation in Distribution System Should Not Conflict with Insolvency System, in: People's Court Daily, 30 April 2014, at 8; Xu Haoshang, Ou Yuanjie, Separation of Functions of Participation in Distribution System and Insolvency System: Restructuring the Participation in Distribution System (in Chinese), in: People's Judicature, 2014 (17), p.102-107

[180] Judicial Interpretation of the Supreme People's Court concerning Application of Civil Procedure Law, [2015] Judicial Interpretation No.5 (in Chinese)

[181] [2015] Judicial Interpretation No.5 (in Chinese), article 513

[182] [2015] Judicial Interpretation No.5 (in Chinese), article 514

[183] The EBL, article 2, para.1: Where an enterprise legal person fails to pay its debt as due, and if its assets are not enough to pay off all the debts or if it is obviously incapable of clearing off its debts, its liabilities shall be liquidated according to this Law.

[184] The EBL, article 2, para.2: Where an enterprise legal person is under the circumstance mentioned in the provision of the preceding paragraph or if it is obviously likely that it is unable to pay off its debts, it may be subject to reorganization according to this Law.

based on likelihood of insolvency. Accordingly under the new judicial interpretation, enterprise debtors are ruled out of the participation in distribution system if they are considered subject to liquidation. Nevertheless, it seems that the new judicial interpretation has not completely excluded enterprise debtors, which reach the lower threshold of reorganization pursuant to Article 2(2), from the participation in distribution system.

1.1.2.2.2 Involvement of the Government

3.19 Discussions about involvement of Chinese government in handling insolvency cases often begin and end with a series of complaints about external interference. From the domestic perspectives, according to Li and Wang, involvement of the government, in particular the local government, in the insolvency proceedings, is regarded as "the most important factor influencing court's function in hearing bankruptcy cases"[185] in the Mainland. Besides, As stated in Jiang's research, which was conducted based on statutory analysis and case studies, it is pointed out that involvement of government agencies in China's bankruptcy proceedings, especially the reorganization proceedings, is excessive, which contributed to a discouraging factor for bankruptcy filings.[186] From the international perspectives, the same concern arose. Early in 2007, it is acknowledged in an investigation report published by the United States International Trade Commission that the policy-led bankruptcy proceedings under the 1986 EBL was considered as "another instrument that China's government has used to satisfy its rationalization objectives",[187] which deviated from the market-oriented function of the bankruptcy laws. In fact, a clear definition of bankruptcy laws is also one of five fundamental criteria,[188] based on which China has been seeking market economy status (MES) recognized by the EU but has been consistently rejected.[189] According to the EU, China has only met one of them, which excluded the bankruptcy laws criteria.[190] It seems that the international confidence in a well-developed bankruptcy system under market

[185] Li Shuguang, Wang Zuofa, The Function of China's Court in Enterprise Bankruptcy and the Future Trend – Observations from the Background of the Four Year Implementation of China's Existing Bankruptcy Law, in: INSOL World, the Quarterly Journal of INSOL International, Fourth Quarter, 2012, p.11

[186] Jiang Yujia, The Curious Case of Inactive Bankruptcy Practice in China: A Comparative Study of U.S. and Chinese Bankruptcy Law, in: Northwestern Journal of International Law & Business, Vol.34, Issue 3, 2014, p.569 – 570

[187] United States International Trade Commission, China: Description of Selected Government Practices and Policies Affecting Decision-Making in the Economy, Investigation No. 332-492, USITC Publication 3978, December 2007, p.30

[188] To be considered a 'market economy', a country must have a floating exchange rate, a free market, a non-intrusive government, effective business accounting standards and, lastly, a clear definition of property rights and bankruptcy laws. In Policy Department of European Parliament, Trade and Economic Relations with China 2015, June 2015, p. 24

[189] European Parliament, China and Granting of Market Economy Status thereto, 20 April 2015, http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=E-2015-006250&language=EN (Last visited on 14 June 2016)

[190] Policy Department of European Parliament, Trade and Economic Relations with China 2015, June 2015, p. 24, http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/549062/EXPO_IDA(2015)549062_EN.pdf (Last visited on 14 June 2016)

economy conditions in China still requires time to be built up. Before that, the fear of foreign creditors to recover their investment and claims in the event of bankruptcy due to government interference can probably result in escape from the Mainland jurisdiction. I will discuss about that point later in section 1.3.

3.20 Government involvement indeed exists in the course of China's insolvency proceedings. Nevertheless, in my view, those complaints also fail to capture the complex reality of China. Some of them do not merely have negative effects but a compromising choice in a transitional economy. In this section, I'd like to explore the forms and the reasons of the government involvement based on the relevant case law.

3.21 In China, involvement of the government in the insolvency proceedings can exist in various forms. The most evident one is the liquidating committee. Under the current EBL, in addition to law firms, certified public accountant firms, bankruptcy liquidation firms or any other social intermediary agencies, the administrator can also be a liquidating committee,[191] which is an inheritance from the 1986 EBL.[192] In accordance with the judicial interpretation, the members of a liquidating committee can be appointed from the related government departments, from the social intermediary agencies included in the roster of administrators, from financial asset management companies as well as from the people's bank and the financial regulatory institution under relevant laws and administrative regulations.[193] For instance, in the Tianyi (San-an) case, it involved reorganization proceeding of a listed company, 45.43% of whose equity structure is state-owned shares.[194] The liquidating committee was appointed, which was composed of the local State Assets Supervision and Administration Committee (SASAC), the local Labor and Social Security Bureau, the local central branch of the People's Bank of China, the local branch of China Banking Supervision and Administration Committee (CBSAC), in addition to an accounting firm and a law firm.[195]

3.22 The same happened to the Huayuan case, which was a listed company directly subordinated to State-owned Assets Supervision and Administration Commission of the State Council (SASAC).[196] The court designated a liquidating committee that was mainly composed of CBSAC Shanghai Bureau, China

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[191] The EBL, article 24

[192] The 1986 EBL, article 24

[193] Provisions of the Supreme People's Court on Designating the Administrator during the Trial of Enterprise Bankruptcy Cases (Interpretation No.8 [2007], issued on 12 April 2007, hereinafter Provisions of Designating the Administrator), article 19

[194] Draft Report on Connected Transaction Concerning Tianyi's Acquisition of Assets through Issuing Stocks, 2008, available at: http://business.sohu.com/20080119/n254757501.shtml (Last visited on 14 June 2016); [2007] Hubei Jinzhou Intermediate People's Court Civil Bankruptcy No.14-5 (in Chinese)

[195] Li Shuguang & Wang Zuofa, Review of the P.R.C. Bankruptcy Law in 2009, INSOL International Technical Series Issue No.11, March 2010, p.5.

[196] Gao Changjiu, Tang Zhengyu, Fu Wang, Legal Dilemmas Encountered in the Course of Listed Corporation Reorganization: Taking ST Huayuan as Example (in Chinese), Nomocracy Forum, 2010, p.45. Please note the authors are judges who participated in the reorganization proceedings of the Huayuan case.

Securities Supervision and Administration Committee Shanghai Bureau, Shanghai Financial Office, SASAC Shanghai Branch.[197] The judges, who participated in the Huayuan case, briefly explained the reason of that assignation. Reorganization of the listed company involved a series of complicated problems and had to coordinate with different government departments. For example, considering the state-owned shares in the debtor's capital structure, the reorganization should be subject to supervision of State Assets Supervision and Administration Committee. Meanwhile, the debtor was also a listed company, which should be regulated by China Securities Regulating Commission. The main creditors of the debtor were banks and thus needed the assistance from the People's Bank of China and China Banking Supervision and Administration Committee. However, the coordinating ability of the social intermediary agencies is relatively weak at this moment. That's why the judges understood that appointment of a liquidating committee might cause controversy but still found it necessary to include the related government departments into the liquidating committee in order to facilitate the reorganization proceedings, which was "in line with China's current national conditions".[198]

3.23 The government may also be requested to participate in the insolvency proceedings, which mostly relates to policy issues. Based on the case law, in particular, in the reorganization cases, the courts sought assistance from the government in matters of tax as well as all kinds of administrative approvals, such as concerning real estate, foreign merger and acquisition as well as employee replacement. Under the current EBL, tax is the second on the rank of the order of paying off debts in the liquidation proceedings.[199] With respect to how to tackle tax issues in the course of reorganization, the current EBL does not provide specific rules but the tax authority itself issued the Measures for the Enterprise Income Tax of Enterprise Reorganizations.[200] In the case of Jiande Xuehong Home Textiles Co., Ltd., the debtor was reorganized by introducing an external investor. If the debtor was charged tax according to Measures for the Enterprise Income Tax of Enterprise Reorganizations, it would put more financial burdens upon the debtor's shoulder. In that case, the problem can be solved if the reorganization with the help of an external investor can be shifted into the category of investment promotion and capital attraction, which should be subject to preferential tax policy and consequently lowered the costs. The court negotiated with the government for several times and finally persuaded the government to accept the arrangement.[201] In the reorganization case of Zhoushan Huatai Petrol Company, a Hong Kong company was accepted as one of the strategic investor, who agreed to purchase the shares of the debtor.

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[197] Zhang Haizheng, Kuang Jingting, Corporate Reorganization Case Analysis under China's New Bankruptcy Law, in: International Corporate Rescue, Vol.11, issue3, 2014, p.177

[198] Gao Changjiu, Tang Zhengyu, Fu Wang, Legal Dilemmas Encountered in the Course of Listed Corporation Reorganization: Taking ST Huayuan as Example (in Chinese), Nomocracy Forum, 2010, p.46

[199] The EBL, article 113

[200] [2010] Announcement of the State Administration of Taxation No. 4 (in Chinese)

[201] 2013 Top Ten Typical Enterprise-related Cases in Zhejiang Province, 13 January, 2014, available at: http://www.zjcourt.cn/content/20140113000001/20140113000008.html (Last visited on 14 June 2016)

However, investment from Hong Kong was regarded as foreign investment in the Mainland, which should go through time-consuming administrative procedures for approval. For the purpose of promoting the efficiency of reorganization, the court persuaded the government to complete the administrative procedure as soon as possible.[202]

3.24 In the case of Tang Ying Garment Co. Ltd., the government made an undertaking upon the request of the court, which was incorporated into the reorganization plan. The main capital of the debtor was its real estates, including the land and buildings. However, the government did not issue related ownership certificates to those real estates, which entailed the ownership of the debtor of those real estate was in question and the interests of the creditor would accordingly be affected. The court held discussion with the government for several times and the government finally agreed to issue related certificates as soon as possible and change the land status used for commercial purpose so as to raise the value of the land. Further, the reorganization plan included a written promise that the government would purchase the real estates if it failed to issue related certificates within two years, which enabled the reorganization plan to achieve a high pass rate.[203]

3.25 Sometimes the involvement of the government in the insolvency proceedings directly links to financial support or employee replacement. LDK, registered in Jiangxi Province, was a private company that manufactured photovoltaic (PV) products. According to the information published on the company's website, it was the first company of that province in China listed on the New York Stock Exchange and used to be a significant revenue contributor to that province.[204] Due to the excess capacity and anti-dumping and anti-subsidy investigation on China's photovoltaic products[205] imported into the U.S.A. and EU, the solar power industry in China plunged since 2011[206] and an array of photovoltaic enterprises went insolvent in China. The business of LDK also deteriorated in 2011. The salary of the employees had to temporarily be paid by the local government.[207] In 2012, a budget bill was passed, which allowed the local government to pay for part of the debts of the private company with fiscal funds. The government had to delete the content of the bill from its official website in order to ease the media uproar incurred.[208] By the end of 2014, LDK

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[202] [2010] Zhoushan People's Court Ordinary Commercial Bankruptcy No.1 (in Chinese)
[203] [2011] Ningbo Fenghua People's Court Commercial Bankruptcy No.1 (in Chinese)
[204] The English website of Saiwei: http://www.ldksolar.com/com_about.php (Last visited on 14 June 2016)
[205] Photovoltaic products generate electricity by converting solar energy through semi-conducting materials that exhibit the photovoltaic effect.
[206] Wei Zheng, Yu Bingqing, Study of the Current Photovoltaic Development in China and Its Solutions (in Chinese), in: Sino-Global Energy, Vol.18, Issue.6, 2013, p.15-16
[207] Guo Fang, Jian Wenchao, Saiwei and the "Kidnapped" Government (in Chinese), in: China Economic Weekly, Issue 30, 2012, p.25
[208] Guo Ruyi, Xinyu Government Deleted from Its Website the Bill to Pay Saiwei's Debt with Fiscal Funds (in Chinese), 19 July, 2012, available at: http://business.sohu.com/20120719/n348571532.shtml (Last visited on 14 June 2016)

has not filed the petition for bankruptcy in the Mainland China, whereas its holding company applied for winding up in Cayman Islands in February 2014.[209]

3.26 LDK is an extreme case. On 26 June 2014, Shanghai No.1 Intermediate People's Court accepted the petition for reorganization concerning Shanghai Chaori Solar Energy Science & Technology Co. Ltd. (Chaori).[210] Chaori was a private company based in Shanghai, which also manufactured photovoltaic (PV) products and experienced financial distress. It is stated in the Chaori's draft reorganization plan that the court designated a law firm and an accounting firm as the administrators and the government participated in the proceedings in order to cooperate with the court in matters of employee replacement.[211] Another case concerning a company producing solar glass, it involved a reorganization proceeding in Zhejiang Province, which was filed in 2013. Considering the practical necessity arising from the reorganization case, the court sent a letter of request to the local government in order to discuss about employee replacement and the replacement fees prepaid by the government, in which the court also suggested that the local government participate in the liquidating committee. The local government, however, refused to take the responsibility of prepaying the replacement fees and considered that it was more appropriate for qualified intermediary agencies to be appointed as administrator. As a result, the court dismissed the application for reorganization because the court considered that the feasibility of reorganization was not very high.[212]

3.27 The reason behind that kind of government involvement is partly due to the lack of public fund related to wage guarantee. As mentioned by Wang and Yang, there are some local specialized funds for protection of labor claims established for limited purpose only available in Beijing and Shanghai.[213] At national level, such a system that provides comprehensive financial support for labor claims incurred by insolvency of enterprises has not been set up. Consequently in 2009, Opinions of the Supreme People's Court on Several Issues Concerning Correctly Trying Enterprise Bankruptcy Cases to Provide Judicial Protection for Maintaining the Order of Market Economy were published.[214] Problems, such as unpaid salaries and replacement of employee, are considered sensitive in nature and the courts are required to seek support from the local government.[215] It is

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[209] LDK Investor Press Releases, LDK Solar Welcomes Appointment of Joint Provisional Liquidators in Cayman Islands, available at: http://investor.ldksolar.com/phoenix.zhtml?c=196973&p=irol-newsArticle&ID=1905143 (Last visited on 14 June 2016)

[210] [2014] Shanghai No.1 Intermediate People's Court Civil IV (Commercial) Bankruptcy No.1-1 (in Chinese)

[211] [2014] Shanghai No.1 Intermediate People's Court Civil IV (Commercial) Bankruptcy No.1-4 (in Chinese)

[212] [2013] Zhejiang Huzhou Intermediate People's Court Bankruptcy Preliminary No.1 (in Chinese)

[213] Wang Xinxin, Yang Tao, Study on Protection of Labor Claims of Insolvent Enterprises: Tolerance and Share of Costs during Social Reform (in Chinese), in: Research on Rule of Law, 2013 (01), p.29

[214] [2009] Judicial Interpretation No.36 (in Chinese)

[215] [2009] Judicial Interpretation No.36 (in Chinese), article 5

further stated "if conditions permit, the government can set up stability funds or encourage the third parties to make advance payments to settle the employees of insolvent enterprises at the first place. The advance payments made by the government or any third party can be firstly repaid in the bankruptcy procedure according to the repayment sequence of employees' claims."[216]

3.28 China's insolvency proceedings involve frequent interplay between the courts and the governments. Compared to the judiciary, the government has been given very extensive powers in administering affairs. Against that background, judicial independence alone is not sufficient to safeguard the sound and efficient operation of the insolvency proceedings (for instance, problems like taxes, employee resettlement, policy-based loans cannot be settled without the proper support of the governments[217]) and the courts have to seek cooperation from the government. Upon emerging consensus, there are "minimal judicial independence, impartiality and integrity that countries of various political stripes should adhere to".[218] Nonetheless, an individual country, which is still in the course of judicial reform, should not simply be condemned before it meets the requirement because it is a long-term and complicated domestic process "involving different balance of struggle among competing interest groups".[219] In addition, both the courts and the governments in China share the same objective of cooperation. As pointed by Zhou Xiaochuan, Governor of People's Bank of China (Central Bank of P.R.C.), "in the process of reform, China attaches special importance to social stability".[220] For example, maintaining social stability is a principle that has been incorporated into related judicial interpretations.[221] In the case of Wuxi Mingte Chemical Fiber Co., Ltd., which involved reorganization concerning a non-public company, the judge held the similar opinion as the judge in the Huayuan case, considering that involvement of government by participating in the liquidating committee has played an irreplaceable role in the reorganization case because the government can cooperate with the court in resolving the social conflicts and ensuring social stability.[222]

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[216] [2009] Judicial Interpretation No.36 (in Chinese), article 5

[217] Pan Junfeng, Study of Judicial Reorganization Practice: from the perspective of reorganization cases handled by the courts in Jiangsu Province (in Chinese), in: Wang Baoshu(ed.), Chinese Yearbook of Commercial Law, Law Press, 2011, p.209

[218] For better understanding of "minimal judicial independence, impartiality and integrity", there are some examples, such as the UN Basic Principles on the Independence of the Judiciary (endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985); IBA Minimum Standards of Judicial Independence (adopted by the International Bar Association in 1982). See also Henderson, Keith E., Halfway Home and a Long Way to Go: China's Rule of Law Evolution and the Global Road to Judicial Independence, Judicial Impartiality, and Judicial Integrity, in: Randall Peerenboom (ed.), Judicial Independence in China: Lessons for Global Rule of Law Promotion, New York: Cambridge University Press, 2010, p.24

[219] Peerenboom, Randall, Judicial Independence in China: Common Myths and Unfounded Assumptions, in: Randall Peerenboom (ed.), Judicial Independence in China: Lessons for Global Rule of Law Promotion, New York: Cambridge University Press, 2010, p.88

[220] Zhou Xiaochuan, Debate on Rescue in the Midst of Financial Crisis (in Chinese), in: Journal of Financial Research, no.9, 2012, p.5

[221] [2009] Judicial Interpretation No.36 (in Chinese); [2012] Judicial Interpretation No. 261 (in Chinese)

[222] [2010] Jiangsu Wuxi Intermediate People's Court Bankruptcy No.6 (in Chinese)

3.29 Further, there are economic incentives for the governments to get involved in the insolvency proceedings. As pointed out by Zhou, the criteria of promotion of local officials have shifted from political achievements to economic contributions since 1980s.[223] Hence, the local government is highly motivated to boost growth of local economy. In 1962, an economist, Arthur Melvin Okun, published his paper based on empirical observation, in which it is stated that for every 1% increase in unemployment, a country's gross domestic product (GDP) will decrease by 2% to 4% from its potential.[224] His theory was later referred to as Okun's law. As pointed out by Knotek, Okun's law can be affected by a number of factors and consequently it might not be very precise but more useful as a forecasting tool to show the tendency.[225] In 2014, IMF conducted empirical research based on the data of a group of advanced economies—the G7 economies plus Australia and New Zealand from 1989 to 2012 and confirmed that consistent with Okun's Law, forecasts of real GDP growth and the change in unemployment are negatively correlated.[226] Bankruptcy and unemployment are directly connected, which thus may have direct influence on the political promotion of local officials.

3.30 Nonetheless, the fact that insolvency system only reminds the local governments of unemployment or bad performance on developing local economy is according to Wang and Xu, nothing but misunderstanding of the function of insolvency system.[227] The genuine purpose of establishing an insolvency system is to allow hopeless enterprise to exit the market in a prompt and efficient way and help to rescue economically viable but distressed businesses. It must be acknowledged that currently in the Mainland the advantages of the governments in facilitating the insolvency proceedings are quite evident. Nevertheless, in the context of market-oriented economy, interference of the government in dealing with insolvency cases is also expected at a proportionate degree.

1.1.2.2.3 Cautious Attitudes of the Courts towards Insolvency Cases

3.31 The cautious attitudes of the courts towards insolvency cases are mainly reflected in reluctance to accept application for insolvency proceedings. The first reason is that it is lack of specific rules for the courts to refer to. In practice, in

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223 Zhou Lian, The Incentive and Cooperation of Government Officials in the Political Tournaments: An Interpretation of the Prolonged Local Protectionism and Duplicative Investments in China (in Chinese), in: Economic Research Journal, 2004(06), p.34

224 Okun, Arthur M., Potential GNP: Its Measurement and Significance, in: American Statistical Association, Proceedings of the Business and Economics Statistics Section, 1962, p. 98–104.

225 Knotek, Edward S., II, How Useful is Okun's Law?, 2007, p.73-103, available at: http://www.kc.frb.org/publicat/econrev/pdf/4q07knotek.pdf (Last visited on 14 June 2016)

226 Ball, Laurence, Jalles, João Tovar and Loungani, Prakash, Do Forecasters Believe in Okun's Law? An Assessment of Unemployment and Output Forecasts (IMF Working Paper), February 2014, available at: https://www.imf.org/external/pubs/ft/wp/2014/wp1424.pdf (Last visited on 14 June 2016)

227 Wang Xinxin, Xu Yangguang, Dilemmas and Solutions to China's Bankruptcy Law: Reasons of Decrease on the Numbers of Acceptance of Bankruptcy Cases and the Relevant Treatment (in Chinese), 19 Nov. 2014, available at http://www.chinaqingsuan.com/news/detail/7702/page/2 (Last visited on 14 June 2016)

particular in the reorganization proceedings, the courts usually conduct a prior review before determining whether or not to open the proceeding. The first reorganization case of listed company, the case of the Zhejiang Hai Na reorganization, after the current EBL came into effect, was such an example.[228] Despite the statutory threshold of rescue stipulated under the EBL,[229] the High Court of Zhejiang Province sent a notice to the lower court, i.e. the Intermediate Court of Hangzhou, to which the reorganization petition was filed, to conduct an evaluation prior to acceptance. The main concern of the High Court of Zhejiang Province related to the feasibility of the draft reorganization plan, the employee arrangement as well as the government opinions etc.,[230] which were all included into the contents of review of the lower court before the reorganization proceedings was decided to be commenced. In the case of Yiyang Tianye Real Estate Development Company (hereinafter the Tianye company), the shareholders of the Tianye company applied for reorganization but their application was dismissed by the court of the first instance, holding that the company was not qualified for entering into reorganization proceeding upon review.[231] The shareholders then appealed to the intermediate court. The intermediate court held a hearing and invited the members of the creditor committee, the representative of the creditors, the administrator and the government authorities in charge of real estate management to give their opinions on the reorganization application. The applicants contended that the court should only conduct formal review instead of substantial review on the reorganization application. The intermediate court held that examination on the reorganization application should include both formal review and substantial review. The substantial review mainly checked with the possibility whether or not the debtor could still be rescued, including the feasibility of the reorganization plan and the capability of the participants to realize the reorganization plan.[232]

3.32 Application for reorganization of listed companies is subject to more pre-conditions. In 2012, the Supreme People's Court issued a notice concerning instructions on reorganization of listed companies.[233] When an applicant file a petition for reorganization of a listed company, in addition to the required documents set forth in Article 8 of the EBL, the applicant shall submit the report concerning the reorganization feasibility of the listed company, the briefing materials sent by the provincial people's government at the place of the listed company's domicile to the securities regulatory authority, the opinions of the securities regulatory authority, the stability maintenance plans issued by the people's government at the place of the listed company's domicile. Where a listed company applies for reorganization on its own, it also shall submit a

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[228] [2007] Hangzhou Civil II First Instance No. 184 (in Chinese)

[229] The EBL, article 70, 95

The EBL, article 96: where upon examination, the people's court deems that the application for compromise conforms to the provisions of this Law, it shall rule on a compromise, announce it and hold a creditors' meeting at which to discuss the draft of a compromise agreement.

[230] Yang Zhengyu, Application of Reorganization to the Listed Companies (in Chinese), in: Guide on Civil and Commercial Trial, People's Court Press, 2008, p.209

[231] [2012] Yiyang Heshan Civil Bankruptcy Civil Verdict No.3-2 (in Chinese)

[232] [2013] Yiyang Civil II Final No.168 (in Chinese)

[233] [2012] Judicial Interpretation No. 261 (in Chinese)

feasible employee resettlement plan.[234] The courts should hold a hearing before the courts decide to accept the application if the listed companies raise objections against the creditors' application or any creditor, the listed company and any contributor respectively present a liquidation petition and a reorganization petition. Considering the possible influence on social stability, the people's courts shall submit relevant materials level by level to the Supreme People's Court for examination before rendering a ruling to accept the reorganization applications of listed companies.[235]

3.33 The second reason is although they have been granted substantial and procedural power in accordance with the EBL,[236] the actual function of the courts in practice has been limited by external factors, such as the competing system of participation in distribution system and the government interference. The Supreme People's Court has taken measures and tried to resolve this problem. In 2011, a judicial interpretation has been issued,[237] which focuses on specifying the conditions of the courts to accept the application of insolvency cases so as to facilitate the courts to accept the insolvency petitions in a timely manner. It stipulated supervision of the higher courts on the courts at the lower level.[238] Suppose that a lower court did not even respond to the bankruptcy petition, it is stipulated that the applicant can present the petition to a higher court and the higher court shall order the court at the lower level to examine the application according to law and timely render a ruling on whether to accept the application. If the court at the lower level still does not render the ruling on whether to accept the application, the higher court may directly render a ruling to accept it and at the same time designates the court at the lower level to adjudicate this case.[239]

3.34 In addition, the courts' reluctance to accept the bankruptcy application may also be attributed to the evaluation system of judges, which is quantity-based and dependent on how many cases the judges deal with. Due to its complexity, insolvency cases are usually very time-consuming. Hence, it is understandable that judges usually try to evade them and can spend more time in handling more ordinary civil and commercial cases, which can contribute to better evaluation results.[240] The further consequence is that the Mainland lacks in professional

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[234] [2012] Judicial Interpretation No. 261 (in Chinese), article 3

[235] [2012] Judicial Interpretation No. 261 (in Chinese), article 4.

[236] Li Shuguang, Wang Zuofa, The Function of China's Court in Enterprise Bankruptcy and the Future Trend – Observations from the Background of the Four Year Implementation of China's Existing Bankruptcy Law, in: INSOL World, the Quarterly Journal of INSOL International, Fourth Quarter, 2012, p.8-10

[237] Provisions (I), [2011] Judicial Interpretation No. 22 (in Chinese)

[238] Song Xiaoming, Zhang Yongjian, Liu Ming (All of the authors are judges of the Supreme People's Court), Understanding and Application of Several Issues concerning the Application of the Enterprise Bankruptcy Law of the People's Republic of China (in Chinese), in: People's Judicature, 2011(21), p.028; See also Wang Xinxin, Transforming Ideas and Improving Legislation, Accepting the Bankruptcy Cases According to Law II: to understand the judicial interpretation of the EBL in depth (in Chinese), in: People's Court Daily, 15 February, 2012, p.07

[239] Provisions (I), [2011] Judicial Interpretation No. 22, article 9

[240] Li Shuguang, Wang Zuofa, The Function of China's Court in Enterprise Bankruptcy and the Future Trend – Observations from the Background of the Four Year Implementation of China's

judges in adjudicating insolvency cases. Fully aware of the problem, it has been advocated by the Supreme People's Court to promote professionalism of judges, who are to be trained with relevant professional knowledge and specialized at handling bankruptcy cases.[241] Moreover, as remarked by Eisenberg in 1987, "Bankruptcy courts would not have arisen unless specialized knowledge was believed desirable."[242] It has been suggested by the Supreme People's Court to establish special tribunals for bankruptcy cases or appoint special collegial panels to adjudicate bankruptcy cases and the judges, who are in charge of bankruptcy cases, shall be evaluated based on different criteria.[243] In practice, instead of establishing special tribunals, jurisdiction over bankruptcy cases are centralizedly allocated to certain courts in some provinces, for instance Shenzhen Intermediate People's Court (since 2011)[244] and Foshan Intermediate People's Court (since 2013)[245] in Guangdong Province, Chongqing 5th Intermediate People's Court (since 2015)[246] in Chongqing Municipality. Nevertheless, the actual effects of those special tribunals still need to be examined after a period of implementation.

1.2 Current Cross-border Insolvency Law in the Mainland

3.35 There is no national-wise legislation concerning cross-border insolvency in the Mainland before the current EBL came into effect in 2007. Under the current EBL there are no rules governing international jurisdiction or choice of law. It only provides one single article (article 5) concerning criteria of recognition related to cross-border insolvency proceedings.[247]

3.36 First of all, the article 5(1) clearly indicates the effects of cross-border insolvency proceedings. A bankruptcy proceeding opened by the Mainland court shall have extra-territorial effect on debtors' assets situated outside the territories of the P.R.C.; whereas a legally effective bankruptcy judgment or ruling rendered by a foreign court, involving a debtor's property within the territory of the P.R.C. shall make an application for recognition and enforcement to the people's court. Therefore, China's insolvency proceedings are vested with outbound universal effect and inbound territorial effect. In addition, The EBL

Existing Bankruptcy Law, in: INSOL World, the Quarterly Journal of INSOL International, Fourth Quarter, 2012, p.13

[241] [2011] Judicial Interpretation No. 281, article 2

[242] Eisenberg, Theodore, Bankruptcy in the Administrative State, in: Law and Contemporary Problems, Vol.50, No.2, 1987, p.5

[243][2011] Judicial Interpretation No. 281, article 2, 3

[244] Please visit: http://www.szcourt.gov.cn/sfgg/spzx/2014/11/27163705826.html (Last visited on 14 June 2016)

[245]Please visit: http://www.fszjfy.gov.cn/pub/court_7/gongzuodongtai/fayuanyaowen/meitijujiao/201304/t20130424_6938.htm (Last visited on 14 June 2016)

[246] Please visit: http://www.chinacourt.org/article/detail/2015/05/id/1638458.shtml (Last visited on 14 June 2016)

[247] Official English version is available at: http://www.npc.gov.cn/englishnpc/Law/2008-01/02/content_1388019.htm (Last visited on 14 June 2016)

provides no special rules concerning ancillary proceedings to foreign insolvency proceedings involving assets in the Mainland.[248]

3.37 Secondly, the article 5(2) sets out the recognition criteria on foreign insolvency proceedings. To recognize and enforce an insolvency proceeding opened outside Mainland China, the following conditions shall be met:

(1) relevant international treaties between the country concerned and Mainland China have been concluded; or
(2) reciprocal relations between the country concerned and Mainland China have been established
(3) the insolvency proceeding shall not violate the basic principles of the laws of the People's Republic of China;
(4) the insolvency proceeding shall not jeopardize the sovereignty and security of the State or public interests;
(5) the insolvency proceeding shall not undermine the legitimate rights and interests of the creditors within Mainland China.

3.38 I will discuss about the recognition criteria set by article 5(2) item by item in the subsequent sections.

1.2.1 International Treaties[249]

3.39 From 1987 till now, China has signed over 30 mutual civil and commercial judicial assistance treaties or agreements.[250] The scope of those treaties covers generally all kinds of civil and commercial cases but some of them exclude recognition of insolvency proceedings, for instance Peru, Tunisia and Spain. In addition, some of them only apply to recognition of arbitral awards, such as Korea, Singapore and Belgium. Those treaties, if applicable, serve as concrete foundation for the court to recognize foreign insolvency proceedings. In fact, before the 2007 EBL came into effect, there were already two cases that sought recognition of the insolvency proceedings based on the bilateral treaty. The first case involved an application from Italy, which is B&T Ceramic Group s.r.l. versus E.N.Group s.p.a..[251] The E.N.Group s.p.a. was declared bankrupt by the Milan Court on October 24, 1997. On September 30, 1999, the Milan Court made

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[248] Wang Weiguo, National Report for the People's Republic of China, in: Faber, Dennis, Vermunt, Niels, Kilborn, Jason, Richter Tomáš (ed.), Commencement of Insolvency Proceedings, Oxford University Press, 2012, 6.7.2

[249] Part of this section has been derived from my publication: Gong Xinyi, To Recognize or Not to Recognize? - Comparative Study of Lehman Brothers Cases in the Mainland China and Taiwan, in: International Corporate Rescue, Chase Cambria, Vol 10, Issue 4, 2013, p. 240 – 247

[250] These countries which signed the civil and commercial judicial assistance treaties with China are (in chronological order) France, Poland, Belgium, Mongolia, Romania, Italy, Spain, Russia, Turkey, Ukraine, Cuba, Belarus, Kazakhstan, Bulgaria, Thailand, Egypt, Greece, Cyprus, Hungary, Morocco, Kirghizstan, Tajikistan, Singapore, Uzbekistan, Viet Nam, Laos, Tunisia, Lithuania, Argentina, Republic of Korea, Democratic People's Republic of Korea, United Arab Emirates, Kuwait, Peru, Brazil, Algeria. Information collected from the database Chinalawinfo (website: http://www.pkulaw.cn.ezproxy.leidenuniv.nl:2048). (Last visited on 14 June 2016)

[251] Yao Hongping, Liu Ziping, Analysis of the Application of the B&T Ceramic Group s.r.l. for Recognition and Enforcement of the Italian Court Judgment (in Chinese), http://www.civillaw.com.cn/article/default.asp?id=13604 (Last visited on 14 June 2016)

decision that all of the property of the E.N.Group s.p.a., including the property overseas, shall be sold to the B&T Ceramic Group s.r.l. as a whole. In order to take over debtor's assets located in China, on December 18, 2000, B&T Ceramic Group applied to the Guandong Foshan Intermediate People's Court for recognition of the bankruptcy judgments made by the Italian Court and restored the legal status of the applicant as the shareholder in Nassetti Ettore company and the shares of Nassetti Ettore company. The Foshan Court formally and explicitly recognized the validity of the bankruptcy judgment rendered by the Italian Court based on Sino-Italy Mutual Civil Judicial Assistance Treaty.[252]

3.40 The second application was filed by a French liquidator, Montier Antoine, on 1 April 2005 to Guangzhou Intermediate People's Court for recognition of insolvency of Pellis Corium (a French company) ordered by the French court in 1998. The Guangzhou Intermediate People's Court in accordance with article 268 of the CPL[253] and the bilateral treaty recognized the effect of the bankruptcy proceeding.[254] Sometimes recognition and enforcement rules can be found in other forms of state-to-state agreement[255] but recognition cannot be guaranteed unless there is a specific arrangement. For instance, Australia has signed the Mutual Promotion and Protection of the Investment Agreement with the Chinese government in 1988, in which it is stated that the Contracting Party should make relevant recognition and enforcement rules in dealing with the investment related civil disputes,[256] which have not been done yet.

3.41 In 2006 the High People's Court of Guangdong Province requested the reply of the Supreme People's Court to clarify whether or not recognition can be granted to a judgment rendered by an Australian court. This case involved a debt

[252] The Chinese proceeding involved a third party, a Hong Kong company. On May 2, 1999, E.N.Group s.p.a. agreed to sell the share it held of the Nassetti Ettore company which was located in China to a Hong Kong company. On July 21, 1999, the agreement was approved by the local government and then the Hong Kong company, replacing E.N.Group s.p.a., became the shareholder of Nassetti Ettore. B&T Ceramic Group argued that E.N.Group s.p.a. had no rights to do that. Therefore, the court dismissed the enforcement request because the court held that the third party (the Hong Kong company) involved, which should be solved in another lawsuit.

[253] Article 268 of the CPL (1991): In the case of an application or request for recognition and enforcement of a legally effective judgment or written order of a foreign court, the people's court shall, after examining it in accordance with the international treaties concluded or acceded to by the People's Republic of China or with the principle of reciprocity and arriving at the conclusion that it does not contradict the basic principles of the law of the People's Republic of China nor violates State sovereignty, security and social and public interest of the country, recognize the validity of the judgment or written order, and, if required, issue a writ of execution to enforce it in accordance with the relevant provisions of this Law; if the application or request contradicts the basic principles of the law of the People's Republic of China or violates State sovereignty, security and social and public interest of the country, the people's court shall not recognize and enforce it.

[254] Wang Meiying, Lian Changren, The Recognition and Enforcement of the Foreign Judgments: The Recognition of a French Bankruptcy Case (in Chinese), http://www.ccmt.org.cn/shownews.php?id=8413 (Last visited on 14 June 2016)

[255] Hu Han, Study of China's Rules and Practice in Matters of Recognition and Enforcement of Foreign Judgments (in Chinese), available at http://article.chinalawinfo.com/Article_Detail.asp?ArticleID=23700 (latest visited on 14 June 2016)

[256] *Sino-Australian Mutual Promotion and Protection of the Investment Agreement, article 5(3)*

dispute between an Australian company and two Chinese citizens. The Supreme Court of Western Australia rendered the judgment in 2005 and then the Australian company sought recognition thereof in Shenzhen. Later in 2006 the case was appealed to the High People's Court of Guangdong Province and the high court made decision based on the Civil Procedural Law. Without mutual civil and commercial judicial assistance treaty or reciprocity, the high court considered that the application for recognition lack of legal basis and thus refused to grant recognition. In its reply to the high court, the Supreme People's Court considered that there is "no" mutual civil and commercial judicial assistance treaty or reciprocity between China and Australia and thus held that the application for recognition of a civil judgment rendered by an Australian court should be dismissed. [257] What will happen if there is no mutual civil and commercial judicial assistance treaty? The foreign judgment will probably not be recognized.

3.42 In 2011, a judge from Shanghai Municipal High Court wrote an article about a case related to the Lehman Brothers insolvency proceeding.[258] In *Hua An Funds v. Lehman Brothers International Europe* (LBIE) case, a fund management firm of the Mainland China filed petitions to High People's Court of Shanghai Municipality based on the fund product cooperative agreement, claimed for damage of 96,4 million USD and sought an attachment of the assets of the defendant within the territory of the Mainland China right after the business of Lehman Brothers collapsed in 2008. It is noteworthy that there is a fundamental block that cannot be bypassed although the case was dealt in the form of a contract dispute, which is the effect of LBIE's insolvency proceeding in UK. The judge declined to recognize the UK proceeding on the basis of lack of the relevant international treaty between UK and China.

1.2.2 Principle of Reciprocity[259]

3.43 Generally speaking, the principle of reciprocity is the idea that States will and should grant others recognition of judicial decisions only if, and to the extent that, their own decisions would be recognized. [260] Unlike the international treaties, the principle of reciprocity is an ambiguous concept in China, which has

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[257] [2006] Civil Division IV of the Supreme People's Court Others No. 45.

[258] See Zhang Fengxiang, The Needs for Improvement of Relevant Laws Arising from the Financial Derivative Products Cooperative Disputes between Hua An Funds and Lehman Brothers International Europe (in Chinese), in: Frontier of Financial Law, 2011, p.33-45. The dispute was settled down in the way of mediation. Unlike judgments, in China, the results of mediation are not necessary to be disclosed. Nevertheless, in his article the judge provided quite detailed information and analysis on that case because as judge who made decision on that case, he found it necessary to disclose some information as reference for improvement of the legislation involved.

[259] Part of this section has been derived from my publication: Gong Xinyi, To Recognize or Not to Recognize? - Comparative Study of Lehman Brothers Cases in the Mainland China and Taiwan, in: International Corporate Rescue, Chase Cambria, Vol 10, Issue 4, 2013, pp. 240 – 247

[260] Ralf Michaels, Recognition and Enforcement of Foreign Judgments, in: Max Planck Encyclopedia of Public International Law (Rüdiger Wolfrum ed., 2009), Heidelberg and Oxford University Press, para.7.
Available at: http://scholarship.law.duke.edu/faculty_scholarship/2076 (Last visited on 14 June 2016)

neither been defined under the legislation nor interpreted by the Supreme People's Court. In 1995 the Supreme People's Court made a reply to the request of the High Court of Liaoning Province, which was, whether or not to recognize a Japanese judgment involving debt dispute. The Supreme People's Court held that China and Japan did not enter into any international treaties in matters of civil and commercial judgments and no reciprocity had been established, either. Therefore, the application should be dismissed.[261] In Japan, foreign judgments are automatically entitled to recognition in Japan if they fulfill the requirements without any formality or special procedure, such as an action for a judgment or summary judgment granting the recognition or registration of foreign judgments.[262] Therefore, it seems that in terms of reciprocity the Supreme Court did not adopt the "would be" approach but more concrete reciprocal basis, especially the precedents. In the aforementioned *Hua An Funds* case, with respect to reciprocity, the judge held that till now no relevant recognition had been given to China by the UK court and thus the effect of the UK insolvency proceeding could not be recognized on a reciprocal basis, either.[263] The judge in fact made a "substantial" review by investigating in the precedents of the counterpart foreign state in matters of recognition of China's civil or commercial judgments.

3.44 Even some foreign courts realized this problem as well. For example, in 2006 Berlin High Court recognized a money judgment rendered by a Chinese court in accordance with the article 328 of German Code of Civil Procedure (Zivilprozessordnung) on a reciprocal basis.[264] The German court indicated that China and Germany so far did not enter into any bilateral treaties concerning recognition and enforcement in the civil and commercial matters. Neither of them granted recognition to judgments rendered by the counterpart court on the reciprocal basis before. On the contrary, there have been some precedents of refusal due to lack of a reciprocal basis.[265] Nevertheless, the court considered that without international treaties one side should probably start to grant

[261] [1995] Civil Division of the Supreme People's Court Others No. 17

[262] In Japan the criteria of recognition of foreign civil and commercial judgments are governed by the article 118 of CCP Code of Civil Procedure (CCP), which was enacted since 1996. See Tada, Nozomi, Enforcement of Foreign Judgments in Japan Regarding Business Activities, in: Japanese Annual of International Law, No. 46, 2003, p. 75-94

[263]Zhang Fengxiang, The Needs for Improvement of Relevant Laws Arising from the Financial Derivative Products Cooperative Disputes between Hua An Funds and Lehman Brothers International Europe (in Chinese), in: Frontier of Financial Law, 2011, p.41

[264] Kammergericht-Berlin-Aktenzeichen: 20 SCH 13/04, Beschluss von 18.05.2006. Leitsatz: 1. Eine rechtskräftige Entscheidung eines Volksgerichts (in China) kann gemäß §328 ZPO anerkannt werden.
Available at: http://www.juraforum.de/urteile/kammergericht-berlin/kammergericht-berlin-beschluss-vom-18-05-2006-az-20-sch-1304 (Last visited on 14 June 2016)

[265] For instance, in 2001, a German company applied for recognition and enforcement of a judgment involving a finance lease contract dispute between the German company and a Chinese company, which was rendered by the court in Frankfurt. In matters of recognition, the Beijing Second Intermediate People's Court employed the same reasoning as in the aforementioned decision and refused to grant recognition. [2003] First Instance of Beijing Second Intermediate People's Court Civil Mediation No. 00002

recognition and thus solve the reciprocity deadlock. Once that obstacle was removed by Germany at first, China would probably follow.[266]

3.45 As a concept arising from sovereignty, reciprocity is not set up as a requirement either under the EIR or the UNCITRAL Model Law. In EU reciprocity is not necessary because automatic recognition of insolvency proceedings is granted based on mutual trust between the Member States under the Union regime.[267] It is deemed outdated in matters of cross-border insolvency cooperation regarding business from the point view of the Model Law,[268] although a number of countries *de jure* or *de facto* apply the reciprocity requirement in the process of implementing the Model Law.[269] However, it is noteworthy that in China although each region has its own independent legal system, none of the legal cooperative arrangements in civil and commercial matters between the Mainland China and the other three regions contain reciprocity requirement for recognition. Considering the business motivated characteristic of cross-border insolvency and the current form of legal cooperation in China, the principle of reciprocity should not play an influential role on China's regional cross-border insolvency.

1.2.3 Public Policy

3.46 Public policy is not the term that appears in article 5(2) EBL, which is replaced by fundamental principles of law, state sovereignty and security, socio-public interests as well as legitimate rights and interests of the creditors. The equivalent expressions can also be found in article 282 of the current Civil Procedure Law, which stipulates the criteria for the recognition and enforcement of a legally effective civil or commercial judgment or written order rendered by a foreign court.[270] Such diverse expressions are regarded as considerable hurdles of understanding the concept of public policy in the course of China's international judicial cooperation, in particular in the matters of recognition and enforcement of foreign judgments and foreign arbitral awards.[271]

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[266] Kammergericht-Berlin-Aktenzeichen: 20 SCH 13/04, Beschluss von 18.05.2006, para. 2(a)

[267] The EC Regulation, Recital (22)

[268] Wessels, Bob, International Insolvency Law (3rd ed.), Kluwer, 2012, at 10385

[269] They are the British Virgin Islands, Mauritius, Mexico, Romania and South Africa. See Ho, Look Chan(ed., 2nd), Cross-border Insolvency, Global Law and Business, 2012, p. 8

[270] Article 282 of CPL (2012):In the case of an application or request for recognition and enforcement of a legally effective judgment or written order of a foreign court, the people's court shall, after examining it in accordance with the international treaties concluded or acceded to by the People's Republic of China or with the principle of reciprocity and arriving at the conclusion that it does not contradict the primary principles of the law of the People's Republic of China nor violates State sovereignty, security and social and public interest of the country, recognize the validity of the judgment or written order, and, if required, issue a writ of execution to enforce it in accordance with the relevant provisions of this Law; if the application or request contradicts the primary principles of the law of the People's Republic of China or violates State sovereignty, security and social and public interest of the country, the people's court shall not recognize and enforce it.

[271] He Qisheng, Public Policy in Enforcement of Foreign Arbitral Awards in the Supreme People's Court of China, 43 Hong Kong Law Journal 1037, 2013, p.1037

3.47 As public policy has long been acknowledged as "a very unruly horse" in practice,[272] it is the judges who get astride it by exercising discretions. To grasp the concept of public policy, the ideal way is to collect the relevant case law as much as possible and then make summary. Nevertheless, the short time period of implementation of the system concerning publicity of judgments and the cross-border insolvency system combinedly result in limited access to relevant information. In addition, insufficient rules and explanation in matters of cross-border insolvency and reluctance of application thereof due to uncertainty are usually mutually reinforcing, which is to be discussed in section 1.3. On top of that, it is required by the article 4 of EBL that the provisions of the CPL should be applicable in case that the EBL does not provide the relevant provisions in dealing with the bankruptcy proceedings, for example, international jurisdiction and applicable law. As result, in the following sections, I sometimes have to refer to the civil and commercial cases as expedient alternatives for comprehension of public policy in the judicial practice of the Mainland.

1.2.3.1 Fundamental Principles of Law

3.48 Due to lack of legislative and judicial interpretation, the concept of the fundamental principles of law is quite vague and broad. Considering it is stipulated in the phrase of article 5,[273] the most related law should be the EBL itself. What are the basic principles of the EBL? The EBL itself does not specify them. After the EBL came into effect, there is only some academic discussion concerning this issue.[274] There seems to be some development in practice. In 2012, a district court in Shanghai heard a case between a local debtor and a local creditor involving individual debt collection action after the debtor was ordered bankrupt.[275] The action was considered invalid and the court clearly stated that protection of equal treatment of the creditors is the primary aim of the bankruptcy law and also serves as one of the basic principles thereof. However, without national wide case registry system and standard criteria, a comprehensive understanding of the fundamental principles of law in the context of cross-border insolvency is missing.

1.2.3.2 State Sovereignty and Security

3.49 In the Mainland, sometimes the sovereignty requirement has something to do with the language. For example, some court considered that translation of relevant documents and supporting materials from foreign language into

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[272] *Richardson v.Mellish* (1824) 2 Bing.228; (1824-34) All ER Rep. 258

[273] The English translation of the EBL is provided by the National People's Congress (China's legislator) and published on its official website. http://www.npc.gov.cn/englishnpc/Law/Integrated_index.html (Last visited on 14 June 2016)

[274] Qi Shujie, Research of Bankruptcy Law (in Chinese), Xiamen University Press, 2005, p. 62-91; Xu Defeng, Rethinking Basic Principles of Bankruptcy Law (in Chinese), in: Legal Science, issue 8, 2009, p. 49-59

[275] [2012] Shanghai Pudong New Area District Court Civil Litigation Second Division (Commercial) First Instance No. 1119

Chinese was required based on the principle of state sovereignty, which could help the Chinese court to make investigation and discover the fact.[276]

3.50 As for Taiwan, the "One China" principle is firmly held by the Mainland courts in dealing with Taiwan related case.[277] In 2004, an application for recognition of an arbitral award rendered by an arbitral tribunal in Taiwan was submitted to a Mainland court. It has been argued that the arbitral tribunal was inconsistent because the arbitral tribunal that appeared on the arbitral award submitted by the applicant was "the Arbitration Association of China" but in fact it was "the Arbitration Association of the Republic of China"[278] that rendered the award. The court noticed that the special heading appearing on the arbitral award was used in the Mainland area alone. Thus the court considered that the arbitral tribunal changed the description of its title for the purpose of facilitating recognition and enforcement of its arbitral award in the Mainland China, which could be deemed as consistency with the "One China" principle and the award thus should be recognized.[279]

3.51 Further, the dispute concerning jurisdiction can cause concerns of the principle of state sovereignty. In order to guarantee the independent judicial power of each state or region, a Chinese court can still exercise its jurisdiction over the same dispute if it falls within the ambit of competence of the Chinese court, although there are parallel civil or commercial proceedings opened in other states or regions.[280]

1.2.3.3 Socio-Public Interests

3.52 Socio-public interests play an important role in China's civil and commercial law. A civil act that violates the public interests shall be null and void.[281] For example, a contract is deemed invalid if it does harm to the socio-public interests.[282] Nevertheless, the socio-public interests, similar to other public policy provisions, do not have a concrete definition. The provision of socio-public

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[276] [2009] Wuhan Intermediate People's Court of Hubei Province Intellectual Property First Instance No. 519

[277] [2004] Xiamen Intermediate People's Court of Fujian Province Civil Recognition No. 20

[278] Republic of China was originally founded in 1912. After the establishment of the People's Republic of China in 1949, Republic of China relocated its government to Taiwan and its surrounding areas. Since 1971 the People's Republic of China restored its position in United Nations, whose representatives are "the only lawful representatives of China" and expelled the unlawful representatives of Republic of China.
See United Nations General Assembly Resolution 2758, Restoration of the Lawful Rights of the People's Republic of China in the United Nations, visit http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/327/74/IMG/NR032774.pdf?OpenElement (last visited on 14 June 2016)

[279] [2004] Xiamen Intermediate People's Court of Fujian Province Civil Recognition No. 20 (in Chinese)

[280] [2003] Xiamen Intermediate People's Court of Fujian Province Economic First Instance No. 146. In that case, the Xiamen Intermediate People's Court of Fujian Province also made detailed explanation on *forum non conveniens*. The case was regarded as model case in that regard and thus published in Gazette of Supreme People's Court Vol.7, 2004, pp.32-34

[281] General Principles of Civil Law of P.R.C., article 58(5)

[282] Contract Law of P.R.C., article 52(4)

interests functions like a general principle in order to make up for legal blanks left behind by the statutes and thus remains flexible enough in order to facilitate the judicial discretion. In practice, the provision of socio-public interests is not frequently utilized by the people's courts in handling bankruptcy cases if there are other specific provisions available. For instance, an employee filed a petition against his employer (a company) that was declared bankrupt for his salaries and compensations. The employee referred to the socio-public interests as one of the important legal basis for his claims. Without adopting the public interests argument, the court approved his claims simply pursuant to article 48 of the EBL.[283]

3.53 Nevertheless, it is noteworthy that public interests can be taken into account when it involves the state-owned company. In 2007, there was a case concerning debt assignment disputes between a creditor and two state-owned companies, one of which was the parent company of the other.[284] Both of them were declared bankrupt and had been listed in the national bankruptcy plan of the year 2003, which is so-called policy-mandated bankruptcy[285]. In accordance with the relevant administrative regulation[286], once listed in the national bankruptcy plan approved by the State Council, the debt can no longer be transferred to the external creditors. The creditor received the debt from a third party who legally took over the debt from the two debtors. The appellate court had the same opinion as the court of first instance, holding that the agreement of debt assignment violated the public interests and should be deemed as invalid. With respect to the socio-public interests, the court considered that policy-mandated bankruptcy aimed at improving the reform of the state-owned companies and maintaining the social stability, which was undoubtedly related to the socio-public interests.

1.2.3.4 Legitimate Rights and Interests of the Creditors

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[283] [2011] Shenzhen Intermediate People's Court Civil Division VI Final Instance No. 94
The EBL, article 48: a creditor shall, within the time limit specified by the people's court for declaration of his claims, file his claim to the administrator.
The wages, subsidies for medical treatment and disability, comfort and compensatory funds as defaulted by a debtor, the fundamental old-age insurance premiums, fundamental medical insurance premiums that shall have been transferred into the employees' personal accounts as well as the compensation for the employees as prescribed by the relevant laws and administrative regulations are not required to be reported, for which the relevant bankruptcy administrator shall make a corresponding checklist upon investigation and make it known to the public. Where any employee has any different opinion to the relevant checklist, he may request the administrator to make correction. Where a bankruptcy administrator fails to correct it, the relevant employee may present a petition before the people's court.
[284] [2007] Hainan High People's Court Civil Division I Final Instance No. 28
[285] In addition although the EBL intends to apply to both SOEs and non-SOE legal person enterprises, the reality is that parallel to the normal bankruptcy proceedings, the administrative closure is also stipulated in the EBL (article 133 of the EBL), which means, certain state-owned enterprises within the period and scope as are prescribed by the State Council before the EBL came into effect shall be handled according to the relevant regulations of the State Council and therefore are excluded from the EBL. See also Charles D Booth, The 2006 P.R.C. Enterprise Bankruptcy Law: the Wait is Finally Over, in: 20 Singapore Academy of Law Journal, 2008, 275.
[286] [2005] Ministry of Finance Financial No. 74, article 2

3.54 What are the legitimate rights of the creditors within the territory of P.R.C.? It is a matter of applicable law. According to Wang Xinxin, one of the drafters of the EBL, it depends on where the debtor's domicile is located. If the domicile of the debtor is in the Mainland and the Mainland court can exercise jurisdiction over the debtor's insolvency proceeding, the legitimate rights shall entail all the legitimate rights granted by the laws of the Mainland(*lex concursus*), including the EBL.[287] In accordance with the EBL, they are mainly the right to apply for opening of bankruptcy proceeding (liquidation or reorganization),[288] the right to declare the claims and to participate in the creditors' meeting[289] and the right to set off. During the insolvency proceeding, most of the influential rights are granted to the creditors' meeting, which generally include (1) checking the claims; (2) supervising the work of the administrator; (3) adopting plans for reorganization or adopting agreements for compromise; (4) adopting plans for management of the debtor's property, adopting plans for realizing the bankruptcy property into money and adopting plans for distribution of the bankruptcy property; (5) deciding on whether to have the debtor continue or discontinue his business operations.[290] If the debtor is domiciled outside the Mainland and the Mainland court is thus not competent to open the insolvency proceeding, the legitimate rights shall refer to the rights in accordance with the bankruptcy law in the foreign state and other laws except for the EBL in the Mainland.[291] Accordingly, it seems that the applicability of the foreign *lex concursus* can be accepted indirectly under the current EBL.

3.55 The EBL does not set limitation on the scope of creditors, which means, in theory, foreign creditors can also apply for the opening of bankruptcy proceedings and enjoy the same legitimate rights. Nevertheless, in matters of cross-border insolvency, does a creditor, whose domicile or registered office is abroad, have the same rights as a domestic creditor under the EBL? Probably not. To recognize a foreign insolvency proceeding, only the legitimate rights and interests of the creditors "within the territory of P.R.C." is taken into consideration under the article 5 of the EBL. Also in the *Hua An* case, by referring to the article 5, the judge stated that without relevant treaties and precedents of reciprocity, the court could protect the legitimate rights and interests of the creditors within the territory of P.R.C. "in priority" in the way of accepting the lawsuit (as an ordinary civil dispute) and ordering interim attachment on the assets.[292] Nonetheless, from the perspective of international insolvency law, domestic and foreign creditors should be equally treated. Without recognition, the court could not grant any relief to assist the foreign insolvency proceedings

[287] Wang Xinxin, Wang Jianbin, Analysis About China's Acknowledging Extraterritorial Effect System Of Foreign Bankrupt Procedure And Its Improvement (in Chinese), in: Law Science Magazine, Issue 6, 2008, p.12
[288] The EBL, article 7
[289] The EBL, Chapter VI & article 59
[290] The EBL, article 61
[291] Wang Xinxin, Wang Jianbin, Analysis About China's Acknowledging Extraterritorial Effect System Of Foreign Bankrupt Procedure And Its Improvement (in Chinese), in: Law Science Magazine, Issue 6, 2008, p.12
[292] Zhang Fengxiang, The Needs for Improvement of Relevant Laws Arising from the Financial Derivative Products Cooperative Disputes between Hua An Funds and Lehman Brothers International Europe (in Chinese), in: Frontier of Financial Law, 2011, p.41.

and thus the legitimate rights and interests of the foreign creditors in the foreign insolvency proceedings will be jeopardized.

3.56 In summary, the current EBL does not provide clear explanation with respect to those various expressions regarding public policy. Although some relevant civil and commercial case law has been found for reference, its reference value is limited because cross-border insolvency law has its own features and needs interpretation peculiar to its own characters. It is suggested to clarify the detailed public policy rules under the current EBL to prevent uncertainty in deciding insolvency cases and different understanding of the same norms on domestic level.

1.3 Consequences Arising from Insufficient Rules[293]

3.57 When the problems of the domestic insolvency system bring down the amount of national insolvency cases, the insufficient rules on cross-border insolvency law discourage filings of recognition and enforcement of the foreign and regional insolvency proceedings before the Mainland courts at the same time.

3.58 On international level, Suntech Power is such a typical example.[294] In 2001, Wuxi Suntech was founded in Wuxi, Jiangsu Province, China. In 2005, Suntech Power Holdings Co. Ltd. was registered in Cayman Islands (Suntech Power). The original purpose of establishing the Suntech Power was to facilitate privatization of Suntech by purchasing the state-owned stocks and the ultimate goal was to be listed on the New York Stock Exchange (NYSE), which was realized by the end of 2005.[295] The aforementioned recession of the photovoltaic industry resulted in multiple cross-border insolvency proceedings concerning Suntech Power in China,[296] the Cayman Islands and the United States[297]. On 17 November 2014, the United States Bankruptcy Court for the Southern District of New York

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[293] Part of this section has been derived from my publication Gong, Xinyi, When Hong Kong Becomes SAR, Is the Mainland Ready? – Problems of Judgments Recognition in Cross-border Insolvency Matters, in: International Insolvency Review, Wiley-Blackwell, Vol. 20, Issue 1, 2011, p.63-64; and also Gong Xinyi, Can the Day Understand the Night? Brief Introduction into Problems of the Current Insolvency System in China, 2015, available at http://iiiglobal.org/iii-prize-in-insolvency.html (Last visited on 14 June 2016)

[294] In *re Suntech Power Holdings Co., Ltd.*, Case No.: 14-10383(SMB), Written Opinion Signed On 17 November, 2014

[295] Li Yulong(ed.), Legal Analysis of Private Equity Cases (in Chinese), Law Press, 2009, p. 3-4

[296] On 20 March 2013, the Mainland court accepted the application of reorganization of Wuxi Suntech (the Wuxi proceeding). See Wu Xi Intermediate Court Successfully Concluded the Suntech Reorganization Proceeding, the Reorganization Plan Has Been Almost Completely Implemented (in Chinese), 7 January, 2014, p.4, available at: http://wxzy.chinacourt.org/public/detail.php?id=5228 (Last visited on 14 June 2016)

[297] On 5 November 2013, provisional liquidation of Suntech Power was initiated in Cayman Islands (the Cayman proceeding). On 21 February 2014, a petition was filed for recognition of Suntech Power's provisional liquidation proceeding pending in Cayman Islands as a foreign main proceeding or non-main proceeding before the United States Bankruptcy Court for the Southern District of New York (S.D.N.Y.) In *re Suntech Power Holdings Co., Ltd.*, Case No.: 14-10383(SMB), Written Opinion Signed On 17 November, 2014, available at http://www.nysb.uscourts.gov/sites/default/files/opinions/247366_67_opinion.pdf(Last visited on 14 June 2016)

(S.D.N.Y.) recognized the Cayman proceeding as the foreign main proceeding.[298] However, as of the commencement of the Cayman proceeding, it was pointed by Solyndra, one of Suntech Power's American creditors that the headquarter, manufacturing facilities and primary assets of Suntech were in China.[299] The intent to shift COMI from China to the Cayman Islands was not hidden. I will turn to the COMI issue of this case later in the section 2.1.4.2 of Part IV. The attorney representing one of the debtor's largest creditor groups called China "the last place that one would go"[300] and indicated that

"The Chinese court's jurisdiction was in doubt, and China has different concepts of the rules of law and creditors' rights compared to those found in the Cayman Islands and the United States."[301]

3.59 Interestingly in the same year, the United States Bankruptcy Court District of New Jersey in *re Zhejiang Topoint photovoltaic CO. Ltd.*, considered all parties concerned in the United States had received due and proper notice of the petition and thus granted recognition of the joint bankruptcy proceedings pending in China[302] as the main proceedings and the relevant reliefs, including suspension on disposal of assets within New Jersey.[303] It seems that the opinions on China's insolvency system in the United States are not univocal. Nevertheless, in the course of cross-border insolvency cooperation, different insolvency systems are merely different options. The underlying consideration is that the parties concerned can choose a more favorable forum to his or her benefit, if the problems in one jurisdiction are considered unacceptable and its cross-border insolvency system deemed unpredictable.

3.60 On regional level, as aforementioned in Introduction (Part I), there is no arrangement in resolving conflicts arising from cross-border insolvency between the Mainland and the SARs. How to recognize and enforce the inter-regional judgments of opening insolvency proceedings and inter-regional judgments, which are directly derived from insolvency proceedings, remains a problem. In practice, instead of submitting a request for recognition before the Mainland courts, the related judgments seek enforcement in an indirect way. In the case of

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[298] In *re Suntech Power Holdings Co., Ltd.*, Case No.: 14-10383(SMB), Written Opinion Signed On 17 November, 2014, p.3

[299] Objection of the Solyndra Residual Trust to Chapter 15 Petition of *Suntech Power Holdings Co., Ltd.* (in provisional liquidation) for Recognition of Foreign Main Proceeding Pursuant to Section 1517 of the Bankruptcy Code, In *re Suntech Power Holdings Co., Ltd.* (in Provisional Liquidation), Case No. 14-10383 (SMB), Related Docket Nos. 1, 2, 3, 4, p.2

[300] In *re Suntech Power Holdings Co., Ltd.*, Case No.: 14-10383(SMB), Written Opinion Signed On 17 November, 2014, at Background, B. Foreign Proceeding, p.6; C. COMI, p.29

[301] In *re Suntech Power Holdings Co., Ltd.*, Case No.: 14-10383(SMB), Written Opinion Signed On 17 November, 2014, at Background, B. Foreign Proceeding, p.5-6

[302] [2014] Jiaxing Haining Bankruptcy(Pre) No.4 (in Chinese)

[303] The bankruptcy proceedings involved Zhejiang Topoint Photovoltaic Co. Ltd. and its three affiliates, Zhejiang Jiutai New Energy Co. Ltd., Zhejiang Yutai Solar Materials Co. Ltd. and Zhejiang Willsolar Photoelectric Materials Co. Ltd. Recognition was granted altogether on 12 August 2014. Their jointly administered proceedings are (i) *Zhejiang Topoint Photovoltaic Co., Ltd.*, Case No. 14-24549-GMB; (ii) *Zhejiang Jiutai New Energy Co., Ltd.*, Case No. 14-24555-GMB; (iii) *Zhejiang Yutai Solar Materials Co., Ltd.*, Case No. 14-24557-GMB; and (iv) *Zhejiang Willsolar Photoelectric Materials Co., Ltd.*, Case No. 14-24559-GMB.

Gu Laiyun and others versus Nardu Company Limited,[304] a liquidator appointed by Hong Kong High Court became a vice president of the company through a shareholders' resolution in the Mainland. In 1993, Nardu Company, registered in HKSAR, signed a joint venture contract with a local real estate company in Guangzhou Province of the Mainland and finally established the Fuyu Company in Guangzhou Province. On 22 June 2005, Hong Kong High Court issued a winding-up order of Nardu Company Limited. On 15 February 2006, two employees of Hong Kong Grant Thornton International Accounting Firm were appointed by Hong Kong High Court as liquidators of Nardu Company Limited. On 2 March 2006, one of the liquidators, Ms. Li Fengying was elected as a vice president of Fuyu Company through a shareholders' resolution. It was stated in the same shareholders' resolution that the business license, seals, accounting records and properties, etc. of the company should be handed over to its new vice president.

3.61 The advantages of that kind of arrangement are obvious. First of all, the liquidator could directly control the assets the Hong Kong debtor located in the Mainland without waiting for the recognition of the Mainland court. The other advantage of this arrangement was fully demonstrated when the former legal representative and the manager of Fuyu Company refused to return the items mentioned, Nardu Company Limited represented by Ms. Li filed a lawsuit against them. Furthermore, due to the dual identity of Ms. Li who was both the liquidator appointed by Hong Kong High Court and the vice president of Fuyu Company, the problem whether the legitimacy of Ms. Li's representation needed to be recognized or not, or whether the winding-up order of Hong Kong High Court should be recognized in advance or not has been by passed. Instead, the Company Law of PRC was applicable to qualification of Ms. Li's actions in the Mainland[305] and the representation power of the liquidator was taken for granted on the same basis.

3.62 This strategy, in which the liquidator appointed by the Hong Kong court becomes member of management or director of the company in the Mainland, seems ideal but it is not satisfactory as a long-term solution. First of all, the status of the liquidator is confusing. They are both the liquidator appointed by the Hong Kong court and a member of management or a representative of a Mainland company at the same time. This is a solution resulting in issues of conflicts of interests, for a liquidator of a Hong Kong wound up company will have to act in the interest of the general body of creditors, whilst a member of

[304] [2007] Guangzhou Intermediate People's Court Civil Fourth Tribunal Final Instance No.7(in Chinese)

[305] The court referred to the Company Law of PRC (2005), article 152:
Where the board of supervisors or the supervisor of a company with limited liability where there is no such board, or the board of directors, or the executive director refuses to take legal proceedings after receiving the written request from the shareholders as specified in the preceding paragraph, or fails to take legal proceedings within 30 days from the date it/he receives such request, or under emergency situations, failure to take legal proceedings immediately results in irreparable damage to the interests of the company, the shareholders specified in the preceding paragraph shall have the right, in their own names, directly to bring a lawsuit to a people's court in the interests of the company.

management or a representative of a local Mainland company is required to act to the benefit of the interests of the company.

3.63 Secondly, it may be complicated and time-consuming. If the liquidators from HKSAR want to become a member of the management in order to control the relevant assets of the company in the Mainland, there are also a lot of requirements. Both the limited liability company and the public limited liability company, which are two main types of companies in the Mainland, have strict rules for the election of the member of the management stipulated either by the Company Law of PRC or by each company's own articles of association.[306] In the case Gu Laiyun and others versus Nardu Company Limited, the reason why the liquidator could successfully become the vice president of the Fuyu company in a short time was that the Nardu Company Ltd was the largest shareholder accounting for 80% of the Fuyu company. However, not all the bankrupt shareholders of Hong Kong can have the same leading portion and the other shareholders may not agree to vote for the liquidator because the idea of enabling a liquidator to interfere with the corporate governance may not be benefit to them. Even though the other shareholders are finally persuaded to vote for the liquidator, it still does not mean that the liquidator has the substantial control over the relevant assets. Without the cooperation of the former management, the handover will probably be extended by one lawsuit or more.

3.64 *First China Technology (Hong Kong) Limited versus Yeung Chung-lung and Fuqing Longyu Food Development Co., Ltd.*[307]is such an example. A provisional liquidator appointed by Hong Kong High Court was also designated by Hong Kong High Court in the same order as the sole member of board of the wound up Hong Kong company, which had a wholly owned subsidiary in the Mainland. The provisional liquidator passed a board resolution that replaced the board of its Mainland subsidiary, including its founder and former chairman, Yeung Chung-lung. The former chairman did not cooperate to facilitate the handover. Therefore, the provisional liquidator had to file a petition before the Mainland court in order to enforce the board resolution. Interestingly, the Mainland court acknowledged the validity of the board resolution, holding that the provisional liquidator exercised its power in a way that did not exceed the limits required under the order of appointment rendered by Hong Kong High Court. Nevertheless, it did not indicate whether the winding-up order should be recognized at the first place as if the winding-up order had been deemed as effective in the Mainland.

3.65 In fact, appointment of provisional liquidator or liquidator as member of the management or representative of the Mainland subsidiaries is an indispensible part of the winding-up order. A winding-up order rendered by Hong Kong court, which has independent jurisdiction, does not automatically have effect in the Mainland unless upon recognition. Prior to that, the provisional liquidators or liquidators do not have proper authority to take over the assets of the Mainland

[306] Company Law of PRC (2013), article 105

[307] [2009] Fuzhou Intermediate People's Court Civil First Instance No.166 (in Chinese)

subsidiaries. Therefore, the indirect solution adopted in practice may seemingly bring some advantages at the first sight but in essence it is merely an evasion of the genuine problems, which involve uncertainty of recognition and lack of ancillary reliefs and coordination. That's why it is necessary to make regional cross-border insolvency arrangements, which can remove the uncertainty concerned eventually.

Ch. 2 Hong Kong Approach

3.66 The first section of this chapter explains the difference of corporate insolvency system and individual bankruptcy system in Hong Kong. It also briefly introduces the recent reform of Companies Ordinance and its influence on insolvency law in Hong Kong. Further, the consultation conclusion on corporate insolvency law improvement, which was issued by the Legislative Council of Hong Kong in July 2014, is also referred to. The second section focuses on the development of the cross-border insolvency in Hong Kong by reviewing the relevant legislative proposals and analyzes its hesitation in accommodating a cross-border insolvency regime. In the third section, the non-statutory feature of HK insolvency system is presented. Key elements of HK cross-border insolvency system such as jurisdiction, recognition and coordination and communication are discussed. Considering the common law characteristics of Hong Kong, they will be examined mainly on the basis of recent case law.

2.1 Brief Introduction into Local Insolvency System

3.67 Hong Kong applies separate insolvency system to companies and individuals. After the revision of the Companies Ordinance, its corporate insolvency system has been put on the reform agenda and a statutory company rescue regime is proposed. As for cross-border insolvency, although the adoption of UNCITRAL Model Law has been taken into consideration, it is still a plan to establish a statutory cross-border insolvency system in Hong Kong, which will probably take time to come into reality.

2.1.1 Companies Ordinance and Bankruptcy Ordinance

3.68 The insolvency system of Hong Kong is not a combined system. The personal insolvency is regulated under the Bankruptcy Ordinance, whereas the Companies Ordinance deals with corporate winding-up. It is noteworthy that the Bankruptcy Ordinance is also applied to insolvent companies from time to time. For example, over the years the Department of Justice, whose role is to provide legislative advices to the Legislative Council, have on numerous occasions drafted amendments to legislation by cross-referring parts of the Companies Ordinance to the Bankruptcy Ordinance.[308] Another example is the Companies Ordinance relies on the cross-references to the provisions on unfair preferences under the BO with modifications to corporate winding-up cases,[309] which has

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[308] Briscoe, Stephen, & Booth, Charles D, Hong Kong Corporate Insolvency Manual (2nd), published by Hong Kong Institute of Certified Public Accountants, 2009, p.5
[309] Cap 32 s266, 266A and 266B refer to s 50 to 51B of the BO.

been proposed for reform by introducing the relevant self-contained provisions into the Companies Ordinance.[310] Financial institutions are resolved pursuant to specialized legislation, for instance, the Banking Ordinance in matters of winding-up of a bank, Insurance Companies Ordinance in case of winding-up of an insurance company.

2.1.2 Revision of Companies Ordinance and Reform of Insolvency Law

3.69 The new Companies Ordinance (Cap 622) was passed on 12 July of 2012, which will come into effect in early 2014. Nevertheless, nothing has been changed in matters of the corporate insolvency under the new Companies Ordinance. The winding-up and insolvency related provisions still remain in the former Companies Ordinance but have a different title the Companies (Winding-up and Miscellaneous Provisions) Ordinance (Cap 32). In 2013, the Financial Services and the Treasury Bureau issued consultation paper on Improvement of Corporate Insolvency Law,[311] in which there are 46 legislative proposals to improve Hong Kong's current corporate insolvency law regime. The consultation lasted for about three month from April to July 2013.[312] In May 2014, the Financial Services and the Treasury Bureau briefed the outcome of the public consultation and the responses of the government[313] and an updated brief was submitted to the Legislative Council in July 2014.[314] It mainly covers the following topics:

(a) commencement of winding-up;
(b) appointment, powers, vacation of office and release of provisional liquidators and liquidators;
(c) conduct of winding-up;
(d) voidable transactions; and
(e) investigation during winding-up, offences antecedent to or in the course of winding-up and powers of the court.

3.70 On top of that, a new statutory company rescue regime has been proposed.[315] Till now, Hong Kong still lacks a statutory company rescue regime. Under the current system, a corporate rescue can only be brought about through

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[310] Financial Services and the Treasury Bureau, Improvement of Corporate Insolvency Law Legislative Proposal (consultation paper), April 2013, at 5.16
http://www.fstb.gov.hk/fsb/ppr/consult/impcill.htm (Last visited on 14 June 2016)

[311] Financial Services and the Treasury Bureau, Improvement of Corporate Insolvency Law Legislative Proposal (consultation paper), April 2013, available at: www. fstb.gov.hk (Last visited on 14 June 2016)

[312] Legislative Council Panel on Financial Affairs Meeting on 7 July 2014, Updated background brief on review of corporate insolvency law and introduction of a statutory corporate rescue procedure, LC Paper No. CB(1)1668/13-14(02), 7 July 2014, p.1

[313] Financial Services and the Treasury Bureau, Improvement of Corporate Insolvency Law Legislative Proposals Consultation Conclusions, 28 May 2014, available at: www. fstb.gov.hk (Last visited on 14 June 2016)

[314] Legislative Council Panel on Financial Affairs, Consultation Conclusions on Corporate Insolvency Law Improvement Exercise and Detailed proposals on a new Statutory Corporate Rescue Procedure, CB(1)1536/13-14(01), 7 July 2014

[315] Legislative Council Panel on Financial Affairs, Consultation Conclusions on Corporate Insolvency Law Improvement Exercise and Detailed proposals on a new Statutory Corporate Rescue Procedure, CB(1)1536/13-14(01), 7 July 2014, p.3-10 & Annex B

the procedure of a scheme of arrangement according to Companies Ordinance.[316] Different from the winding-up proceeding, there is no such relief as moratorium or stay of proceedings against the company while a scheme of arrangement is being worked out. In other words, the fact that a company is pursuing a scheme of arrangement does not provide standstill to stay proceedings against the company generally or to give the company breathing space in respect of its obligations to creditors. To make up for the legislative blank in practice, a stay of proceedings against the company is usually brought about by Cap 32 s186 with the appointment of a provisional liquidator. The Hong Kong courts seem to approve this approach so as to mitigate the difficulty of the lack of a moratorium while a restructuring proposal is being worked out, until there is new legislation for a corporate rescue procedure.[317]

3.71 In 2009, the Hong Kong government formally announced a public consultation on the review of legislative proposals on corporate rescue procedure. The proposed rescue procedure will not be a US-style Chapter 11. Instead, it is recommended to introduce a regime of "provisional supervision", which is similar to voluntary administration in the UK or Australia.[318] In 2014, the provisional supervision approach has been further detailed by the government in the proposal concerning the new statutory corporate rescue procedure, which mainly includes initiation of provisional supervision/appointment of provisional supervisor, effect of provisional supervision and rights of secured creditors, status, role, duty and powers of provisional supervisor, process and termination of the provisional supervision, process and termination of the voluntary arrangement.[319] In addition, problems concerning insolvent trading provisions,[320] safeguards for abuse of the special procedure set out in section 228A of the former CO[321] have also been addressed in the proposal. Financial Services and Treasury Bureau intended to prepare an amendment bill with a view to introduce the proposal into the Legislative Council in 2015.[322]

2.2 Pending Development of Cross-border Insolvency Law

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[316] Cap 622, s. 668-670, 673, 674, 677

[317] See for example: *Re Keview Technology (BVI) Ltd.* [2002] 2 HKLRD 290; *Re Luen Cheong Tai International Holdings Ltd.* [2002] 3 HKLRD 610; *Re I-China Holdings Ltd.* [2003] 1 HKLRD 629; *Re Fujian Group Ltd.* [2003] HKEC 266

[318] For more details of the "provisional supervision" proposal, see Booth, Charles D. & Lain, Trevor N., Rescuing Hong Kong Companies with Provisional Supervision: Proposals That Workers and Management Can Support, in: Hong Kong Law Journal (40 HKLJ 271), 2010.

[319] Legislative Council Panel on Financial Affairs, Consultation Conclusions on Corporate Insolvency Law Improvement Exercise and Detailed proposals on a new Statutory Corporate Rescue Procedure, CB(1)1536/13-14(01), 7 July 2014, Annex B

[320] Legislative Council Panel on Financial Affairs, Consultation Conclusions on Corporate Insolvency Law Improvement Exercise and Detailed proposals on a new Statutory Corporate Rescue Procedure, CB(1)1536/13-14(01), 7 July 2014, Annex C

[321] Legislative Council Panel on Financial Affairs, Consultation Conclusions on Corporate Insolvency Law Improvement Exercise and Detailed proposals on a new Statutory Corporate Rescue Procedure, CB(1)1536/13-14(01), 7 July 2014, Appendix III-B

[322] Financial Services and the Treasury Bureau, Improvement of Corporate Insolvency Law Legislative Proposals Consultation Conclusions, 28 May 2014, p.10, available at: www. fstb.gov.hk (Last visited on 14 June 2016)

3.72 As a region deeply influenced by common law, Hong Kong does not have a comprehensive legislative framework for resolving cross-border insolvency issues but deals with the cross-border insolvency matters in a common law manner. Only a few provisions in the Companies Ordinance can be referred to in matters of cross-border insolvency. Cap 32 Part X s327 grants the court the authority to wind up the companies incorporated outside Hong Kong, which are non-Hong Kong companies in accordance with the Companies Ordinance.[323]

3.73 Although the Law Reform Commission[324] considered the adoption of UNICTRAL Model Law into the Companies Ordinance in 1999. It was stated in the Commission's 1999 Report on the Winding-up Provisions of the Companies Ordinance that

We note that there is some strong support for adoption of the UNCITRAL Model Law of Insolvency, … but we have been unable to find any jurisdiction which has adopted the Model Law and we are hesitant about recommending that Hong Kong, which is a relatively small jurisdiction, should pioneer the Model Law. (para 26.3)
…
We do not reject the Model Law. We are simply exercising caution and a watch and wait approach. When the Model Law is adopted by leading jurisdictions, that would be the time to consider adopting the Model Law in Hong Kong, but until that happens we consider that there is no benefit in being the first to adopt the Model Law. (para 26.43)[325]

3.74 In the 2014 proposal, it has been well acknowledged that

"At present, the court has the power to deal with certain cross-border insolvency cases under section 327 of the C(WUMP)O. However, there are certain limits to the extent to which a Hong Kong court will recognize the vesting and discharging effects of a non-Hong Kong order. We note that while some overseas jurisdictions have adopted the Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law, many jurisdictions, particularly those in Asia (e.g. Singapore and the Mainland), still rely on the local legislation to handle such cases. We will closely monitor the international development in this regard and will consider how best to take forward the matter."[326]

3.75 It is observed that Hong Kong still adopted a wait-and-see attitude towards the reform of its cross-border insolvency law. Although the UNCITRAL Model

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[323] Cap 622, s2: non-Hong Kong company means a company incorporated outside Hong Kong that—(a) establishes a place of business in Hong Kong on or after the commencement date of Part 16; or (b) has established a place of business in Hong Kong before that commencement date and continues to have a place of business in Hong Kong at that commencement date.

[324] The Law Reform Commission of Hong Kong was established in January 1980. The Commission considers for reform those aspects of the laws of Hong Kong, which are referred to it by the Secretary for Justice or the Chief Justice.

[325] The Law Reform Commission of Hong Kong, 1999 Report on the Winding-up Provisions of the Companies Ordinance, available at: http://www.hkreform.gov.hk/en/publications/rwind.htm (Last visited 14 June 2016)

[326] Legislative Council Panel on Financial Affairs, Consultation Conclusions on Corporate Insolvency Law Improvement Exercise and Detailed proposals on a new Statutory Corporate Rescue Procedure, CB(1)1536/13-14(01), 7 July 2014, p.65

Law was published nearly two decades and over 40 countries and regions have adopted the Model Law as part of their domestic laws,[327] concerns have been expressed about the possibility of synchronous development in the neighboring jurisdictions, in particular, the Mainland. Due to the closer economic relationship between the Mainland and Hong Kong, the need for trans-regional cooperation in matters of cross-border insolvency has never been higher. For instance, many Hong Kong companies have set up branches in the Mainland. Some of the local companies may transfer their assets to their associated enterprises in the Mainland instantly before winding-up.[328] Lack of cooperation will probably result in assets dissipation.

2.3 Current Cross-border Insolvency Law in Hong Kong

3.76 In Hong Kong, it is lack of statutory that provides cross-border insolvency cooperation. This section will introduce the current cross-border insolvency system by referring to illustrative case law and touches on the topics of jurisdiction, the ways of recognition and coordination and communication. It is noteworthy that owing to lack of ancillary proceedings or reliefs for cross-border insolvency cooperation, rules of jurisdiction, which enables commencement of the parallel territorial insolvency proceedings, play a very important role in Hong Kong's current cross-border insolvency system.

2.3.1 Jurisdiction

2.3.1.1 Statutory Basis

3.77 A non-Hong Kong company, which is incorporated abroad, is called an "unregistered company" in Hong Kong[329]; it also includes an "oversea company" as a consequence of the decision of the court in the case of *Securities and Futures Commission v MKI Corporation*, which held that an "oversea company" might be wound-up as an "unregistered company" in Hong Kong.[330] It is stipulated under Cap 32 s.327(1) that subject to the provisions of Cap 32 Part X, any unregistered company may be wound-up. As a result, an insolvency practitioner appointed in the company's place of incorporation can also seek a winding-up order in Hong Kong to protect and realize the Hong Kong assets of an unregistered company.

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[327] Available at: http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html (Last visited on 10 April 2016)

[328] In the case of *Ocean Grand Holdings Limited versus Ocean Grand Aluminum Industrial (San Shui) Ltd.,* Ocean Grand, which was a holding company incorporated in Bermuda, registered in Hong Kong. Its subsidiaries were mainly located in Nanhai and Zhuhai in the Mainland, and in Hong Kong. On 24 July 2006, *Ocean Grand* presented a petition for its own winding up in Hong Kong and in Bermuda. Before the application, Ocean Grand announced on mid July 2006 that a total sum of about 840 million US dollars funds in the four Mainland subsidiaries, including *OG San Shui*, had disappeared. For more detailed information regarding this case, please refer to Gong, Xinyi, When Hong Kong Becomes SAR, Is the Mainland Ready? – Problems of Judgments Recognition in Cross-border Insolvency Matters, in: International Insolvency Review, Wiley-Blackwell, Vol. 20, Issue 1, 2011, p.62

[329] Cap 32 s326(2), Companies Ordinance

[330] *Securities and Futures Commission v MKI Corporation* [1995] 2 HKC 79

An unregistered company may be wound-up in accordance with the Cap 32 s.327(3) on the following grounds,

(a) if the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purposes of winding-up its affairs;
(b) if the company is unable to pay its debts;
(c) if the court is of the opinion that it is just and equitable that the company be wound-up.

3.78 The conditions set up in Cap 32 s.327(3), including inability to pay debts, are not very difficult to satisfy, which result in that the HK courts are conferred on a wide and unfettered jurisdiction to wind up unregistered company.

2.3.1.2 Discretion in Case Law

3.79 As explained by Lord Scott NPJ in the Court of Final Appeal in *Re Chime Corporation Limited,*

"The fact, however, that the terms of a statute create or confer a jurisdiction in very wide terms does not necessarily mean that the courts have an unlimited jurisdiction to make any orders that are within the wide statutory terms." [331]

3.80 There have been settled criteria adopted by the HK courts in exercising their power under Cap 32 s.327 to wind up a non-Hong Kong company, which are so-called three core requirements:

(1) there is sufficient connection with Hong Kong, but this does not necessarily have to consist in the presence of assets within the jurisdiction;
(2) there is a reasonable possibility that the winding-up order would benefit those applying for it; and
(3) the court must be able to exercise jurisdiction over one or more persons interested in the distribution of the company's assets.

3.81 The three core requirements are gradually developed by case law.[332] The wording embedded into the three requirements, such as "sufficient connection", "reasonable possibility" is considered to leave the court with a wide margin of discretion.[333] The Hong Kong court used to hold that the mere presence of assets in Hong Kong was sufficient to establish the jurisdiction, especially satisfy the first two requirements. For instance, in *re China Tianjin International Economic and Technical Cooperative Corporation*,[334] the court should decide whether or not

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[331] *Re Chime Corporation Limited* [2004] 7 HKCFAR 546, at 40

[332] The three core requirements were adopted in several cases in Hong Kong. For instance, *Re Zhu Kuan Group Co. Ltd.* [2004] HKCFI 795; HCCW874/2003 (2 August 2004), at 22; *Re Information Security One Ltd* [2007] HKCFI 848; [2007] 3 HKLRD 780; [2007] 4 HKC 383; HCCW212/2007 (13 August 2007) at 8; *Re Beauty China Holdings Ltd* [2009] 6 HKC 351, at 23; In *re Yung Kee Holdings Limited* [2012] 6 HKC 246, at 70; *Re Pioneer Iron and Steel Co. Ltd*. [2013] HKCFI 324, at 27

[333] Kwan, Susan (ed.-in-Chief), Company Law in Hong Kong – Insolvency, Sweet & Maxwell, 2012, p. 529

[334] Zoneheath Associates Ltd., as creditor, which was a United Kingdom Company, sought a winding up order in Hong Kong against China Tianjin International Economic and Technical

the HK court had jurisdiction in winding up a company incorporated in the Mainland. The court considered that presence of substantial assets, which are liable to be recovered in Hong Kong, constituted a solid ground for exercising jurisdiction.[335] In 2014, that point of view has been altered in *re Yung Kee.*[336] The company involved is a company incorporated in the British Virgin Islands ("BVI") and is not registered under the CO. It is the ultimate holding company of a Hong Kong restaurant that is well known in Hong Kong for its roasted goose. It indirectly holds all of the group's businesses and properties, including the Hong Kong restaurant. The applicant sought two reliefs before the HK court. The principal relief is an order under Cap 622 s724 (1) (former Cap 32 s168A).[337] As an alternative, the applicant also sought a winding-up order under Cap 32 s327(3)(c) that gives the HK court a discretionary jurisdiction to wind up an unregistered company on the just and equitable ground. It is noteworthy that BVI company is still solvent. As to whether the court should assume jurisdiction to wind up a foreign company, it is held that

"No single criterion, nor any prescribed combination of criteria, is to be considered as supplying an essential precondition for meeting this requirement: it is a matter of judgment to be made in the light of the evidence presented to the court in a particular case."[338]

3.82 Later in *re Pioneer Iron and Steel*,[339] the three core requirements have been further explored in detail. It is stated in the judgment that the significance of each core requirement will vary from case to case.[340] For the first core requirement, the consideration of the court is different from other aforementioned cases. Without presence of an asset in Hong Kong,[341] the court indicated that

"I accept that if the matter relied on by the Petitioners was the presence of assets in Hong Kong alone a sufficient connection would not have been demonstrated, but they are not."[342]

3.83 The company's sole shareholder and also sole director, who was resident in Hong Kong, made major business decisions concerning the company's affairs

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Cooperative Corporation, which was incorporated in the Mainland and therefore was a non-Hong Kong company. In *re China Tianjin International Economic and Technical Cooperative Corporation* [1994] HKCFI 114; [1994] 1 HKLR 327; [1995] 1 HKC 720; HCCW438/1994

[335] *Re China Tianjin International Economic and Technical Cooperative Corporation* [1995] 1 HKC 720, at 3,6

[336] *Re Yung Kee* [2014] 2 HKC 556

[337] In accordance with Cap 622 s 724 (1):

(1) The Court may exercise the power under section 725(1)(a) and (2) if, on a petition by a member of a company, it considers that—

(a) the company's affairs are being or have been conducted in a manner unfairly prejudicial to the interests of the members generally or of one or more members (including the member); or

(b) an actual or proposed act or omission of the company (including one done or made on behalf of the company) is or would be so prejudicial.

[338] *Re Yung Kee* [2014] 2 HKC 556, at 42

[339] *Re Pioneer Iron and Steel Group Co. Ltd.* [2013] HKCFI 324

[340] *Re Pioneer Iron and Steel Group Co. Ltd.* [2013] HKCFI 324, at 28

[341] *Re Pioneer Iron and Steel Group Co. Ltd.* [2013] HKCFI 324, at 34

[342] *Re Pioneer Iron and Steel Group Co. Ltd.* [2013] HKCFI 324, at 35

from her base in Hong Kong.[343] Thus the court considered that "the controlling mind" of the company was based in Hong Kong, which constituted a substantial connection with Hong Kong."[344] As for the second core requirement, the court considered that it was satisfied through the use of the procedures provided for in the Companies Ordinance. For example, it is stipulated under the Cap 32 s221 that once Hong Kong proceeding commences, the liquidator will be enabled to have investigatory powers, which can be deemed as beneficial to the applicants.[345] With respect to the third core requirement, the court must be able to exercise jurisdiction over "a person who is concerned with the proper distribution of assets and over whom the Court can exercise jurisdiction other than by virtue of him being a creditor of the company".[346] The fact that the sole shareholder of the company asserted that she had a significant claim against the company was sufficient to satisfy the third requirement.[347] In addition, as indicated in *Re Pioneer Iron and Steel Group*, under the exceptional circumstance that the connection with Hong Kong is so strong and the benefits of a winding-up order for the creditors of a company are so substantial, the court would be willing to exercise its jurisdiction despite the third core requirement not being satisfied.[348]

3.84 As for how to proper understand the exceptional circumstance, the court made some explanation later in *re China Medical Technologies Inc*.[349] The debtor incorporated in the British Virgin Islands was the ultimate holding company of a group, through which it held three indirectly wholly-owned Hong Kong subsidiaries. Its principal business, involving manufacture of surgical and medical equipment, was located in the Mainland. There were three subsidiaries in the Mainland, which were held by the aforementioned three Hong Kong subsidiaries.[350] It used to be listed in NASDAQ. The debtor did not carry on any business in the Cayman Islands or in the USA, except in the case of the latter, raising funds.[351] On 27 July 2012 the Company was wound up in the Cayman Islands. On 31 August 2012 the Company filed a bankruptcy petition in the United States Bankruptcy Court for the Southern District of New York. In order to be able to avail themselves of the investigatory powers granted to Hong Kong liquidators and make clear the Mainland subsidiaries-related fundraising process, on 26 November 2012 the debtor filed a petition for an order of its winding-up in Hong Kong.[352] On 9 April 2014, the Hong Kong court dismissed the petition because the third core requirement was not satisfied.[353]

3.85 By referring to its decision in *re Pioneer Iron and Steel,* the court stressed again that the third core requirement could not be omitted unless the connection

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[343] *Re Pioneer Iron and Steel Group Co. Ltd.* [2013] HKCFI 324, at 36
[344] *Re Pioneer Iron and Steel Group Co. Ltd.* [2013] HKCFI 324, at 38
[345] *Re Pioneer Iron and Steel Group Co. Ltd.* [2013] KCFI 324, at 41.
[346] *Re Pioneer Iron and Steel Group Co. Ltd.* [2013] HKCFI 324, at 43.
[347] *Re Pioneer Iron and Steel Group Co. Ltd.* [2013] HKCFI 324, at 43.
[348] *Re Pioneer Iron and Steel Group Co. Ltd.* [2013] HKCFI 324, at 28
[349] *Re China Medical Technologies Inc*., [2014] HKCFI 656
[350] *Re China Medical Technologies Inc*., [2014] HKCFI 656, at 1, 12
[351] *Re China Medical Technologies Inc*., [2014] HKCFI 656, at 13
[352] *Re China Medical Technologies Inc*., [2014] HKCFI 656, at 21, 22
[353] *Re China Medical Technologies Inc*., [2014] HKCFI 656, at 54

with Hong Kong was sufficiently strong and the benefits of a winding-up order sufficiently substantial.[354] In *re China Medical Technologies Inc.,* the court found it sufficient to satisfy the first core requirement on the basis of the presence of an office in Hong Kong and staff here, albeit leased and employed by a subsidiary, a certain amount of investor relations activities, occasional board meetings and, most significantly, the use of Hong Kong accounts for a substantial amount of its banking activity.[355] However, the court considered

> "it is clear that Hong Kong was peripheral to the Company's principal activities such as research and development, manufacturing and equity and debt fund raising. In my view the court would only be justified in ordering a winding up if the third core requirement is not satisfied if the court is satisfied that Hong Kong was clearly central to the Company's principal activities and in my view it is not."[356]

3.86 Given the decisions in the recent case law, it can be briefly summarized that the presence of assets have been gradually replaced, for instance, by the location of the controlling mind, which can satisfy the first core requirement concerning sufficient connection with Hong Kong. That approach shares some similarities with the idea of central administration indicated in the decisions handed down by the CJEU.[357] The power of liquidators to undertake investigations under Cap 32 s221 can be deemed as of benefit to those filing for the winding up petition, through which the second requirement can be satisfied. The third requirement can be omitted only if the court is satisfied that Hong Kong was clearly central to the debtor's principal activities. Otherwise, the winding-up order will not be granted if one of the three core requirements has not been met.

2.3.2 Means of Recognition

2.3.2.1 Commencement of Winding up Proceeding

3.87 Recognition of foreign liquidation proceedings in Hong Kong is not governed by statutory laws. A foreign liquidator usually needs to start insolvency proceedings afresh even though insolvency proceedings are under way in another jurisdiction.[358] By doing so, a foreign liquidator is appointed pursuant to the Companies Ordinance to wind up an insolvent unregistered company, who actually does not seek recognition but indirectly attempts to achieve the effects of recognition through utilizing the reliefs available under the local insolvency regime, including collection of the assets in Hong Kong in accordance with Hong

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[354] *Re Pioneer Iron and Steel Group Co. Ltd.* [2013] HKCFI 324, at 27

[355] *Re Pioneer Iron and Steel Group Co. Ltd.* [2013] HKCFI 324, at 57,58

[356] *Re Pioneer Iron and Steel Group Co. Ltd.* [2013] HKCFI 324, at 58

[357] Case C-341/04 *Eurofood IFSC Ltd* [2006] ECR I-03813 (*Eurofood*), para. 34; Case C-396/09 *Interedil Srl (in liquidation) v Fallimento Interedil Srl, Intesa Gestione Crediti SpA* [2011] ECR I-09915 (*Interedil*), para. 51; Case C-191/10 *Rastelli Davide e C. Snc v. Jean-Charles Hidoux* [2011] ECR I-13209 (*Rastelli*), para. 35

[358] The Law Reform Commission of Hong Kong, 1999 Report on the Winding-up Provisions of the Companies Ordinance, para. 26.24
available at: http://www.hkreform.gov.hk/en/publications/rwind.htm (Last visited on 14 June 2016)

Kong law.[359] In *Re Information Security One Ltd*,[360] the company was incorporated in the Cayman Islands and registered in Hong Kong as an oversea company. In 2006, the court in the Cayman Islands ordered the company to be wound up and appointed the liquidators. Later the liquidators filed the new liquidation petition in Hong Kong to seek the assistance of the Hong Kong court to recover assets within its jurisdiction and to invoke the procedure under section 221 for the examination of various directors.[361] The Hong Kong court wound up the company by holding that there was sufficient connection with Hong Kong for the court to exercise its discretion.[362]

3.88 With respect to possibility of opening ancillary proceeding to assist the liquidation in the company's state of incorporation, the judge in *Re Pioneer Iron* held that

…[Unless] the three core requirements had been satisfied there was no independent basis for the Court to proceed to order an ancillary liquidation.[363]

3.89 The attorney who presented on behalf of the provisional liquidators provided a number of authorities, which it was suggested to support the ancillary liquidation approach. However, the court considered that

"It does not seem to me that the fact that in a particular case it is demonstrated that viewed objectively a liquidation in Hong Kong of an unregistered company will assist a foreign liquidator in carrying out his duties is a reason for making a winding-up order if the three core requirements have not been established. In my view it would be inconsistent with the principles discussed earlier in the judgment to make an order which commenced the statutory regime for the liquidation of companies in order to enable a foreign liquidator to use that regime's investigatory procedures to obtain information about the affairs of a company, which had little connection with Hong Kong other than the presence here of one of its officers."[364]

3.90 Further, the judge made it even clearer that

"It seems to me relevant that Hong Kong has not enacted an equivalent to section 426 of the Insolvency Act 1986 and is not a signatory to the UNCITRAL Model Law on Cross-Border Insolvency, which would have enabled orders to be made for the purpose of assisting liquidators of unregistered companies investigate in Hong Kong matters concerning their affairs despite the fact that the three core requirements referred to in paragraph 27 cannot be satisfied."[365]

3.91 In short, if an unregistered company is already in liquidation in its place of incorporation, a liquidator is required to be appointed in Hong Kong to wind up the insolvent unregistered company and the winding-up proceeding in Hong

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[359] See *In re Bank of Credit and Commerce International SA* (No 2) BCLC 579 and *In re B.C.C.I. SA* (No 3) (1993) BCLC 1490

[360] *Re Information Security One Ltd* [2007] HKCFI 848

[361] *Re Information Security One Ltd* [2007] HKCFI 848, at 6.

[362] *Re Information Security One Ltd* [2007] HKCFI 848, at 11.

[363] *Re Pioneer Iron and Steel Group Co. Ltd.* [2013] HKCFI 324, at 44

[364] *Re Pioneer Iron and Steel Group Co. Ltd.* [2013] HKCFI 324, at 44

[365] *Re Pioneer Iron and Steel Group Co. Ltd.* [2013] HKCFI 324, at 44

Kong is supposed to be treated as ancillary. Nevertheless, Hong Kong has not adopted the Model Law, which means there is no independent legal basis for the Hong Kong courts to open an ancillary proceeding. Accordingly, whether or not a foreign liquidator can seek assistance in Hong Kong will depend on whether or not the local jurisdiction rules (three core requirements) can be satisfied and the Hong Kong court can exercise its jurisdiction.

2.3.2.2 Civil Action

3.92 It is also possible that the effects of insolvency proceedings can be recognized by the Hong Kong Court in the process of a civil action, which involves enforcement of judgments against a debtor that is subject to insolvency proceedings abroad. According to Smart, this kind of recognition shall be subject to two-stage analysis. The distinction has to be drawn between "whether a debt has been discharged and whether the creditor can levy execution".[366] First of all, the effect of the foreign insolvency proceeding is not binding on the creditor's claim in Hong Kong because the foreign discharge does not form part of the proper law, which governs the contract and gives rise to the claim.[367] Nevertheless, in the second stage, it comes to the question of enforcing the civil judgment. To fulfill the objective of universal distribution on a comity basis, the Hong Kong court may refuse execution against such assets within Hong Kong.[368]

3.93 In the case of *CCIC Finance Ltd. v. Guangdong International Trust & Investment Corporation* (GITIC),[369] CCIC applied for a garnish order against GITIC, which was a company declared bankrupt by the Mainland court. The claim was based on a "Letter of Support" from GITIC to CCIC, which related to the loan agreement, entered into between the parties concerned and governed by the laws of Hong Kong.[370] The Hong Kong Court considered the debt was due and allowed judgment to be entered against GITIC.[371]

3.94 With respect to enforcement, the court turned to determine whether the Mainland insolvency proceeding had extra-territorial effect. The court consulted four expert witnesses from the Mainland, who provided their differing expert opinions to the court on this issue.[372] The HK court held that

[366] Smart, Recognition of Japanese Reorganization Proceedings, in: International Corporate Rescue, Vol. 1, issue 4, 2004, p. 187
[367] Smart, Recognition of Japanese Reorganization Proceedings, in: International Corporate Rescue, Vol. 1, issue 4, 2004, p. 186, 187
[368] Smart, Recognition of Japanese Reorganization Proceedings, in: International Corporate Rescue, Vol. 1, issue 4, 2004, p.188
[369] *CCIC Finance Ltd. v. Guangdong International Trust & Investment Corporation* (GITIC), [2005] 2 HKC 589
[370] *CCIC Finance Ltd. v. Guangdong International Trust & Investment Corporation* (GITIC), [2005] 2 HKC 589, at 12
[371] *CCIC Finance Ltd. v. Guangdong International Trust & Investment Corporation* (GITIC), [2005] 2 HKC 589, at 47
[372] *CCIC Finance Ltd. v. Guangdong International Trust & Investment Corporation* (GITIC), [2005] 2 HKC 589, Shi Jingxia at 67; Wang Xinxin at 83; Zou Hailia, at 75; Wang Weiguo at 76

"It seems clear to me that whatever has been decided before and whatever may happen in the future, 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* of distribution is strictly being adhered to."[373]

3.95 Hence, the court refused to allow CCIC's application for a garnishee order attaching the debtor's assets in Hong Kong, although this approach was considered unconvincing since it was not until 2007, the enactment of the new EBL, becomes the bankruptcy law of the Mainland universal in scope in outbound transactions.[374]

3.96 Later in *Hong Kong Institute of Education (HKIE) v. Aoki Corporation,*[375] HKIE, a Hong Kong company, filed a petition of enforcement of an arbitral award against a Japanese company (Aoki), which had completed the civil rehabilitation proceeding ordered by the Japanese court. Aoki alleged,

"The enforcement of the Award would be repugnant to the fair and equitable debt restructuring scheme ['the Scheme'] in force [in relation to Aoki under the civil rehabilitation proceeding in Japan, the jurisdiction where Aoki was incorporated".[376]

3.97 HKIE contended that HKIE was never invited to register its claim against Aoki in the Japanese civil rehabilitation proceedings and that it did not take part in the same.[377] After considering the authorities and academic commentaries, the court also adopted the 2-stage analysis.[378] Firstly, the court held that judgment would be entered in HKIE's favor since Japanese law could not discharge a Hong Kong debt.[379] Secondly, the court did not allow HKIE to proceed immediately to execution and further emphasized that

"Comity does not mean blind recognition of any corporate restructuring proceeding in any jurisdiction whatsoever, however bizarre or oppressive the result. ... It is necessary to assess whether the foreign proceedings are on balance fair and equitable in all the circumstances. There would be an onus on the debtor to satisfy the Court that the Scheme approved by the foreign court was reasonable and just and was obtained through due process."[380]

3.98 There is risk that the creditors may be able to enforce the debts owed to them in Hong Kong if the debts are considered discharged in the foreign proceedings but not recognized as having that effect in Hong Kong. To convince the Hong Kong courts, further evidences have to be submitted, in which the foreign proceedings should be proved reasonably and justly conducted through

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[373] *CCIC Finance Ltd. v. Guangdong International Trust & Investment Corporation* (GITIC), [2005] 2 HKC 589, at 84

[374] See Booth, Charles D., the 2006 P.R.C. Enterprise Bankruptcy Law: The Wait is Finally Over, in: 20 Singapore Academy of Law Special Issue 275, 2008, p 311-312.

[375] *Hong Kong Institute of Education v. Aoki Corporation* [2004] 2 HKC 397

[376] *Hong Kong Institute of Education v. Aoki Corporation*, [2004] 2 HKC 397, at 108

[377] *Hong Kong Institute of Education v. Aoki Corporation* [2004] 2 HKC 397, at 120

[378] *Hong Kong Institute of Education v. Aoki Corporation* [2004] 2 HKC 397, at 123-124, 160

[379] *Hong Kong Institute of Education v. Aoki Corporation* [2004] 2 HKC 397, at 159

[380] *Hong Kong Institute of Education v. Aoki Corporation* [2004] HKCFI 33; [2004] 2 HKLRD 760; [2004] 2 HKC 397; HCCT109/2003, at 149, 151

due process. Therefore, it can be concluded that recognition in the course of civil action is not a direct way of cooperation with the foreign insolvency proceedings but an alternative solution in order to prevent enforcement actions brought by individual creditor on local assets.

2.3.2.3 Sanction of Schemes of Arrangement

3.99 In accordance with s. 673(2) Cap 622, the power to sanction an arrangement or compromise is conferred upon the Hong Kong courts. In UK, this power has been utilized by some companies, which have no clear links to the UK but would like to restructure their business through scheme of arrangement instead of a formal insolvency proceeding. Pursuant to the recent case law, the connection between the UK courts and those foreign companies can be established either by COMI relocation[381] or by incorporating choice of law and choice of jurisdiction clauses into the underlying agreement.[382]

3.100 That kind of restructure strategy also becomes workable in Hong Kong since 10 December 2014, when the High Court of HKSAR handed down its decision on sanction of scheme of arrangements of LDK group.[383] As aforementioned, LDK is a photovoltaic products manufacturer based in the Mainland. In order to raise funds for its business and get access to the international capital market, LDK started to build up its offshore presence oversea. In 2006, LDK Solar, as the holding company of a group of companies, was incorporated in the Cayman Islands. In 2009, LDK Silicon, as a direct wholly-owned subsidiary of LDK Solar, was also incorporated in the Cayman Islands. In 2010, LDK Silicon Holding, as a direct wholly-owned subsidiary of LDK Silicon, was incorporated in Hong Kong.[384] As aforementioned, owing to global recession of the photovoltaic market, the three aforementioned offshore companies filed petition for winding-up, LDK Solar was ordered in provisional liquidation by the Grand Court of the Cayman Islands on 27 February 2014.[385] There were three schemes, two of which were connected to LDK Solar and LDK Silicon respectively and approved by the Grand Court of the Cayman Islands.[386] The third one related to LDK Silicon Holding, which was sanctioned by the Hong Kong Court.[387] All of them sought sanction before the Hong Kong Court. Considering that LDK Solar and LDK Silicon were incorporated in the Cayman Islands, one of the creditors raised the question of the jurisdiction of the Hong Kong court to sanction schemes of arrangement in respect of foreign companies.[388]

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[381] *Re Zlomrex International Finance SA* [2013] EWHC 4605 (Ch), at 13
[382] *Re Apcoa Parking (UK) Ltd and others* [2014] EWHC 997 (Ch), at 39
[383] *Re LDK Solar Co. Ltd.* [2014] HKCFI 2234
[384] *Re LDK Solar Co. Ltd.* [2014] HKCFI 2234, at 5-10
[385] *Re LDK Solar Co. Ltd.* [2014] HKCFI 2235, at 17
[386] *Re LDK Solar Co. Ltd.* [2014] HKCFI 2234, at 2
[387] *Re LDK Solar Co. Ltd.* [2014] HKCFI 2234, at 2
[388] *Re LDK Solar Co. Ltd.* [2014] HKCFI 2234, at 25

3.101 The Hong Kong Court firstly considered that it was vested with broad jurisdiction to wind up any unregistered company in accordance with Cap 32 S. 327.[389] Secondly, the Hong Kong Court acknowledged that

"Like the jurisdiction to wind up a foreign company which has been said to be an exorbitant power, the jurisdiction of the Hong Kong court to sanction a scheme of arrangement in relation to a foreign company ought also to be exercised only where there is sufficient justification for the Hong Kong court to do so."[390]

3.102 Further, the Court identified the different criteria between the jurisdiction to wind up a company and the jurisdiction to sanction a scheme of arrangement.[391] The Court indicated that the justification for exercising the power of sanctioning a scheme should not be governed by exactly the same requirements regulating the exercise of the power of winding up.[392] By referring to English common law,[393] the Court held that only the first core requirement had to be fulfilled in the case of sanctioning a scheme of arrangement, which is, there is a sufficient connection of the scheme with Hong Kong.[394] In addition, the Court referred to the UK High Court's decision in r*e Apcoa Parking Holdings,[395]*holding that the claims of the creditors are all or partly governed by Hong Kong Law and thus sufficient connection was established with Hong Kong.[396] Moreover, the Court regarded the Hong Kong schemes as "part of a multi-jurisdictional restructuring exercise",[397] holding

"the Hong Kong schemes form part of a larger cross-border restructuring that includes the Cayman schemes and an application to the United States Bankruptcy Court for recognition of certain aspects of the Cayman scheme in respect of LDK Solar. The Hong Kong schemes and the Cayman schemes are materially identical and inter-conditional in the sense that each takes effect only if the others are sanctioned and become effective. As such they constitute a unitary restructuring exercise. It seems to me that, in these circumstances, in sanctioning the Hong Kong schemes, comity would be fostered and not thwarted."[398]

3.103 The LDK case is a typical example of the trans-regional company, which is structured into the onshore operations and the offshore operations separately. The onshore part consists of principal business mainly located in the Mainland side, whereas the offshore part is usually composed of headquarter established in the haven jurisdictions, such as Cayman Islands, operations in North America and Europe in order to gain access to international capital markets to finance the company's activities. Due to the special tax arrangement, the Mainland has

[389] *Re LDK Solar Co. Ltd.* [2014] HKCFI 2234, at 36
[390] *Re LDK Solar Co. Ltd.* [2014] HKCFI 2234, at 39
[391] *Re LDK Solar Co. Ltd.* [2014] HKCFI 2234, at 36
[392] *Re LDK Solar Co. Ltd.* [2014] HKCFI 2234, at 41
[393] *Re Drax Holdings Ltd* [2004] 1 BCLC 10, at 25; *Re LDK Solar Co. Ltd.* [2014] HKCFI 2234, at 43
[394] *Re LDK Solar Co. Ltd.* [2014] HKCFI 2234, at 44
[395] *Re Apcoa Parking Holdings GmbH* [2014] 2 BCLC 285, at 19
[396] *Re LDK Solar Co. Ltd.* [2014] HKCFI 2234, at 55,56
[397] *Re LDK Solar Co. Ltd.* [2014] HKCFI 2234, at 63
[398] *Re LDK Solar Co. Ltd.* [2014] HKCFI 2234, at 62

granted Hong Kong more preferential tax rate than it did to other countries.[399] Hence, Hong Kong is always chosen as an intermediate place of incorporation in order to connect onshore operations with the offshore operations for more preferential tax rate, which can always be deemed as a sufficient connection. The *re LDK Solar* decision enables the liquidators from the offshore jurisdictions to avail of the Hong Kong scheme of arrangement regime, which provides much more flexible jurisdiction criteria than formal insolvency proceedings and in fact further broadens the extent of the jurisdiction power of the Hong Kong Court.

2.3.3 Cooperation and Communication

3.104 By referring to case law in other common law jurisdiction, Hong Kong is the only region among the four that utilizes protocols and video-conference to conduct coordination and communication in practice.

2.3.3.1 Protocol

3.105 If a company does no business in Hong Kong, it pays no tax in the territory on income derived from outside Hong Kong.[400] Although Hong Kong is not perceived to be an international tax haven, it has the de facto effect. Therefore, many companies that are based in Hong Kong are incorporated elsewhere and Hong Kong is also an ideal jurisdiction for holding companies since an HK-registered holding headquarters may accumulate tax-free profits gained by its subsidiaries outside Hong Kong. Against that background, it still took decades for the CO to be reformed in Hong Kong and the cross-border insolvency is not yet included in the reform agenda. Without a statutory framework, how to cope up with the ever-growing cross-border insolvency issues? In practice, the protocols are utilized by the Hong Kong court in the absence of an international treaties or legislation on cross-border insolvency, which is indeed the "judicial innovation". In most of the cases the protocols deal with coordination of concurrent insolvency proceedings in the place of incorporation (usually offshore companies in Bermuda, BVI etc.) and in Hong Kong[401] as well as group companies whose subsidiary is operating business in Hong Kong.[402] It can be concluded from those cases that the protocols should be consistent with comity without infringing on the jurisdictions of each court. Due to lack of statutory rules, the protocols should enable the liquidators to administer both liquidations in the most economical way, reducing the conflicts and complications that may arise in cross-border insolvency matters. As summarized in *Re Jinro,* the objectives of the protocols mainly focus on:

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[399] Daljit, Kaur and Susarla, Kamesh, Anti-Tax Avoidance Developments in Selected Asian Jurisdictions, Asia-Pacific Tax Bulletin, Volume 17, No 4, 2011, p.261

[400] Hong Kong Economic and Trade Office, Tax Regime and Regulations, http://www.hongkong-eu.net/pg.php?id_menu=88 (Last visited on 14 June 2016)

[401] *Re Peregrine Investments Holdings Ltd.* [1998] HKCFI 643, *Greater Beijing First Expressways Ltd.* [2000] HKCFI 755, *Re Kong Wah Holdings Ltd.* [2000] HKCFI 21, *Re Akai Holdings Ltd.* [2004] HKCFI 346

[402] *Re Jinro (HK) International Ltd.* [2003] HKCFI 239

" A. harmonizing and coordinating the proceedings in Hong Kong and in other jurisdictions if required;

B. ensuring the orderly and efficient administration of proceedings in the above jurisdictions;
C. identifying, preserving and maximizing the value of the debtor's worldwide assets for the collective benefit of the creditors and other interested parties, wherever located;
D. sharing of information and to minimize duplication of effort and costs;
E. complying with the laws of Hong Kong and foreign jurisdictions, and to satisfy the statutory and professional obligations of foreign representatives"[403]

2.3.3.2 Applicability of Video-conference

3.106 In *Re Chow Kam Fai David,*[404] the debtor was required to attend the hearing of the bankruptcy petition to be cross-examined on his affidavit. The debtor applied to the court to be permitted to be cross-examined using video conference facilities (VCF). The court of the first instance considered that the giving of evidence by VCF was an exception rather than the rule and that it would be a matter of privilege accorded to the respondent and not a matter of right for him to be allowed to do so.[405] This approach was supported by the court of appeal, which further indicated that

"There is no doubt that VCF is a highly useful tool. It must be a question of judgment in each case as to whether VCF should be used for the taking of evidence. No doubt, on those occasions when the witness is giving evidence that is technical or purely factual, without important issues as to credibility, a court may be more disposed to allow evidence to be given by the use VCF. Questions of cost and convenience are no doubt also important considerations that the court will have to weigh in deciding whether to allow evidence to be given using VCF. But, first and foremost, it seems to me that the judge was correct in his approach that a party wishing to give evidence using VCF should establish a sound reason why that privilege should be accorded."[406]

3.107 The court held that the cross-examination of the respondent using VCF would be inappropriate in this case because both the court of the first instance and the court of appeal casted doubts in the honesty of the debtor, which can be told clearly from his avoidance of his contractual and legal obligations.[407] Moreover, the reason that the debtor applied for using VCF is because the debtor might be subject to arrest in Hong Kong for failure to observe the earlier order requiring his attendance for examination.[408] The court of appeal also indicated that the decision of the judge in this respect was clearly an exercise of his discretion. However, the facts of the *Re Chow Kam Fai David* case are rather extreme. It is suggested that in other cases, for example where a director is prepared to be examined by video-conference but not to come to Hong Kong, the discretion may well be exercised differently based on all the relevant

[403] *Re Jinro (HK) International Ltd.* [2003] HKCFI 239, para.32
[404] *Re Chow Kam Fai David* [2004] HKCA 111
[405] *Re Chow Kam Fai David* [2004] HKCA 111, at 16
[406] *Re Chow Kam Fai David* [2004] HKCA 111, at 19
[407] *Re Chow Kam Fai David* [2004] HKCA 111, at 25
[408] *Re Chow Kam Fai David* [2004] HKCA 111, at 21

circumstances.[409] Therefore, it is possible that the HK court applies video-conference to communication in the course of cross-border insolvency cooperation.

Ch.3 Macao Cross-border Insolvency System

3.108 Due to its territoriality approach, the cross-border insolvency system is hardly established in Macao. This chapter will mainly focus on the exclusive jurisdiction exercised by Macao courts over foreign insolvency proceedings and its possible influences on practice.

3.1 Brief Introduction into Local Insolvency System

3.109 According to the latest statistics released, from 2000 to 2014, the Court of First Instance of Macao accepted 88 insolvency cases in total,[410] whereas the annual total of the winding-up orders made by the Hong Kong court in 2014 alone reached 271.[411] It is evident that insolvency cases in Macao relatively rarely happen.

3.110 One of the reasons is the insolvency law is a bit outdated. Insolvency law of Macao is incorporated into the Civil Procedure Code of Macao (CPCM), which is enacted in 1999. As mentioned in the Part I, Macao's legal system is deeply influenced by Portugal, which is based upon the tradition of European Civil Law countries. Although the CPCM has been recodified due to Macao's reunification with P.R.C., the legacy of Portuguese laws still remains in the current code.[412] Even after the current CPCM came into effect, the Macao court still substantially referred to the 1961 Civil Procedure Code of Portugal in handling insolvency cases.[413]

3.111 Both companies and natural persons are governed by the CPCM. Commercial enterprises, which are companies or whoever commit commercial activities,[414] shall be regulated by the rules of bankruptcy in accordance with the CPCM.[415] Debtors, who are not commercial enterprises and not able to pay the debts when they fall due, can be declared insolvent and regulated pursuant to relevant rules under the CPCM.[416] Corporate insolvency proceedings in Macao

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[409] Kwan, Susan (ed.-in-Chief), Company Law in Hong Kong – Insolvency, Sweet & Maxwell, 2012, p. 559

[410] Data collected from http://www.court.gov.mo/zh/subpage/statisticstjb?report=2013 (Last visited on 14 June 2016)

[411] Data collected from http://www.oro.gov.hk/cgi-bin/oro/stat.cgi?stat_type=W&start_year=2009&start_month=1&end_year=2014&end_month=12&Search=Search (Last visited on 14 June 2016)

[412] Feng Wenzhuang, Brief Introduction into the Compositions of Macao Civil Proceedings (in Chinese), in: http://www.dsaj.gov.mo/macaolaw/cn/data/prespectiva/issued/VASCO.pdf (Last visited on 14 June 2016)

[413] Case No.84/2001, see: http://www.court.gov.mo/tools/attachment/1385027673kxmur.pdf (Last visited on 14 June 2016)

[414] Commercial Code of Macao, article 1

[415] CPCM, article 1043 - 1184

[416] CPCM, article 1185 - 1198

are described as "cumbersome, inflexible, and time-consuming."[417] In particular, lack of pre-liquidation asset protection under Macao's insolvency system has been condemned,[418] which can also explain the scarcity of insolvency cases there.

3.2 Current Cross-border Insolvency Law in Macao

3.2.1 Exclusive Jurisdiction

3.112 There is no cross-border insolvency provision provided in the CPCM. In accordance with the Article 20 of the CPCM, the Macao courts shall have exclusive jurisdiction over the lawsuits concerning the bankruptcy or insolvency of legal persons, whose domicile is within Macao.[419] In accordance with Commercial Code of Macao, the domicile of companies shall be established in a determined place,[420] which should be registered in accordance with the Commercial Registration Code of Macao.[421] Moreover, companies with their registered office in Macao cannot avoid the application of the provisions of Commercial Code of Macao against the third parties by relying on the fact that they do not have their main administration here.[422] Therefore, it seems that the registered office is a decisive factor to the domicile of Macao companies. Foreign insolvency proceedings will not have effects in Macao, unless the foreign judgment is recognized according to the relevant rules.[423] With respect to affirmative requirements for recognition of civil judgments from outside Macao, it is stated under the Article 1200-I of the CPCM that

" 3. The court which rendered the judgment shall exercise jurisdiction over the case without fraud and the judgment does not fall into the ambit of the exclusive jurisdiction of Macao court."

3.113 In short, the territorial approach of Macao in matter of cross-border insolvency is quite self-explanatory. More importantly, even if foreign insolvency proceedings are recognized, they will only be able to affect the debtors' assets in Macao, after the claims of all Macao creditors, whose debt has its origin in Macao, have been satisfied.[424]

3.2.2 Treatment of Priority under the Commercial Code of Macao

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[417] Sue Kendall, Winding Up Macanese Companies in Macau-The Zhu Kuan Experience Brings Positive Development, Out of Court, Autumn 2004, p.3

[418] Pace, Vincent A., The Bankruptcy of the Zhu Kuan Group: A Case Study of Cross-border Insolvency Litigation against a Chinese State-owned Enterprise, 27 U. Pa. J. Int'l L. 517, 2006, p.565

[419] CPCM, article 20

[420] Commercial Code of Macao, article 181

[421] Commercial Registration Code of Macao, article 5

[422] Commercial Code of Macao, article 175-II

[423] CPCM, article 1199

[424] Garcia, Augusto Teixeira, Macao Insolvency Law and Cross-border Insolvency Issues, New Zealand Association for Comparative Law: hors série (Wellington) Vol. XIX, 2015, p. 341

3.114 It is stated under the Article 83 (Liability for obligations contracted outside Macao) of the Commercial Code of Macao that

" 1. The assets of a foreign company, which are possessed by the representative office in Macao, are only liable for the debts abroad after all the debts incurred by operating business in Macao are paid off.

2. A decision of a foreign authority that orders a foreign company bankrupt shall only be binding on the assets mentioned in the previous paragraph after the payment obligation therein has been observed."[425]

3.115 With respect to distribution of the local assets of a foreign company, according to the Article 83 of the Commercial Code of Macao that the local claims in Macao have priority over the foreign claims. In addition, if a foreign company is declared bankrupt by the court at its place of incorporation, the decision can be recognized but will not be enforced until the local debts have been paid off through the local assets. Besides, in accordance with the article 739 of the Civil Code of Macao, the local fines[426] and tax claim[427] are ranked as the first priority. Moreover, it is stipulated under the Decree of Labor Relations in Macao that in case of bankruptcy or judicial liquidation of assets, the employees as a creditor has priority over other creditors.[428]

3.3 Development in Practice

3.116 The insolvency proceeding in Macao is hardly fully reported and the relevant information is released mostly through the judgments of other jurisdictions.

3.3.1 *Re Zhu Kuan* case

3.117 In *Re Zhu Kuan* case, Zhu Kuan Group (ZKG) was incorporated in Macao since 1988. Zhu Kuan (Hong Kong) Company Limited (ZKHK) was incorporated in Hong Kong on 19 May 1992. They were both established as "window companies" for the commercial activities of the Zhuhai Municipal Government ("ZMG") of the People's Republic of China ("the P.R.C."). In 2004, the companies were declared winding-up and the liquidators were appointed in each proceeding. To restructure the companies, the Hong Kong liquidator in the Hong Kong proceedings and the Macao liquidator have worked closely in the way that the Hong Kong scheme of arrangement for the ZKG or application was to be followed in Macao.[429] Regardless of Macao's exclusive jurisdiction provision on insolvency, there is possibility that cross-border cooperation can still be voluntarily achieved between the liquidators.

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[425] For the official text of the Commercial Code of Macao (in Chinese) please visit http://bo.io.gov.mo/bo/i/99/31/codcomcn/codcom0001.asp#l1t1 (Last visited on 14 June 2016)

[426] Macao Rules of Court Litigation Fees, article 102

[427] Macao Civil Code, article 739 (a)

[428] Decree of Labor Relations in Macao, Decree-Law nº 24/89/M, 3 April 1989 (With amendments introduced by the Decree-Law nº 32/90/M, 9 July 1990), article 32

[429] *Re Zhu Kuan (Hong Kong) Co Ltd.* [2007] HKCFI 1119, para.1,4,5,12

3.3.2 *Central Steel Macao* Case

3.118 Being a free trade port with roughly 27 square kilometers territory, Macao continues to implement its low taxation policy, which is guaranteed by the Basic Law,[430] and attempts to become a haven of offshore commercial activities.[431] There is a case involving Central Steel (Macao Commercial Offshore) Limited (hereinafter, Central Steel Macao) that was incorporated in Macao. It was an indirect wholly owned subsidiary of China Metal Recycling (Holdings) Limited (hereinafter, China Metal) incorporated in the Cayman Islands and registered under s.333 of the repealed Companies Ordinance (Cap. 32) as a non-Hong Kong company, which has numerous subsidiaries in other jurisdictions including the Mainland and Macao.

3.119 In 2013, the Securities and Futures Commission of HKSAR (hereinafter the SFC) filed a petition for the compulsory winding up of China Metal to Hong Kong High Court in light of the evidence of fraud and dishonesty on the part of its senior management, in particular the existence of records of fictitious transactions, forged documents, and round robin of funds.[432] As the sourcing arm of the group for the acquisition of scrap metal from international markets for its operation in the Mainland, Central Steel Macao, as alleged by the SFC, was "at the center of a fraudulent scheme".[433] Upon the request of a winding-up order by the SFC, Hong Kong High Court appointed two joint provisional liquidators for China Metal, who were also appointed as directors of Central Steel Macao on the same day in order to gain access to and taking control of the subsidiary.[434] It seems that the same approach of appointing directors has been adopted to address the regional cross-border insolvency issues between Hong Kong SAR and Macao SAR. (Please refer to section 1.3 for the disadvantages of such arrangements.)

3.120 Macao's insolvency caseload stays at a very stable low level. Restricted by its territorial approach, Macao's cross-border insolvency system is a relatively closed system and lack of interactivity with other jurisdiction, although there might be possibility of cooperation in some individual case. With respect to distribution on local assets, the local creditors will be treated with priority over foreign ones. Moreover, owing to employee protection and the superior ranks of certain local compulsory claims, foreign creditors probably will not have high expectation for the local assets. When the development of Macao's offshore activities is on the rise but the cross-border insolvency law does not make any progress, Macao can also become a forum that can be avoided, in particular on

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[430] Basic Law of Macao SAR, article 106

[431] Although there exists taxation of income in Macao, the level of taxation is significantly lower than that of industrialized Western countries. Macao makes active efforts to attract foreign investment, namely through the Macao Investment Promotion Board. There is special procedure for investors to obtain permanent residence in Macao and a special regime for offshore industrial and financial activities. See Godinho, Jorge A.F., Macao Business Law and Legal System, in: LexisNexis Hong Kong, 2006, p18-20.

[432] *Re China Metal Recycling (Holdings) Ltd.* [2014] HKCFI 2404, paras.1, 2, 11

[433] *Re China Metal Recycling (Holdings) Ltd*. [2015] HKCFI 332, paras.9, 10

[434] *China Metal Recycling (Holdings) Ltd. and Another v. Chun Chi Wai and Others* [2013] HKCFI 1305, para.7

regional level, by replacing the directors or management personnel in the local subsidiary.

Ch.4 Taiwan Cross-border Insolvency System

3.121 The current Bankruptcy Act of Taiwan (TBA) is decades old. That's why the insolvency system in Taiwan is undergoing reform. In this section, the revised draft of the Debt Clearance Act (the 2015 Draft), in particular, its new chapter concerning cross-border insolvency, is introduced. It further discusses the development of the current cross-border insolvency by referring to the case law. Due to the territorial approach adopted by the current TBA, discussion mainly covers the topic of jurisdiction and recognition. It will be demonstrated in this section that the opinions of Taiwan courts with respect to the effect of foreign insolvency proceedings vary and different criteria of recognition have been applied in practice. In the end, the possible influences of parallel recognition rules of civil judgments to the Mainland and SARs on trans-regional insolvency proceedings will be examined.

4.1 Brief Introduction into Local Insolvency System

3.122 The current Bankruptcy Act of Taiwan (hereinafter TBA) was enacted in 1935. It applies to both legal persons and natural persons[435] with the exception of the financial institutions.[436] Pursuant to TBA, there are two types of proceedings, one of which is reconciliation and the other is liquidation.[437] Reorganization is stipulated separately under Taiwan Corporate Act (hereinafter the TCA).[438] In accordance with TCA, the corporates, which issue stocks or corporate bonds with possibility of revival, can apply to the court for reorganization.[439] Although insolvent natural persons may also use TBA to resolve their indebtedness, it has been seldom employed owing to its out-of-date provisions. After breakout of credit card debt crisis, in 2008 the Taiwan Consumer Debt Clearance Act came into effect (TCDCA). TCDCA aims at assisting debtors in restructuring their debts and maintaining their basic living standard in a more efficient way.[440] Nevertheless, none of the aforementioned laws, except for the article 4 under TBA, have anything to do with cross-border insolvency.

4.2 A New Chapter of Cross-border Insolvency under the 2015 Draft

3.123 Some new ideas concerning cross-border insolvency sprouted up in 2007 when the Judicial Yuan issued a draft of the new bankruptcy law (also in a new name, Debt Clearance Act). The draft integrated three types of proceedings,

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[435] TBA, article 3

[436] The ways of resolution of the Taiwanese financial institutions are scattered in relevant laws and regulations, such as Insurance Act, Insurance Deposit Act, Banking Act, Financial Institutions Merger Act, Financial Holding Company Act and etc.

[437] TBA, Ch. II & Ch. III,

[438] TCA, article 282 - 314

[439] TCA, article 282

[440] TCDCA, article 1; see also Shyuu, Shu-Huan, Basic Structures of Debt Clearance Law (in Chinese), Taiwan: Yuanzhao Press, 2007, p 18.

reconciliation, liquidation and reorganization. It also provided a specialized chapter in handling the cross-border insolvency. In February 2014, the Judicial Yuan released a revised draft of the Debt Clearance Act (the 2014 Draft) for public consultation. Under the 2014 Draft, Chapter VI is entitled Recognition of Debt Clearance Proceedings Rendered by the Foreign Courts. It is composed of 23 provisions, which covers key aspects of the cross-border insolvency, including jurisdiction, recognition criteria, the effect of the foreign proceedings, the applicable law and the duty of cooperation. On 2 June 2015, the Judicial Yuan approved the 2014 Draft, which will soon be moved forward into legislative process.[441] On 15 June, 2015, the Judicial Yuan published the approved draft (the 2015 Draft). The approved 2015 Draft will be used as basic reference in this dissertation.

4.2.1 Venue and International Jurisdiction

3.124 The 2015 Draft designates a specialized court exclusively to adjudicate recognition of foreign debt clearance proceedings in Taiwan, which is the Taipei District Court.[442] Besides, a debt clearance proceeding comes under the venue of the Taiwan's court exclusively situated at the domicile of the debtor. If the debtor's head office or principal place of business is located abroad, the place where to adjudicate the debt clearance proceedings is its head office or principal place of business in Taiwan.[443] In other words, the courts of foreign countries, within the territory of which the head office or principal place of business of the debtor is located, shall have jurisdiction to commence the foreign debt clearance proceedings. Recognition of such foreign debt clearance proceedings shall not preclude opening of the parallel debt clearance proceedings in Taiwan,[444] where the local head office or local principal place of business of the debtor is situated. Besides, if the forum to adjudicate the debt clearance proceedings within Taiwan cannot be ascertained based on the aforementioned factors, the proper venue for opening the local debt clearance proceedings shall be the place where the debtor's principal assets is situated.

4.2.2 Recognition: Restrictions and Effects

3.125 Recognition is granted on a reciprocal basis under the 2015 Draft[445] and the court can refuse to recognize the foreign proceedings if

1. in accordance with the laws of Taiwan, the foreign courts do not have jurisdiction;
2. the interests of the domestic creditors are inappropriately impaired in the foreign proceeding;
3. recognition of the foreign proceeding is on contrary to the public policy or *boni*

[441] Please visit: http://jirs.judicial.gov.tw/GNNWS/NNWSS002.asp?id=192147 (Last visited on 14 June 2016)
[442] The 2015 Draft, article 297(1)
[443] The 2015 Draft, article 7(2)
[444] The 2015 Draft, article 315(1)
[445] The 2015 Draft, article 299(2): if the foreign country where the debt clearance proceeding is opened does not recognize the debt clearance opened by Taiwan courts, the courts may dismiss the application by issuing a ruling.

mores[446]

3.126 Moreover, after the Taiwan courts commence the debt clearance proceedings, the foreign debt clearance proceedings, upon which recognition has been granted, can be stayed.[447] In addition, the 2015 Draft also provides the conditions, upon which the courts can withdraw the recognition of the foreign debt clearance proceedings:

1. the foreign debt clearance proceeding falls in the ambit of Article 299;
2. the foreign debt clearance proceeding has been terminated or rescinded;
3. the documents submitted by the liquidator in accordance with Article 298-I and Article 300-I are forged, altered or involving other fraudulent behaviors.
4. the liquidators, administrator or debtors seriously violate the statutory obligations.[448]

3.127 If there are debt clearance proceedings against the same debtor pending before the Taiwan's court, the recognition of foreign debt clearance proceedings should be ceased unless recognition will be more beneficial to the local creditors in Taiwan.[449]

3.128 Except as otherwise provided, the effect of recognition dates back to the opening of debt clearance proceedings ordered by foreign courts.[450] Once recognized, the foreign debt clearance proceedings shall have effect on the assets of the debtor or interested party within Taiwan.[451] To dispose of, distribute and transfer the debtor's assets located within Taiwan, the petitions should be filed to the Taiwan court for approval.[452] The court shall refuse to grant approval if the petitions can inappropriately impair the interests of the local creditors.[453] In addition, in order to ensure the *pari passu* distribution among the creditors, the hotchpot rules have been introduced into the 2015 Draft. It is required that the creditors, who have in the course of foreign debt clearance proceedings, obtained a dividend on their claims shall share distributions made in the Taiwan proceeding only where creditors of the same ranking obtained an equivalent distribution.[454] Moreover, it is also stipulated that if creditors, who will in the course of foreign debt clearance proceedings, obtain dividends on their claim, shall take distributions made in the Taiwan proceeding only where creditors of the same ranking have obtained an equivalent distribution or they can provide appropriate guarantee. If the guarantee cannot be provided, their distributions shall be held in escrow.[455]

4.2.3 Applicable Law

[446] The 2015 Draft, article 299
[447] The 2015 Draft, article 315(2)
[448] The 2015 Draft, article 310
[449] The 2015 Draft, article 314(1)
[450] The 2015 Draft, article 309(1)
[451] The 2015 Draft, article 304(1)
[452] The 2015 Draft, article 305(1)
[453] The 2015 Draft, article 305(3)
[454] The 2015 Draft, article 318(1)
[455] The 2015 Draft, article 318(2)

3.129 With respect to the rules of applicable law, except as otherwise provided in this chapter, the law applicable to foreign debt clearance proceedings, once recognized, and their effects, shall be that of the foreign country within the territory of which such proceedings are opened (*lex concursus*).[456] There are also certain exceptions to *lex concursus*, mainly including employment contract, right of offset and right of avoidance. Despite the effects of foreign debt clearance proceedings, the law applicable to the employment contract shall be that of Taiwan if it is more beneficial to the employees.[457] The law applicable to right of offset, which can only be initiated upon the commencement of the debt clearance proceedings and shall not be interfered by the opening of the foreign debt clearance proceedings, shall be the law governing the contract.[458] The law applicable to right of avoidance shall be that of the foreign country where the debt clearance proceedings are opened unless it is proved that the law originally governing the contract forbids the avoidance.[459]

4.2.4 Duty of Cooperation

3.130 The 2015 Draft provides some general rules concerning the duty of the domestic and foreign liquidators or administrators to cooperate with each other. The liquidators or administrators appointed in the Taiwan debt clearance proceedings can request the foreign liquidators or administrators for necessary cooperation and information as well as provide the foreign liquidators or administrators with necessary cooperation and information.[460] Further, it is stated that Chapter VI of the 2015 Draft shall apply mutatis mutandis to recognition of debt clearance proceedings opened in the Mainland China, Hong Kong and Macao.[461]

3.131 In summary, the 2015 Draft provides a relatively comprehensive cross-border insolvency regime. Nevertheless, several limitations have been set on recognition criteria of foreign insolvency proceedings. Protection of interests of the local creditors is emphasized, in particular, which may have impact on the stay of recognition, approval of disposal of local assets and applicable law to the employment contract. Moreover, it is also observed that Taiwan tends to apply uniform rules in matters of recognition of cross-border insolvency proceedings regardless of its place of origin among China, Hong Kong, Macao and other foreign countries, which is a different approach from recognition of civil and commercial judgments.

4.3 Current Cross-border Insolvency Law in Taiwan

4.3.1 Jurisdiction

[456] The 2015 Draft, article 304(2)
[457] The 2015 Draft, article 306
[458] The 2015 Draft, article 307
[459] The 2015 Draft, article 308
[460] The 2015 Draft, article 317(1)
[461] The 2015 Draft, article 319

3.132 There are no specific rules concerning international insolvency jurisdiction under TBA. In practice, some courts refer to the doctrine of *forum non conveniens*. In the case of *Chinatrust Commercial Bank (CTCB) v. Richard S. & Lehman Brothers Treasury Co., B.V.*, the plaintiff filed a damage claim against the defendants on the ground of their infringing acts by intentionally concealing important information and unjustified enrichment therefrom.[462] This case was lodged as a civil claim but indeed originated from Lehman Brother's global insolvency proceedings. As stated in the arguments of the defendants (Richard S. & Lehman Brothers Treasury Co., B.V.) in the first instance, in 26 January 2010 CTCB withdrew the lawsuit against Lehman Brothers Holdings Inc. because it feared that its claim would be eliminated from the creditor list by the courts which opened the insolvency proceeding of Lehman Brothers Holdings Inc. if its individual actions continued. Instead, CTCB filed a petition against Lehman Brothers Treasury Co., B.V., which is a subsidiary of Lehman Brothers Holdings Inc., by referring to the theory of reverse piercing the corporate veil.[463] The case went through three levels of adjudication and was treated as ordinary civil petition and concentrated on how to determine the *locus delicti*.[464] Nevertheless, on an international scenario, if a creditor is still allowed to take individual enforcement actions against a foreign debtor's assets in the local court after opening of a foreign proceeding, it will be inconsistent with the principle of *pari passu* among the creditors and jeopardize the collective insolvency regime.

3.133 First Commercial Bank lodged a damage petition against Lehman Brothers Treasury Co., B.V. in 2010 as well. The lower court applied the doctrine of *forum non conveniens* and dismissed the application of the plaintiff. Later the High Court approved the decision of the lower court and dismissed the appeal. In deciding whether or not the court has jurisdiction on this dispute, it held

> "… The appellant purchased and paid for the bonds outside Taiwan. Even if the respondent shall undertake the tort liability, *locus delicti* is not situated in Taiwan. In accordance with the Article 15 of Code of Civil Procedure, our court does not have jurisdiction on this dispute. … In addition, the respondent argued that pursuant to Dutch insolvency law, once the debtor is declared bankrupt, all the compulsory execution and attachment on the debtor's assets as well as the lawsuits filed against the debtor should be stayed. In the bankruptcy proceeding, all the unsecured creditors can only submit their claims to the liquidator, instead of initiating separate actions. … The appellant argued that the bankruptcy proceeding of the respondent was already opened on 8 October 2008 in the Netherlands. If our court makes decision on this dispute, it will be difficult to be recognized by the Dutch court. Consequently, the goal of the litigation cannot be met. "[465] (translated by author)

3.134 Later in 2012, the Supreme Court reversed the ruling rendered by the High Court, holding

[462] Taiwan Taipei District Court Litigation No. 1807 [2010]
[463] Taiwan Taipei District Court Litigation No. 1807 [2010]
[464] Taiwan High Court Appeal from Ruling No.215 [2011]; Taiwan Supreme Court Appeal from Ruling No. 1022 [2011]
[465] Taiwan High Court Appeal from Ruling No.286 [2012]

"… [I]t has been proved that the finance of Lehman Brothers are highly integrated, who took advantage of establishment of different entities in order to separate the responsibilities. The affiliated companies were set up and exploited as tools, which helped to evade or hide the responsibilities and make profits by issuing bonds. The respondent, together with Lehman Brother International (Europe), Lehman Brothers Holdings Inc. and Lehman Brothers Commercial Corporation Asia Limited shall take the joint liability for the damages … In addition, … the loss of the appellant occurred within Taiwan. … The High Court did not make investigation on the appellant's aforementioned arguments but considered that Taiwan did not have jurisdiction on this dispute. The ruling is questionable. …"[466] (translated by author)

3.135 By referring to the respondent's argument, the High Court seemed to be aware of the effects of foreign insolvency proceedings on the local civil lawsuit. Nevertheless, the Supreme Court again regarded this dispute as an ordinary civil case and thus assumed Taiwan's jurisdiction over this case without taking into consideration the existing bankruptcy proceeding commenced abroad.

4.3.2 Recognition

4.3.2.1 Statutory Limitation on the Effects of Foreign Proceedings

3.136 It is stipulated under the Article 4 of TBA that

"If reconciliation or declaration of bankruptcy is rendered in a foreign country, it shall have no binding effect on the assets of the debtor or the bankrupt, which are located in Taiwan."[467]

3.137 It is self-explanatory that Article 4 abides by the principle of territoriality in matters of cross-border insolvency. It was further explained by the Taiwan Supreme Court in its decision handed down in 1996 that in accordance with Article 4 of TBA, reconciliation or declaration of bankruptcy is rendered in a foreign country shall have no binding effect on the assets of the debtor within Taiwan. On the basis of reciprocity, the foreign courts can also refuse to recognize the effect of a Taiwanese bankruptcy order on the assets situated in the foreign states.[468] It is observed that the Supreme Court of Taiwan used to apply the principle of territoriality, not only to the inbound effects of the foreign bankruptcy orders in Taiwan, but also to the outbound effects of Taiwanese bankruptcy orders in the foreign states. However, if declaration of bankruptcy rendered by foreign courts shall not be recognized, a parallel proceeding or derivative claims originating from foreign bankruptcy proceeding may occur, which can result in execution of debtor's property located in Taiwan and thus damage the collectivity of insolvency proceedings.

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[466] Taiwan Supreme Court Appeal from Ruling No. 529 [2012]

[467] In the process of translation, the author has made some technical modification in wording of this article. In the original Chinese version of article 4 TBA, it is stated China instead of Taiwan. Please note that the act was enacted in 1935, i.e. before establishment of P.R.C. Nowadays, it might cause misunderstanding if China is being utilized here. In order to make clear the effective geographic extent of this article, the corresponding context is thus translated into Taiwan.

[468] Taiwan Supreme Court No. 1592 [1996]

4.3.2.2 Flexible Interpretations in Practice

3.138 Certain lower courts followed the aforementioned holdings of the Supreme Court,[469] whereas the majorities incline to interpret Article 4 in more flexible ways. Some courts adopt the optional recognition approach, considering that the limitation set up by Article 4 only applies to the assets located within Taiwan but does not preclude all effects of the foreign proceedings from being recognized. In 1999 the Taipei District Court heard a case between a company registered in Cayman Islands and a company registered in BVI. The former company was ordered winding-up in Hong Kong. The debtor filed a petition for damages due to the provisional attachment initiated by the defendant after the commencement of the HK winding-up proceeding. With respect to the effect of the winding-up order of the HK court, the court held that:

"… Although it is stated under the article 4 of TBA that "if reconciliation or declaration of bankruptcy is rendered in a foreign country, it shall have no binding effect on the assets of the debtor or the bankrupt, which are located in Taiwan", it shall be interpreted that declaration of bankruptcy has no binding effect merely on the assets located in Taiwan. Therefore, the defendant argued that the declaration of winding-up rendered by HK court had no binding effect at all in Taiwan, which is contrary to the legislative purposes of TBA and thus cannot be accepted…"[470] (translated by author)

3.139 The defendant appealed to Taiwan High Court. The Taiwan High Court agreed with the lower court and dismissed the appeal.[471]

3.140 In 2011, the Taiwan High Court recognized the power of liquidators appointed by Hong Kong High Court in Lehman Brothers insolvency proceeding (*Taipei Fubon Bank v. Lehman Brothers Commercial Corporation Asia Limited*). The court also considered that Article of TBA only excluded the effect of the foreign insolvency proceedings on the assets located within Taiwan but it does not deny the effects of all the actions done by foreign courts in foreign insolvency proceedings, especially the effect of appointment of legal agents or statutory representatives for the debtor rendered by the court. Otherwise, the debtor would not be able to participate in or respond to any suits due to lack of legal agent in Taiwan. Consequently the creditors in Taiwan will not be able to make any property reservation or compulsory execution on the assets of the debtor in Taiwan and even their claims will not be able to be recognized and thus will be disadvantaged.[472]

3.141 Generally speaking, the liquidators are appointed to administrate and coordinate the insolvency proceedings and one of their key functions is to realize all or part of the debtor's local assets, which is contrary to the purpose of Article 4. In that case, the mere recognition of the appointment of the liquidators, who will not be allowed to take any action on the local assets, is not very meaningful but only of some symbolic value.

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[469] Banqiao District Court Bankruptcy No.9 [2012]
[470] Taipei District Court International Trade No.9 [1999]
[471] Taiwan High Court International Trade Appeal No. 9 [2002]
[472] Taiwan High Court Important Appeal No. 23 [2011]

3.142 Some courts identify recognition of foreign insolvency proceedings as non-litigation lawsuit and thus apply Article 49 of the Non-litigation Law,[473] instead of Article 4 of the TBA. In 2009, the Taiwan court recognized a ruling rendered by Hong Kong High Court [In The High Court of the Hong Kong Special Administrative Companies (Winding- Up) Proceeding NO. 441 of 2008]. In accordance with article 42-I of the HK and Macao Act[474] Taipei District Court identified the case as a "non-litigation lawsuit" and thus applied Article 49 of the Non-litigation Law, holding

"… Upon investigation, the aforementioned ruling is not contrary to public policy or good morals of Taiwan. The applicant also asserted that on 2 July 1998 Hong Kong Court of Appeal recognized the insolvency ruling rendered by Taiwan Court in the case of Chen Li Hung & Another v. Ting Lei Miao & Others, 2000-1 HKC 461. By referring to Taiwan Supreme Court Appeal No. 1943 [2004], mutual recognition can be confirmed. In accordance with the relevant law, upon the request of the applicant, the application is hereby approved." [475] (translated by author)

3.143 Further, some courts held that the Article 49 of the Non-litigation Law adopted the automatic recognition approach. Accordingly, the foreign insolvency proceedings are deemed as automatically effective and thus it is not necessary for the Taiwan courts to grant recognition. In 2012, Taipei District Court handed down a decision concerning recognition of a Japanese insolvency proceeding.[476] The Japanese liquidator, referring to the judgment of Taipei District Court in the former Lehman Brothers decision (Taipei District Court Trial on Application No. 514 [2009]), applied for recognition of a reorganization ruling rendered by Tokyo District Court. Taipei District Court dismissed the application, holding:

"Except as otherwise provided by law or in pursuit of a ground for execution, the party concerned shall apply to the court in Taiwan who shall render a judgment for compulsory execution of foreign judgments. Under any other circumstances, there is no legal ground for the court to grant recognition on the effect of foreign judgments. That's why the Non-Litigation Law only lists some exceptional conditions to refuse recognition but it does not require that the foreign judgments can only be deemed as effective after the Taiwan courts grant recognition. Therefore, it is inconsistent with the article 49 of Non-litigation Law that the applicant applied for recognition of reorganization proceeding ordered by Tokyo District Court."[477] (translated by author)

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[473] Non-litigation Law, article 49: a final and binding judgment rendered by a foreign court shall be recognized, except in case of any of the following circumstances: 1. Where the foreign court lacks jurisdiction pursuant to the laws of Taiwan; 2. The interested parties, who are citizens of Taiwan, assert that documents or notices of opening of the proceedings have not been served to them and therefore they are not able to exercise their rights; 3. Where the performance ordered by such judgment or its litigation procedure is contrary to public policy or morals of Taiwan; 4. Where there exists no mutual recognition between the foreign country and Taiwan, except that the foreign judgment does not have adverse effect on Taiwan.

[474] In accordance with article 42-I of HK and Macao Act, in determining the conditions for the validity, jurisdiction, and enforceability of civil judgments made in Hong Kong or Macao, Article 402 of the Code of Civil Procedure and Article 4, Paragraph 1 of the Compulsory Execution Law shall apply mutatis mutandis.

[475] Taipei District Court Trial on Application No. 514 [2009]

[476] Taipei District Court Trial on Application No. 355 [2012]

[477] Taipei District Court Trial on Application No. 355 [2012]

3.144 As for relevance of its former judgment, Taipei District Court pointed out that in the case of Taipei District Court Trial on Application No. 514 [2009], it was a case related to Hong Kong and accordingly recognition was rendered on the basis of Article 42 of the HK and Macao Act, which thus did not apply to the Japanese insolvency proceeding.[478] As aforementioned in para.2.73, Taiwan applies parallel recognition rules of civil judgments to the Mainland and SARs. Since Article 42 of the HK and Macao Act is regarded as proper legal basis for recognition of Hong Kong insolvency proceedings, the corresponding legal basis for recognition of the Mainland insolvency proceedings shall be Article 74 of the Mainland Act. In accordance with the interpretation the Taiwan Supreme Court concerning Article 74 of the Mainland Act, the civil ruling or judgment rendered in the Mainland do not have *res judicata* in Taiwan and therefore should be subject to substantial review when applying for recognition.[479] Consequently, the differential criteria adopted by Taiwan to recognize civil judgments rendered by the Mainland and SARs will be extended to the insolvency proceedings under the current Taiwan's legal system.

4.3.2.3 Possible Influences of Parallel Recognition Rules

3.145 Multi-layered recognition systems concerning cross-border insolvency are not something unique. In UK where the insolvent has interests in a country that is outside the EU, the CBIR implementing the UNCITRAL Model Law should be used to seek the cooperation of the foreign courts. If the insolvent has interests in a Member State of the European Union (EU), the provisions of the EC Regulation on Insolvency Proceedings prevail in UK. As for some designated countries, most of which are Commonwealth countries, s426 of the English Insolvency Act 1986 will take precedence. The common law is also applied alongside the CBIR and sometimes also s426 as alternative grounds for relief. The reason why UK adopted such an intricate system for cross-border insolvency is more complicated. It is promoted by development of international insolvency law, influenced by EU legal integration as well as its own legal tradition and political heritages. What's more, it is also expected that the same rules will be applied to recognition of insolvency proceedings in accordance with the 2015 Draft,[480] which will solve the problem in the near future.

3.146 However, Taiwan's parallel recognition rules of civil judgments to the Mainland and SARs will still evoke problems of *pari passu* treatment among the creditors from different regions. For instance, it is provided under the Enterprise Bankruptcy Law of P.R.C. that

> " Where the debtor or creditor has objections to what is recorded in the form of claims, he may file an action with the people's court that has accepted the application for bankruptcy."[481]

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[478] Taipei District Court Trial on Application No. 355 [2012]
[479] Taiwan Supreme Court Appeal No. 2376 (2008)
[480] The 2015 Draft, article 319
[481] The EBL, article 58

3.147 That means the debt owed to some creditors in the Mainland insolvency proceeding shall be affirmed by the people's court either by a ruling or by a judgment. If the debtor is declared bankrupt in Taiwan and the creditors want to participate in the Taiwan bankruptcy proceeding, they will have to report their claims to the liquidator of Taiwan proceeding.[482] In order to prove their claims to Taiwan liquidator, they should submit the Mainland ruling or judgment for confirmation. The creditors from the Mainland have to apply for recognition to Taiwan court with the possibility that the court might refuse to recognize them since those rulings or judgments are rendered in the Mainland and thus not automatically recognized. The creditors from the Hong Kong, Macao or foreign proceedings, however, may not have the same problem because their rulings or judgments will be automatically recognized (see para.3.160 of Part III).

Conclusion

3.149 The cross-border insolvency systems in the four regions have different characteristics and each of them has their own problem. The national insolvency system in the Mainland has developed synchronously with its economic reform. Insolvencies of state-owned and non-state-owned companies were not treated in a uniform manner because the state-owned enterprises used to be the main form of economic entities and those insolvency proceedings were directly interfered by the government. In 2006, the current EBL was adopted, covering all types of incorporated enterprises. Although the former bankruptcy law still has some influence on the 2006 EBL, it lays emphasis on corporate rescue by introducing reorganization proceedings.

3.150 Nevertheless, with more advanced arrangements under the current EBL, the amount of insolvency cases declines on an annual basis. One of the reasons is existence of the competing system - participation in distribution system. It provides a leeway from ordinary insolvency proceedings, because assets distributed through the participation in distribution system are irrevocable, which undermines the principle of collectivity, one of the fundamental principles of the insolvency law. Involvement of government is also a very important factor that has influence on implementation of the current EBL. Although there are obvious advantages of government involvement in the insolvency proceedings, it is required by the market-oriented economy to reconsider the relationship between the local governments and the local enterprises and the means of their involvement, which cannot touch the bottom line of the independence of the courts in the insolvency proceedings. Thirdly, it is observed that the actual function of the courts in practice has been limited and restrained. The tentative solution to the problems is to establish specialized tribunals for bankruptcy cases.

3.151 The current EBL provides one article (article 5) that deals with cross-border insolvency issues. The first provision governs the effects of China's insolvency proceedings, which are vested with outbound universal effect and inbound territorial effect. The second provision stipulates the criteria of

[482] TBA, article 65

recognition, which is composed of the key elements, including the international treaties, the principle of reciprocity and the reservation of public policy. In practice, for the countries, which have mutual civil and commercial judicial assistance treaties or agreements, it is more likely that the effects of the insolvency proceedings in those countries can be recognized in the Mainland. Besides, the Chinese courts still hold quite restrictive reciprocity standards in rendering recognition of foreign civil and commercial judgments. As for the reservation of public policy, it has been incorporated in article 5(2) EBL in the form of diverse expressions, such as fundamental principles of law, state sovereignty and security, socio-public interests as well as legitimate rights and interests of the creditors, which can cause considerable hurdles of proper understanding in practice. The current EBL does not provide clear explanation with respect to those various expressions regarding public policy. Although some relevant civil and commercial case law has been found for reference, its reference value is limited because cross-border insolvency law has its own features and needs interpretation peculiar to its own characters and a comprehensive understanding of public policy in the context of cross-border insolvency is still missing.

3.152 Meanwhile, the insufficient rules on cross-border insolvency law discourage filings of recognition and enforcement of the foreign and regional insolvency proceedings before the Mainland courts at the same time. On international level, the Mainland jurisdiction has been intentionally avoided due to lack of confidence in its insolvency system and uncertainty of its cross-border insolvency legislations. On regional level, the absence of regional cross-border insolvency arrangements resulted in invention of substitutes based on company law, i.e. appointment of provisional liquidator or liquidator as member of the management or representative of the Mainland subsidiaries. Nevertheless, as an indispensible part of the winding-up order, such a solution can bring complexity to the proceedings owing to the dual identities of the liquidators and delay the process because of the resistance of the former members. Moreover, the solution, as an indispensible part of effects of the parallel proceedings, which do not automatically have effect in the Mainland, is merely an evasion of the genuine problem.

3.153 In Hong Kong SAR, individual bankruptcy and corporate winding-up proceedings are governed by separate ordinances. The personal insolvency is regulated under the Bankruptcy Ordinance, whereas the Companies Ordinance sets rules on corporate winding-up. Although the Companies Ordinance has experienced revision, it did not change anything related to corporate insolvency. In July 2014, Legislative Council Panel on Financial Affairs issued Consultation Conclusions on Corporate Insolvency Law Improvement Exercise and Detailed proposals on a new Statutory Corporate Rescue Procedure, which recommended the regime of provisional supervision similar to voluntary administration in the UK and Australia. Hong Kong still held a wait-and-see attitude towards the reform of its cross-border insolvency law. Although the UNCITRAL Model Law was published nearly two decades and over 20 countries and regions have adopted the Model Law as part of their domestic laws, concerns have been expressed about the possibility of synchronous development in the neighboring

jurisdictions, in particular, the Mainland. Thus, evolvement of Hong Kong's statutory cross-border insolvency system is still pending.

3.154 The current Hong Kong cross-border insolvency law is greatly influenced by common law practice. Despite the legal basis provided under Cap 32 s.327, the case law has set up three core criteria to determine jurisdiction of the Hong Kong courts over non-Hong Kong companies. Given the decisions in the recent case law, it can be briefly summarized that the presence of assets have been gradually replaced, for instance, by the location of the controlling mind, which can satisfy the first core requirement concerning sufficient connection with Hong Kong. The power of liquidators to undertake investigations under Cap 32 s221 can be deemed as of benefit to those filing for the winding up petition, through which the second requirement can be satisfied. The third requirement can be omitted only if the court is satisfied that Hong Kong was clearly central to the debtor's principal activities. Otherwise, the winding-up order will not be granted if one of the three core requirements has not been met. In Hong Kong, jurisdiction also plays an important role in recognition of foreign insolvency proceedings. There is no independent legal basis for the Hong Kong courts to open an ancillary proceeding. To seek assistance of the Hong Kong courts, a foreign liquidator usually needs to start insolvency proceedings afresh even though insolvency proceedings are under way in another jurisdiction. However, the purpose of seeking assistance alone does not suffice to be granted a winding-up order if three core requirements have not been satisfied.

3.155 The effects of insolvency proceedings can also be recognized by the Hong Kong Court in the process of the civil action, which is subject to two-stage analysis. First of all, the foreign insolvency proceeding is not deemed effective in Hong Kong because the foreign discharge does not form part of the proper law, which governs the contract and gives rise to the claim. Nevertheless, on the second stage, it comes to the question of enforcing the civil judgment. To fulfill the objective of universal distribution on a comity basis, the Hong Kong court may refuse execution against such assets within Hong Kong. However, there is still risk that after passing the first-stage analysis, the effects of the foreign proceedings are still not recognized in Hong Kong. It is required to submit further evidences to prove that the foreign proceedings were reasonably and justly conducted through due process. Therefore, it can be concluded that recognition in the course of civil action is not a direct way of cooperation with the foreign insolvency proceeding but a factor to be determined in execution of the civil judgment.

3.156 The third means to seek recognition in Hong Kong is to utilize the power of the courts to sanction scheme of arrangement as stipulated under Cap 622 s. 673(2). In the case of sanctioning a scheme of arrangement, only the first core requirement is needed to exercise jurisdiction. By referring to the UK High Court's decision, the Hong Kong court held that the claims of the creditors are all or partly governed by Hong Kong Law and thus sufficient connection was established with Hong Kong. As part of a multi-jurisdictional restructuring scheme, sanction of Hong Kong scheme of arrangements will enable Hong Kong to participate in the global unitary restructuring exercise on a comity basis. With

respect to cooperation and coordination, video-conference may also be taken into consideration in matters of communication and coordination of concurrent insolvency proceedings. In Hong Kong it is possible that assistance can be provided in the form of protocols without infringing on the jurisdictions of each court. Video-conference may also be taken into consideration in matters of communication and coordination of concurrent insolvency proceedings.

3.157 Macao's insolvency caseload stays at a very stable low level. By adopting exclusive jurisdiction over insolvency proceedings of a company, Macao follows a territorialism approach in handling cross-border insolvency cases, which gives rise to interactivity with other jurisdiction. With respect to distribution on local assets, the local creditors will be treated with priority over foreign ones. Moreover, owing to employee protection and the superior ranks of certain local compulsory claims, foreign creditors probably will not have high expectation for the local assets, although there might be possibility of cooperation in some individual case. When the development of Macao's offshore activities is on the rise but the cross-border insolvency law does not make any progress, Macao can also become a forum that can be avoided, in particular on regional level, by replacing the directors or management personnel in the local subsidiary.

3.158 In June 2015, the Judicial Yuan of Taiwan issued the approved draft of the Debt Clearance Act (the 2015 Draft) in order to conduct reform on the current decade-old Bankruptcy Act. The 2015 Draft provides one new chapter concerning cross-border insolvency, which is a relatively comprehensive cross-border insolvency regime, including rules of jurisdiction, recognition criteria, applicable laws and duty of cooperation. Nevertheless, several limitations have been set on recognition criteria of foreign insolvency proceedings. Protection of interests of the local creditors is emphasized, in particular, which may have impact on the stay of recognition, approval of disposal of local assets and applicable law to the employment contract. There are also some general rules concerning the duty of the domestic and foreign liquidators or administrators to cooperate with each other. Moreover, it is observed that Taiwan tends to apply uniform rules in matters of recognition of cross-border insolvency proceedings regardless of its place of origin among China, Hong Kong, Macao and other foreign countries, which is a different approach from recognition of civil and commercial judgments.

3.159 There are no specific rules concerning international insolvency jurisdiction under the current TBA. Therefore, the relevant provisions under Code of Civil Procedure are applied by analogy in dealing with the jurisdiction issues. Accordingly in practice, the Taiwanese court tended to regard the cross-border insolvency cases as ordinary civil cases and thus assumed Taiwan's jurisdiction over this case without taking into consideration the existing bankruptcy proceeding commenced abroad. In addition, the current TBA (article 4) set limitation on the foreign insolvency proceedings, which shall have no binding effect on the assets of the debtor within Taiwan. The majorities of the courts opt to interpret the limitation in more flexible ways. Some courts adopt the optional recognition approach, considering that the limitation only applies to the assets located within Taiwan but does not preclude all effects of the foreign

proceedings, such as appointment of liquidators, from being recognized. Generally speaking, the liquidators are appointed to administrate and coordinate the insolvency proceedings and one of their key functions is to realize all or part of the debtor's local assets, which is contrary to the purpose of article 4. In that case, the mere recognition of the appointment of the liquidators, who will not be allowed to take any action on the local assets, is not very meaningful but only of some symbolic value.

3.160 Some courts identify recognition of foreign insolvency proceedings as non-litigation lawsuit and thus apply article 49 of the Non-litigation Law, instead of article 4 of the TBA. Further, some courts held that the article 49 of the Non-litigation Law adopted the automatic recognition approach. Accordingly, the foreign, including Hong Kong and Macao, insolvency proceedings are deemed as automatically effective and thus it is not necessary for the Taiwan courts to grant recognition. However, as aforementioned in Part I, recognition of the Mainland judgments was granted on a different basis, which provides that judgment rendered in the Mainland do not have *res judicata* in Taiwan and therefore should be subject to substantial review when applying for recognition. Consequently, the differential criteria adopted by Taiwan to recognize civil judgments rendered by the Mainland and SARs will be extended to the insolvency proceedings under the current Taiwan's legal system. It is expected that the problem will be solved in the near future if the 2015 Draft is passed by the Legislative Yuan, which contains the uniform recognition criteria on cross-border insolvency proceedings regardless of its place of origins. Nevertheless, Taiwan's parallel recognition rules of civil judgments to the Mainland and SARs will still evoke problems of *pari passu* treatment among the creditors from different regions.

3.161 For a sovereign state that has gone through reunification, to harmonize legal conflicts thereof is something inevitable in the process of further integration. Meanwhile, driven by economic interaction, legal cooperation also has to be carried out between the Mainland China and Taiwan. Considering the special political composition and diverse cross-border insolvency systems among the four regions, the most urgent issues are concerning how to achieve efficient recognition by overcoming the jurisdiction hurdles and promote coordination of the concurrent insolvency proceedings opened in the four regions.

Part IV Regulation versus. Model Law: a Comparative Review on Key Aspects

Introduction

4.01 In this part, the Regulation on insolvency proceedings [Council Regulation (EC) 1346/2000, hereinafter EC Regulation], the Regulation of the European Parliament and of the Council on insolvency proceedings (recast) [Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), hereinafter the EU Regulation (recast)][483] and the UNCITRAL Model Law on Cross-border Insolvency (1997) with Guide to Enactment and Interpretation (2013) (hereinafter the Model Law and the Guide and Interpretation) will be compared to each other in order to figure out the similarities and differences of the two regimes on key aspects through literature review and case analysis. Rules of applicable law will not be discussed in detail but briefly mentioned because they do not constitute a part of proposed China's regional cross-border arrangements. The reason for the exclusion will be discussed later in Part V. Please also refer to Annex IV, in which the main lines of the three regimes have been briefly outlined and summarized comparatively in the form of table. Besides, to illustrate the way of implementation of the Model Law, the US case law will be referred under most circumstances, which is usually regarded as "helpful guide to the way in which key expressions may be interpreted and applied by national courts".[484]

4.02 In the following sections, the comparative discussion about the Regulation and the Model Law will cover the key topics concerning cross-border insolvency law, in particular, jurisdiction, recognition and enforcement, corporate groups, cooperation and communication. Before starting to make such comparison, there are two questions that need to be answered. The first one is why the Regulation and the Model Law are selected. The reason is that they are outstanding examples in the area of cross-border insolvency. Before the Regulation and the

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[483] In EU, the EU Insolvency Regulation, twelve years after it came into effect, received the political agreement on its amended text by the Council (Justice and Home Affairs) on 4 December 2014. On 12 March 2015, the Council officially adopted its position at first reading with a view on the Regulation (EU) of the European Parliament and of the Council on insolvency proceedings (recast) [2012/0340 (COD)]. Later on 28 April 2015 the position of the Council at the first reading together with its statement of reasons was published on the Official Journal [Position (EU) No.7/2015 of the Council at first reading with a view to the adoption of a Regulation of the European Parliament and of the Council on insolvency proceedings (recast) adopted on 12 March 2015, 2015/C 141/01; Statement of the Council's reasons: Position (EU) No 7/2015 of the Council at first reading with a view to the adoption of a Regulation of the European Parliament and of the Council on insolvency proceedings (recast), 2015/C 141/02]

On 20 May 2015, the European Parliament approved the final text of the recast of the European Insolvency Regulation, which was published in the Official Journal of the European Union on 5 June 2015 and shall apply from 26 June 2017.

The text of Regulation (EU) 2015/848 of the European Parliament and of the Council on insolvency proceedings (recast) is referred to as the EU Regulation (recast) in the entire dissertation. For the text of EU Regulation (recast), please visit: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2015:141:FULL&from=EN (Last visited on 14 June 2016)

[484] Wessels, Bob, International Insolvency Law (3rd ed.), Vol.X, Deventer: Kluwer, 2012, para.10254

Model Law began to play the leading role in dealing with issues arising from cross-border insolvency, there have been a few multilateral initiatives, either on the international level or on the regional level, most of which failed to gain wide and active acceptance. For instance, in Latin America, some relevant efforts have been made, for example, through Treaty of Montevideo 1940. However, with limited provisions it was not that successful.[485] In Europe, some related conventions were replaced or partly replaced by the EC Regulation, such as the Nordic Bankruptcy Convention of 1933 partly replaced except that it is still applicable in the Denmark case because Denmark falls beyond the scope of the Regulation. It is required under the EC Regulation that

> "no later than 1 June 2012, and every five years thereafter, the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Regulation. The report shall be accompanied if need be by a proposal for adaptation of this Regulation."[486]

4.03 In December 2012, the European Commission presented its proposals of amendments to the EC Regulation.[487] In February 2014, the Parliament made amendments to the proposal of the Commission.[488] On 4 December 2014, the revision of the EC Regulation passed its first reading and evolved into the EU Regulation (recast),[489] which was approved by the EU Parliament on 20 May 2015.[490] Although the EU Regulation (recast) will be implemented 2 years after it comes into effect and the EC Regulation will still apply in the interim, the EU Regulation (recast) represents the updated development of the current EC Regulation and the legislation of the cross-border insolvency on EU level in the near future. Hence, it will be introduced as well.

4.04 The Model Law was developed in the mid 90s of the last century, at a time when trade and investment increasingly expanded across all over the world. The administration of cross-border insolvencies at that time, however, were conducted in a fragmented way subject to national insolvency laws prevailingly based on territoriality.[491] By then, the text of the EC Regulation 1346/2000 was

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[485] See Wood, Philip, Principles of International Insolvency, London: Sweet & Maxwell 2nd. ed., 2007, 29-081; Wessels, Bob, International Insolvency Law (3rd ed.), Vol.X, Deventer: Kluwer, 2012, para. 10066

[486] The EC Regulation, Article 46

[487] EU Commission Explanatory Memorandum, Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings, Strasbourg, 12.12.2012, COM(2012) 744 final

[488] European Parliament, Legislative Resolution of 5 February 2014 on the Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings (COM (2012) 0744 – C7-0413/2012 – 2012/0360(COD)), Strasbourg, 5 February 2014

[489] Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings [First reading] - Political agreement, 15414/14 ADD 1 COR 1, Brussels, 25 November 2014

[490] Please refer to the procedure file of the EU Parliament: http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2012/0360(COD) (Last visited on 14 June 2016)

[491] UNCITRAL, A/CN.9/398 - Cross-border Insolvency: Report on UNCITRAL – INSOL Colloquium on Cross-Border Insolvency, 1994, paras.5-6

merely available in the preliminary form of a draft convention[492] and "best practice" guidelines served as earlier initiatives to address the global cross-border insolvency problems.[493] During 1995 and 1997, a project was launched by UNCITRAL with participation of "seventy-two states, seven inter-governmental organizations and 10 non-governmental organizations" in order to work out a draft model law on cross-border insolvency.[494] Therefore, the drafting procedure of the Model Law found its wide acceptance on a global level and accordingly the Model Law was established based on international consensus.[495] Nowadays there are over 40 jurisdictions in the world that have incorporated the Model Law into their insolvency systems,[496] five of which are the Member States of EU, including Greece (2010), Poland (2003), Romania (2002), Slovenia (2007) and the United Kingdom (2006).[497]

4.05 Unlike the Regulation, the worldwide agreement on adoption of the Model Law is not guaranteed by any regional legal instrument but achieved by its own flexible nature, which tolerates a wide range of legal diversity. Even though it is expected to find a solution to China's interregional cross-border insolvency issues, it cannot be established in exactly the same way as the Regulation due to lack of the same degree of integration or equivalent legal foundation. Instead, more discretionary alternatives offered by the Model Law can be taken into consideration. In addition, the merits of the Model Law are that it does not address all of the traditional topics of private international law, such as jurisdiction or choice of law, but focuses on "model legal provisions for streamlined recognition of cross-border insolvency proceedings"[498] and in

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492 Moss, Gabriel, Fletcher, Ian F, Isaacs, Stuart (ed.), The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide (2nd ed.), Oxford University Press, 2009, paras.1.01- 1.25

493 For example, Committee J of the Section on Business Law of International Bar Association (IBA), The Model International Insolvency Cooperation Act (MIICA), 1989; IBA, International Bar Association Cross Border Insolvency Concordat, 1995

494 Mohan, S Chandra, Cross-border Insolvency Problems: Is the UNICITRAL Model Law the Answer?, in: International Insolvency Review, Vol. 21, 2012, p.202

495 See the report of UNCITRAL on the work of its thirtieth session (Official Records of the General Assembly, Fifty-second Session, Supplement No. 17 (A/52/17), paras. 12-225).

496 Please note that the number of the Enacting States of the Model Law is subject to changes. For instance, in September 2015, the 17 Member States (including Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Republic of the Congo, Côte d'Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Senegal, Togo and Democratic Republic of the Congo) of OHADA (the Organisation pour l'Harmonisation en Afrique du Droit des Affaires) adopted the UNCITRAL Model Law. The so-called Uniform Act Organizing Collective Proceedings for Wiping Off Debts establishes regimes to address cross-border insolvency cases both from outside OHADA States and internal to OHADA. It also introduces a number of reforms to the OHADA insolvency framework consistent with the UNCITRAL Legislative Guide on Insolvency Law and the World Bank Principles on Effective Insolvency and Creditor/Debtor Rights. Enactment of legislation based on UNCITRAL texts is a positive example of the role UNCITRAL can play in assisting law reform in regional economic integration organizations like OHADA.
Available at: http://www.unis.unvienna.org/unis/en/pressrels/2015/unisl222.html
Please also visit the official website of UNCITRAL for the relevant updated information.
http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html (Last visited on 14 June 2016)

497 Ibid.

498 Block-Lieb, Susan and Halliday, Terence C., Less is More in International Private Law, (2015) 3 NIBLeJ 4, p.56

particular, obligation of cooperation and communication between the courts and insolvency representatives involved, which is also considered as the emphasis of China's interregional cross-border insolvency arrangement. Considering the successful contribution of the two regimes to international development of the cross-border insolvency, it is of significance to conduct comparative research on the two regimes to discover their respective advantages as well as their differences, which will help to find a better solution to China's cross-border insolvency issues.

4.06 The second question is how to make comparison between the Regulation, a binding regional framework, and the Model Law, a soft law mechanism. Generally speaking, they are different in forms, objectives, scopes, structures and ways of interpretation. However, they are also interrelated to each other. The Model Law has taken into consideration the content of the EC Regulation by adopting some key concepts stipulated under the EC Regulation, such as COMI and establishment.[499] With respect to cooperation and communication, it is also explicitly stated under the EU Regulation (recast) that European insolvency practitioners and courts shall refer to "relevant guidelines prepared by UNCITRAL".[500] Besides, they also share something in common in treating corporate groups. For example, both suggest the actors involved to cooperate and communicate with each other properly through use of cross-border insolvency agreements[501] or appointment of a single insolvency practitioner to conduct coordination,[502] although in the EU context such an appointment may also be affiliated with opening of group coordination proceedings.[503] In pursuit of a suitable solution for China's cross-border insolvency cooperation, it is of significance to discover the difference and similarity from those leading international regimes, which are both potentially relevant models.

Ch.1 General Provisions

4.07 In this chapter, comparison of the characteristics between the Regulation and the Model Law will be presented from general perspectives, including forms, objectives, scopes, structures and ways of interpretation. In each section concerning the EU context, development of the Regulation from the EC Regulation to the EU Regulation (recast) will be addressed as well. If the contents remain unchanged, they will be referred to as the Regulation altogether and the relevant provisions under the EU Regulation (recast) will be provided in the footnotes subsequent to the EC Regulation.

1.6 Forms

[499] Guide and Interpretation, para.10, 82
[500] The EU Regulation (recast), recital (48)
[501] The EU Regulation (recast), recital (49), article 56; Part III to the Legislative Guide (treatment of enterprise groups), III, para.48-54
[502] The EU Regulation (recast), article 71; Part III to the Legislative Guide (treatment of enterprise groups), III, para.43-47
[503] The EU Regulation (recast), recital (55), article 61(1)(a)

4.08 In EU, a cross-border insolvency cooperation regime was originally supposed to be in the form of a convention, which was unfortunately not favored by all contracting States and did not succeed in the end.[504] The current EU cross-border insolvency regime is adopted in the form of regulation because systematic cross-border insolvency cooperation throughout EU was regarded as a matter of "inescapable".[505] The Regulation is binding in its entirety, has general application and is directly applicable in all EU member states, except for Denmark,[506] which used to be a Community legal instrument based on ex Article 65 TEC[507] and now a Union legal instrument in accordance with Article 81 TFEU.[508] By means of regulation, it enables EU to provide directly binding measures on cross-border judicial cooperation between the Member States.[509]

4.09 In contrast to the binding characteristics of the Regulation, the Model Law adopted a soft law mechanism, which is of voluntary nature and subject to different national enactment. As pointed out by Berends that from the beginning it was clear that the UNCITRAL instrument "should be cast in a different mold".[510] Without equivalent institutional arrangements like EU and also considering the diversity of national legislations, it might be too ambitious to achieve a binding text on a global level at that time. Hence, the Model Law is a recommendation in essence. On the other hand, the flexibility of the Model Law also guarantees that its "membership" is widely open, which enables its far more extensive potential range of application than the Regulation.

1.7 Objectives

1.2.1 General Objectives

4.10 With its entry into force on 31 May 2002, the EC Regulation filled in the gap left behind by the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [now Brussels Regulation I (recast)].[511] The birth of the EC Regulation is triggered by the need of a uniform

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[504] There was a Preliminary Draft Convention that evolved over the years from 1960 to 1980 (Phase I), which failed in the end. In 1995 the Convention on Insolvency Proceedings was signed by 12 states (Phase II). By April 1996, fourteen Member States had signed the EU Convention and only the United Kingdom had not yet done so due to the mad-cow disease. See also Moss, Gabriel, Fletcher, Ian F, Isaacs, Stuart (ed.), The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide (2nd ed.), Oxford University Press, 2009, para. 1.01- 1.25.

[505] See Fletcher, Ian, Insolvency in Private International Law. National and International Approaches, Oxford Private International Law Series, Oxford University Press 2nd ed. 2005, para. 7.02.

[506] The EC Regulation, recital (8), (33); the EU Regulation (recast), recital (8), (88); See also Moss, Fletcher, Isaacs (ed.), The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide (2nd ed.), Oxford University Press, 2009, para. 1.02

[507] The EC Regulation, recital (2)

[508] The EU Regulation (recast), recital (3)

[509] The EC Regulation, Recital (8); the EU Regulation (recast), recital (8)

[510] Berends, André, The UNCITRAL Model Law on Cross-border Insolvency: A Comprehensive Overview, in: 6 Tul. J. Int'l & Comp. L., pp. 319.

[511] Brussels I refers to Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which replaced the 1968 Brussels Convention with effect from 1 March 2002 [2001] OJ L12. Brussels I

efficient and effective cross-border insolvency system within EU, as stressed by the Council, which can better safeguard "the proper functioning of the internal market."[512] It has been concluded by Virgós and Garcimartín that the EC Regulation has three basic objectives:

"(1) to provide for legal certainty in cross-border insolvency;
(2) to promote the efficiency of insolvency proceedings, by favoring those solutions which facilitate their administration and improve the *ex ante* planning of transactions;
(3) to remove inequalities among Community-based creditors with regard to access and participation in such proceedings"[513]

4.11 The Model Law, which was adopted in 1997, is designed to assist States to equip their insolvency laws with a modern, harmonized and fair framework to address more effectively instances of cross-border insolvency.[514] The Model Law indicates its objectives explicitly under the Preamble:

"(a) Cooperation between the courts and other competent authorities of State and foreign States involved in cases of cross-border insolvency;
(b) Greater legal certainty for trade and investment;
(c) Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
(d) Protection and maximization of the value of the debtor's assets; and
(e) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment."

4.12 It is unsurprisingly that the EC Regulation and the Model Law, both of which are leading international insolvency regimes, generally aims at assisting states in operating transnational insolvency systems in an efficient, fair and cost-effective manner, providing legal certainty and protecting equal treatment of creditors. The EU Regulation (recast) brings the common objectives closer, by introducing the aims of promoting rescue into the existing European cross-border insolvency regime[515] and encouraging cooperation and communication between all the actors involved, including insolvency practitioners and the courts.[516] Nevertheless, in pursuit of efficient administration of the debtor's insolvency estate and effective realization of the total assets, the EU Regulation (recast) lays different emphasis on coordination. In case of a single debtor, the dominant role of the main proceedings shall be preserved in the way that insolvency practitioners in the main proceedings are granted with powers to intervene if the secondary proceedings are considered unsupportive for the efficient and

was replaced by Brussels I (recast), Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matter (recast), which became applicable on 10 January 2015. Article 2(b) of the Brussels I (recast) explicitly excludes bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogues proceedings.

[512] The EC Regulation, recital (2)

[513] Virgós and Garcimartín, The European Insolvency Regulation: Law and Practice, Kluwer Law International, 2004, p.7

[514] Guide and Interpretation, para.1

[515] The EU Regulation (recast), recital (10), article 1(1), 47

[516] The EU Regulation (recast), recital (48), (49), article 41, 42, 43, 56,57,58

effective realization of the total assets.[517] With respect to coordination of insolvency proceedings relating to group of companies, the EU Regulation (recast) provides the integrated possibilities, which are the group coordination proceedings on a voluntary basis,[518] in addition to the combined efforts of all the actors involved in the multiple proceedings through compulsory cooperation and communication.[519]

1.2.2 Aim of Prevention of Forum Shopping

4.13 Despite those general objectives in common, the EC Regulation alone literally sets up the aim of prevention of forum shopping[520] and the EU Regulation (recast) further attempts to rule out forum shopping in a fraudulent or abusive manner.[521] Such an arrangement is tied to the characteristics of cross-border insolvency law and the requirement of the effective functioning of the internal market.

4.14 As summarized by Bell, forum shopping is possible because first, there are potential parallel forums that are available to be selected;[522] second, the legal systems in those potentially available forums must be heterogeneous.[523] In international insolvency law, debtor's center of main interests (COMI) is the criterion to determine the jurisdiction of the main proceedings. It is not defined and shall be assessed based on facts. COMI's fact-dependent feature provides opportunities for shift and manipulation of forum.[524] Change of forum would not be necessary if the insolvency system was the same everywhere. On the contrary, the fact is that each Member State in EU has its own insolvency law, which can be perceived through the Annex A to the Regulation. In accordance with Heidelberg-Luxembourg-Vienna Report as well as Impact Assessment issued by EU Commission, for example, UK is deemed as an attractive venue because it provides flexible restructuring tools for corporates in default[525] as well as shorter time period of discharge for indebted individuals[526].

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[517] The EU Regulation (recast), recital (41)

[518] The EU Regulation (recast), recital (55), (56)

[519] The EU Regulation (recast), recital (52)

[520] The EC Regulation, recital (4)

[521] The EU Regulation (recast), recital (5), (29), (31)

[522] Bell, Andrew, Forum Shopping and Venue in Transnational Litigation, Oxford, 2003, p.5

[523] Bell, Andrew, Forum Shopping and Venue in Transnational Litigation, Oxford, 2003, p.25

[524] Eidenmüller, Horst, Abuse of Law in the Context of European Insolvency Law, in: 6 ECFLR 1, 2009, p.4

[525] Hess, Oberhammer, Pfeiffer, European Insolvency Law-The Heidelberg-Luxembourg-Vienna Report on the Application of Regulation No.1346/2000/EC on Insolvency Proceedings (External Evaluation JUST/2011/JCIV/PR/0049/A4), C.H.Beck.Hart.Nomos, 2014, para.175; EU Commission Staff Working Document Impact Assessment Accompanying the document - Revision of Regulation (EC) No 1346/2000 on insolvency proceedings, Strasbourg, 12.12.2012, SWD(2012) 416 final, at 3.4.1.2, p. 21

[526] Hess, Oberhammer, Pfeiffer, European Insolvency Law-The Heidelberg-Luxembourg-Vienna Report on the Application of Regulation No.1346/2000/EC on Insolvency Proceedings (External Evaluation JUST/2011/JCIV/PR/0049/A4), C.H.Beck.Hart.Nomos, 2014, para.121; EU Commission Staff Working Document Impact Assessment Accompanying the document - Revision of Regulation (EC) No 1346/2000 on insolvency proceedings, Strasbourg, 12.12.2012, SWD(2012) 416 final, at 3.4.1.2, p. 20

4.15 In EU, the freedom of establishment of companies is regarded as one of the fundamental principles guaranteed currently by the TFEU,[527] which is of central significance to the effective functioning of internal market.[528] Following its interpretation in *Centros*,[529] the CJEU continues in the case law to support the freedom of establishment in case of allegedly abusive conduct[530] and embrace a very liberal and "pro-free market" point of view,[531] which might facilitate COMI shift.[532] The EU Regulation (recast) thus introduced a look-back period of three months to ease the tension between the freedom of establishment and avoidance of COMI shift.[533] It is also required that a study on the issue of abusive forum shopping shall be submitted by the Commission to the European Parliament, the

[527] TFEU, article 49 (ex article 43 TEC), Article 54 (ex article 48 TEC); Case C-55/94, *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, Case C-2/74, *Jean Reyners v Belgian State* [1974] ECR 631

[528] European Commission, the EU Single Market: freedom to provide services/ freedom of establishment, at: http://ec.europa.eu/internal_market/top_layer/living_working/services-establishment/index_en.htm (Last visited on 14 June 2016)

[529] Case C-212/97, *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-01459, at 27: "That being so, the fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment. The right to form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty."

[530] Case C-208/00, *Überseering BV v Nordic Construction Company Baumanagement GmbH* [2002] ECR I-09919, at 95: "where a company formed in accordance with the law of a Member State (`A') in which it has its registered office exercises its freedom of establishment in another Member State (`B'), Articles 43 EC and 48 EC require Member State B to recognise the legal capacity and, consequently, the capacity to be a party to legal proceedings which the company enjoys under the law of its State of incorporation (`A')."

Case C-411/03, *Sevic Systems AG* [2005] ECR I-10805, at 19: "Cross-border merger operations, like other company transformation operations, respond to the needs for cooperation and consolidation between companies established in different Member States. They constitute particular methods of exercise of the freedom of establishment, important for the proper functioning of the internal market, and are therefore amongst those economic activities in respect of which Member States are required to comply with the freedom of establishment laid down by Article 43 EC."

Case C-210/06, *Cartesio Oktató és Szolgáltató bt,* [2008] ECR I-09641, at 124: "as Community law now stands, Articles 43 EC and 48 EC are to be interpreted as not precluding legislation of a Member State under which a company incorporated under the law of that Member State may not transfer its seat to another Member State whilst retaining its status as a company governed by the law of the Member State of incorporation."

Case C-378/10, *VALE Építési Kft.* [2012], at 41: "Articles 49 TFEU and 54 TFEU must be interpreted as precluding national legislation which enables companies established under national law to convert, but does not allow, in a general manner, companies governed by the law of another Member State to convert to companies governed by national law by incorporating such a company."

[531] Tridimas, P. Taski, Abuse of Right in EU Law: some reflections with particular reference to financial law, 2009, p.15, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1438577 (Last visited on 14 June 2016)

[532] Eidenmüller, Horst, Abuse of Law in the Context of European Insolvency Law, in: 6 ECFLR 1, 2009, p.12

[533] The EU Regulation (recast), recital (31)

Council and the European Economic and Social Committee in no later than 3 years after the EU Regulation (recast) 's entry into enactment.[534]

4.16 The Model Law does not set up prevention of forum shopping as its objective and actually it is a concept that has not been mentioned in its main text. Instead, there is an equivalent concept of forum shopping stated under the Guide and Interpretation Law, which is abuse of process.[535] Under the circumstance that an applicant falsely claims the center of main interests to be in a particular State, whether or not that constitutes a deliberate abuse of the process and accordingly provides a ground to decline recognition is not governed by the Model Law but by domestic law or procedural rules.[536] Therefore, prevention of abuse of the process will bring two consequences to the Model Law regime. One is refusal of recognition and the other, non-uniformity in its application. Recognition is one of the core objectives of the Model Law. Refusal of recognition will undermine its function, i.e. "to foster international cooperation as a means of maximizing outcomes for all stakeholders".[537] Therefore, it is suggested that domestic law or procedural rules applied to abuse of process should be narrowly construed. [538] In addition, unlike the Regulation, which is a Union legal instrument binding in its entirety, uniformity in its application is the goal the Model Law shall strive for.[539] Without a uniform criteria of abuse of process, the enacting State should apply its domestic law with due consideration and regard has to be given to international origins of the Model Law.[540] In sum, although the courts are not prevented from applying domestic law or procedural rules in response to an abuse of process,[541] the two overriding purposes of the Model Law, including reducing the possibility of non-recognition to the minimum and promoting uniformity in application on international level, outweigh the necessity to set up prevention of abuse of process as an objective.

1.8 Scopes

1.3.1 Definitions

4.17 The definition of insolvency proceedings under the EC Regulation has four characteristics.[542] Some has been reserved and some has been changed pursuant to the EU Regulation (recast). First of all, the general scopes of application of both of them are the same, which applies to collective insolvency proceedings.[543] Secondly, it is required that the proceedings under the EC Regulation must be based on the debtor's insolvency and not on any other grounds.[544] The EC Regulation inherited the traditional concept of insolvency, which attached

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[534] The EU Regulation (recast), article 90(4)
[535] Guide and Interpretation, para.161-162
[536] Guide and Interpretation, para.162
[537] Guide and Interpretation, para.161
[538] Guide and Interpretation, para.161
[539] Guide and Interpretation, para.22
[540] Guide and Interpretation, para.161
[541] Guide and Interpretation, para.162
[542] Virgós/Schmit Report (1996), para.49
[543] The EC Regulation, recital (9); the EU Regulation (recast), recital (12)
[544] Virgós/Schmit Report (1996), para.49(b)

importance to liquidation and distribution of the remaining assets of the debtor's.[545] According to Wessels, the liquidation approach prevailed in Europe during the last two decades of the last century.[546] The EC Regulation restricts the secondary proceedings to liquidation.[547] In accordance with the EC Regulation, even the person or body, who is entrusted with the administration of the assets of the debtor in the insolvency proceedings, are called "liquidators".[548] As pointed by the European Commission in its Impact Assessment, that traditional preference now becomes an obstacle to promote the rescue of business in financial difficulties and fails to sufficiently reflect "current EU priorities and national practices in insolvency law".[549] For the purpose of promoting the rescue culture, the EU Regulation (recast) broadens the definition of insolvency proceedings, which also covers pre-insolvency proceedings on an interim or provisional basis and hybrid proceedings, in which the debtor can continue to manage its assets and affairs (debtor in possession).[550] Accordingly, the liquidation limitation set on the secondary proceedings has been removed, which will be discussed in the following section. Thirdly, the EU Regulation (recast) also substitutes the term "liquidators" with a more extensive one, "insolvency practitioners", including on an interim basis,[551] which echoes its rescue-oriented reform. Thirdly, it is required under the EC Regulation alone that the proceedings should entail at least partial divestment of that debtor, which is influenced by the liquidation approach, and the appointment of a liquidator.[552] That means the power of administration and disposal of the debtor's assets are vested in total or in part in the liquidator or through the intervention and control of the liquidator's actions.[553] The appointment of liquidators is no longer considered a component of the definition concerning insolvency proceedings under the EU Regulation (recast) because in the process of debt restructuring such appointment is not always deemed necessary.[554] Fourthly, the definition of the insolvency proceedings under the EC Regulation was exclusively enclosed with relevant Annexes.[555] The close-list approach serves as direct indication of applicability of the EC Regulation and generated high degree of legal certainty, which has also been followed by the EU Regulation (recast).

4.18 The EC Regulation and the Model Law used to have considerable disparities in definitions of insolvency proceedings, which have now been notably reduced

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[545] Hess, Oberhammer, Pfeiffer, European Insolvency Law-The Heidelberg-Luxembourg-Vienna Report on the Application of Regulation No.1346/2000/EC on Insolvency Proceedings (External Evaluation JUST/2011/JCIV/PR/0049/A4), C.H.Beck.Hart.Nomos, 2014, para.36

[546] Wessels, Bob, Themes of the future: rescue businesses and cross-border cooperation, in: Insolv.Int. 2014, 27(1), p.4

[547] The EC Regulation, article 3(3), Annex C

[548] The EC Regulation, article 1(1), Annex B

[549] EU Commission Staff Working Document Impact Assessment Accompanying the document - Revision of Regulation (EC) No 1346/2000 on insolvency proceedings, Strasbourg, 12.12.2012, SWD(2012) 416 final, at 3.1, p. 10

[550] The EU Regulation (recast), article 1(1), 2(4), Annex A

[551] The EU Regulation (recast), article 2(5), Annex B

[552] Virgós/Schmit Report (1996), para.49(c), (d)

[553] Virgós/Schmit Report (1996), para.49(c)

[554] The EC Regulation, article 1(1)

[555] The EC Regulation, article 1(1), 2(a), (b)

due to the revision of the former. First of all, both the EU Regulation (recast) and the Model Law require that the insolvency proceedings should be collective proceedings, [556] albeit in accordance with the EU Regulation (recast), the insolvency proceedings are exhaustively listed in Annex A.[557] Secondly, both the Regulation and the Model Law can cover any collective proceedings, regardless of for the purpose of reorganization or liquidation or interim proceedings.[558]

4.19 Thirdly, both the EU Regulation (recast) and the Model Law provide that the collective proceedings should be based on a law relating to insolvency[559] but they have different focuses. The EU Regulation (recast) requires that proceedings are not qualified as pursuant to laws relating to insolvency unless they are designed exclusively for insolvency situations.[560] On the contrary, the Model Law aims at seeking a compatible description in order to encompass a range of insolvency rules as extensive as possible regardless of whether the specific statue or law is exclusively related to insolvency or not labeled as insolvency law but addressing insolvency *de facto* (e.g. company law).[561] Moreover, the Model Law also acknowledges that insolvency proceedings may be initiated under specific circumstances defined by law of some enacting states that the debtor is not in fact insolvent.[562] It therefore establishes a rebuttable presumption of insolvency of the debtor for the purposes of commencing a local insolvency proceeding, which is, recognition of a foreign main proceeding can be deemed as proof that the debtor is insolvent.[563]

4.20 Fourthly, both the EU Regulation (recast) and the Model Law requires that the collective proceedings should be subject to "control or supervision" by a court.[564] Nevertheless, the EU Regulation (recast) neither clarifies the level of control or supervision required to satisfy this aspect of the definition nor the time at which that control or supervision should arise. It merely indicates in its recital that the intervention by the court on appeal by a creditor or other interested parties can meet the condition of "control or supervision" by a court.[565] Meanwhile, UNCITRAL makes some clarification concerning "control or supervision". In accordance with Guide and Interpretation, a proceeding in which the debtor retains some measure of control over its assets, albeit under court supervision, such as a debtor-in-possession would fulfill the condition.[566] In addition, indirect control or supervision exercised by an actor, such as an insolvency representative, who is subject to control or supervision by the court,

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[556] The EC Regulation, recital (10), article 1(1); the EU Regulation (recast), article 2(1); the Model Law, article 2(a), Guide and Interpretation, para.69-70
[557] The EU Regulation (recast), recital (9), article 2(4)
[558] The EU Regulation (recast), article 1(1), 2(4), Annex A; the Model Law, article 2(a)
[559] The EU Regulation (recast), recital (16), article 1(1); the Model Law article 2(a), Guide and Interpretation, para.73
[560] The EU Regulation (recast), recital (16)
[561] Guide and Interpretation, para.73
[562] Guide and Interpretation, para. 72
[563] The Model Law, article 31
[564] The EU Regulation (recast), recital (10), article 1(1); the Model Law, article 2(a)
[565] The EU Regulation (recast), recital (10)
[566] Guide and Interpretation, para.74

can qualify as well.[567] As for the proper time of control or supervision, it recognizes that expedited reorganization proceedings, which need control or supervision by a court at a late stage of the insolvency process, should also be counted in.[568] Last but not least, fully aware of the importance of disclosure of information to the creditors and to preserve the collective nature of the proceedings,[569] the EU Regulation (recast) also literally introduces the word "public" into the definition of insolvency proceedings,[570] which is different from its predecessor and the Model Law.

1.3.2 Exclusion

4.21 First of all, the Regulation and the Model Law has slightly different attitudes towards whether or not to include natural persons and non-traders. In accordance with the Regulation, the courts of the other Member States shall unconditionally grant recognition without being able to review the assessment on the basis of domestic legal rule, which is made by the court that opened the main insolvency proceedings enclosed in the Annexes.[571] The supportive basis, as indicated by the CJEU, is the principle of mutual trust, which should be deemed as "the waiver by the Member States of the right to apply their internal rules on recognition and enforcement in favor of a simplified mechanism for the recognition and enforcement of judgments handed down in the context of insolvency proceedings."[572] The Model Law is not established on the ground of the principle of mutual trust. Considering that in some jurisdictions there is no special insolvency regime governing natural persons and non-traders, they can be excluded from the scope of application of the Model Law if it is so required in accordance with the insolvency law of the enacting State.[573]

4.22 Secondly, both the Regulation and the Model Law exclude the financial institutions from the scope of application. The insolvency proceedings related to insurance undertakings,[574] credit institutions and investment undertakings[575]

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[567] Guide and Interpretation, para.74

[568] Guide and Interpretation, paras.75-76; See also Legislative Guide, Part two, Ch. IV, paras. 76-94 and Recommendations 160-168

[569] EU Commission Staff Working Document the Impact Assessment Accompanying the document Revision of Regulation (EC) No 1346/2000 on insolvency proceedings, Strasbourg, 12.12.2012, SWD(2012) 416 final, at 3.4.3, p.24-25

[570] EU Regulation (recast), Article 1(1)

[571] Case C-444/07, *MG Probud Gdynia sp. z o.o*. [2010] ECR I-00417, para. 29, 39, 40; *Eurofood,* para.42, 46, 47

[572] The EC Regulation, recital (22); the EU Regulation (recast), recital (69); Case C-444/07, *MG Probud Gdynia sp. z o.o*. [2010] ECR I-00417, para.28; Case C-341/04 *Eurofoods IFSC Ltd* [2006] ECR I-03813 (*Eurofood*), para.40

[573] Guide and Interpretation, para. 61

[574] Council Directive (EC) 2001/17 on the reorganization and winding-up of insurance undertakings, O.J. L 110 of 20 April 2001.

[575] Council Directive (EC) 2001/24 on the reorganization and winding-up of credit institutions, O.J. L 125 of 5 May 2001; Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field as amended by Directive 95/26/EC; Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities, amended by Directive 95/26/EC

have been left outside the scope of application under the EC Regulation.[576] As explained in the Virgós/Schmit Report, those aforementioned institutions are subject to prudential supervision under national laws as well as regulated pursuant to the standards set up by the Directives.[577] Due to the amendments to those related Directives, the EU Regulation (recast) further specifies that investment firms and other firms, institutions and undertakings[578] as well as collective investment undertakings shall be excluded.[579] The Model Law also provides the possibility of excluding the financial institutions, such as banks or insurance companies because they are usually subject to a special insolvency regime under the national law.[580]

4.23 Thirdly, with respect to whether proceedings are based on a law relating to insolvency, the EU Regulation (recast) provides that those proceedings that are based on general company law shall be excluded.[581] Hence, UK schemes of arrangement based on the Companies Act 2006, s 885 are beyond the scope of the recast Regulation. It is further clarified that certain adjustment of debt proceedings concerning a natural person of very low income and very low asset value, which never makes provisions for payment to creditors, should be excluded.[582] Accordingly, UK Debt Relief Orders based on Part 7A of the Insolvency Act 1986 (c. 45) do not fall within the ambit of the recast Regulation. As aforementioned in section 1.3.1, the Model Law has wider extent in this regard by acknowledging proceedings opened on the basis of specific law, which is not exclusively related to insolvency but addresses insolvency *de facto*, such as company law.[583] Nevertheless, it is noteworthy that the Model Law explicitly excludes a simple proceeding for a solvent legal entity, which merely seeks to dissolve its legal status, instead of pursuing reorganization.[584]

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[576] The EC Regulation, recital (9), article 1(2)

[577] Virgós/Schmit Report (1996), para.54

[578] The EU Regulation (recast), recital (19), article 1(2)(c); The investment firms and other firms, institutions and undertakings are referred to those to the extent these are covered by Directive 2001/24/EC as amended. On 15 May 2014, Directive 2014/59/EU of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (hereinafter, Directive 2014/59/EU) was issued. The Directive 2014/59/EU will apply to both credit institutions investment firms. Thus the Directive 2001/24/EC, which provides for the mutual recognition and enforcement in all Member States of decisions concerning the reorganization or winding up of institutions having branches in Member States other than those in which they have their head offices, shall be amended accordingly. Directive 2014/59/EU, recital (1), (119)

[579] The EU Regulation (recast), recital (19), article 1(2)(d), 2(2): collective investment undertakings means undertakings for collective investment in transferable securities (UCITS) as defined by Directive 2009/65/EC and alternative investment funds (AIFs) as defined by Directive 2011/61/EU. On 23 July 2014 the European Union adopted Directive 2014/91/EU amends the current Directive 2009/65/EC. On 17 December 2013 the European Commission adopted a Delegated Regulation (EU) No 694/2014 supplementing Directive 2011/61/EU.

[580] The Model Law, Article 1(2); Guide and Interpretation, para.56

[581] The EU Regulation (recast), recital (17)

[582] The EU Regulation (recast), recital (17)

[583] Guide and Interpretation, para.73

[584] Guide and Interpretation, para.73

4.24 Last but not least, by introducing the word 'public' into the definition of insolvency proceedings,[585] the EU Regulation (recast) alone confirms that no confidential proceedings should be included.[586] For example, French *mandataire ad hoc* and conciliation proceedings, which are both out-of-court settlement proceedings (règlement amiable) based on Article L611-13 and L611-4 of French Commercial Code and are preventative and confidential in nature, should thus be excluded.

1.4 Structures

4.25 The Regulation consists of recitals, articles and annexes. There are 33 recitals and 47 articles under the EC Regulation and 89 recitals and 92 articles under the EU Regulation (recast). The main text of the EC Regulation is composed of international private law rules in matters of jurisdiction, applicable law, recognition and enforcement of judgments, cooperation and communication involving cross-border insolvency proceedings, which has been excluded from the scope of the Brussels I[587] that is now repealed by the Brussels I (recast).[588] Deriving from the EC Regulation, the EU Regulation (recast) makes an overall improvement of the aforementioned basic contents and further enhances the function of cooperation and communication, sets out provisions related to group companies and the interconnection of insolvency registers. The recitals are placed prior to the main text, which present the background, context and aims of the Regulation. Besides, the recitals of the Regulation possess explanatory function. Although the definitions contained in them are not binding,[589] they can equip the national courts and the CJEU with guidance for proper understanding and interpretation of the Regulation.[590] That probably explains why the amount of the recitals grows proportionally to those of the articles under the EU Regulation (recast).

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[585] The EU Regulation (recast), recital (12), article 1(1)

[586] The EU Regulation (recast), recital (13)

[587] The EC Regulation, recital (7); Brussels I refers to Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which replaced the 1968 Brussels Convention with effect from 1 March 2002 [2001] OJ L12

[588] The EU Regulation (recast), recital (7); Brussels I (recast) refers to Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matter (recast), which replaced the Brussels I and came into effect on 10 January 2015. OJ 20 December 2012, L 351/1

[589] Virgós and Garcimartín, The European Insolvency Regulation: Law and Practice, Kluwer Law International, 2004, p. 7

[590] *Re BRAC Rent-A-Car-International Inc* [2003] BCC 248, 251C (Lloyd J): the recitals "help to cast light on some of the substantive provisions", (qtd. in Moss, Fletcher & Isaacs (ed.), The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide (2nd ed.), Oxford University Press, 2009, p.32 footnote 90); The recitals were decisive in e.g. Case C-294/02, *Commission of the European Communities v AMI Semiconductor Belgium BVBA and Others* [2005] ECR I-02175; *Commission v. AMI Semiconductor Belgium BVBA* [2005] C-294/02 and, Case C-1/04 *Susanne Staubitz-Schreiber* [2006] ECR I-00701 (*Staubitz-Schreiber*) (qtd. in Wessels, Bob, International Insolvency Law (3rd ed.), 2012, 10489 (5)

4.26 There are three annexes attached to the EC Regulation, which determine whether or not the relevant national insolvency proceedings and liquidators fall within the ambit of the EC Regulation. The three annexes are equally important for the application of the EC Regulation. Annex A contains a list of insolvency proceedings pursuant to article 2(a). Annex B includes a list of winding-up proceedings in accordance with article 2(c). Annex C refers to persons and organs, qualifying as liquidators based on article 2(b). These annexes work together with the main text of the EC Regulation by indicating which national legal institutions fall within the ambit of the definitions. The "close-list method" serves to provide liquidators and courts with a simple method of consulting the annexes to verify whether the EC Regulation is applicable to a specific proceeding.[591] Four annexes are enclosed to the EU Regulation (recast). Compared to their predecessors, the renewed annexes have undergone content and structural adjustments. In accordance with the EU Regulation (recast), winding-up proceedings are no longer the sole attribute assigned to the secondary proceedings. Therefore, it is no longer necessary to provide a separate list as under the Annex B to the EC Regulation. The recast Annex A is an integrated list of insolvency proceedings, including interim proceedings as well as proceedings related to rescue, adjustment of debt, reorganization or liquidation.[592] The revised Annex B accommodates any person or body, including on an interim basis, who are qualified as insolvency practitioners under the relevant national law of each member state.[593] The renewed Annex C records the list of successive amendments to related EU legislations due to repeal of the EC Regulation.[594] In addition, a correlation table is placed in the Annex D adhered to the EU Regulation (recast) in order to provide relevant references to the repealed EC Regulation.

4.27 The Model Law consists of Preamble and 32 articles. According to Berends, the general idea behind the Model Law is that "there are only three things that are important in cross-border insolvency: speed, speed, and more speed. To put it bluntly: act first, think later."[595] The Model Law focuses on four elements identified as key to the conduct of cross-border insolvency cases: access, recognition, relief (assistance) and cooperation.[596] As an international instrument, the Model Law does not contain any close-list annexes, in which applicable insolvency proceedings are mandatorily included. Instead, the Model Law leaves room for national legislations by inserting brackets filled with *italics*, which can be replaced by introducing relevant national legislations into the model provisions.

4.28 Besides, the Model Law is complemented by guides, which gradually evolved to cope with the demands in practice. Among all those guides, the Guide

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[591] Wessels, Bob, International Insolvency Law (3rd, ed.), at 10443; see also Virgós/Schmit Report (1996), para. 9.
[592] The EU Regulation, recital (7), (9), article 1(1), 2(4)
[593] The EU Regulation, recital (21), article 2(5)
[594] The EU Regulation, Annex C
[595] Berends, André, The UNCITRAL Model Law on Cross-border Insolvency: A Comprehensive Overview, in: 6 Tul. J. Int'l & Comp. L., pp. 320.
[596] The Judicial Perspective, at 13

to Enactment is of particular importance, which provides background and explanatory information as well as article-by-article remarks (as revised in 2013, titled "Guide to Enactment and Interpretation", hereinafter Guide and Interpretation). UNCITRAL has also adopted the Legislative Guide on Insolvency Law in 2004 (the Legislative Guide), the Practice Guide on Cross-border Insolvency Cooperation in 2009 (the Practice Guide on Cooperation), Part III to the Legislative Guide (treatment of enterprise groups) in 2010 (the Legislative Guide Part III), the Judicial Perspective in 2011 as well as Part IV to the Legislative Guide (Directors' obligations in the period approaching insolvency) in 2013.[597] In addition, once enacted, the Model Law will be included in the CLOUT information system, which is used for collecting and circulating information on case law relating to the conventions and model laws that have emanated from the work of UNCITRAL. The purpose of the system is to "promote international awareness" of the legislative texts formulated by UNCITRAL and to "facilitate their uniform interpretation and application".[598]

1.5 Ways of Interpretation

4.29 The Regulation is supposed to be uniformly applied throughout the Member States. However, there is risk of mistranslation since the Regulation is translated into about 23 official languages and each version is equally authoritative. A report, written by Virgós and Schmit (the Virgós/Schmit Report), was published together with the 1995 Insolvency Convention that was adopted nearly verbatim by the EC Regulation.[599] Judicial opinions and legal academics unanimously hold that this report is a source of authoritative explanatory guidance for the interpretation of the EC Regulation.[600] Nevertheless, with the development of the Regulation and the contents replaced, updated sources of explanatory statement are needed. As aforementioned, the recitals, the number of which is notably increasing under the EU Regulation (recast), can be regarded as guidance to proper understanding of the revised Regulation. Moreover, as a Union legal instrument, the Regulation is subordinate to the Union legal order and rules. Therefore, the Regulation shall be interpreted in such a way that is consistent with the Treaty articles as well as general principles of Union law that govern it, which have been recognized as such by the Court of Justice of the European Union (CJEU).[601] In accordance with the Treaty on the Functioning of the European Union (TFEU), the CJEU is granted the jurisdiction to give preliminary

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[597]The texts are available at http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency.html (Last visited on 14 June 2016)

[598] Guide and Interpretation, para.243

[599] Virgós and Garcimartín, The European Insolvency Regulation: Law and Practice, Kluwer Law International, p. 7

[600] Academic perspective: Virgós and Garcimartín, The European Insolvency Regulation, p. 7; Vallender, Aufgaben und Befugnisse des deutschen Insolvenzrichters in Verfahren nach der EuInsVO, KTS . 2005, p 283, 288; in: Pannen, Klaus. cit., Introduction, mn 41, p. 17; Smid, Stefan, Deutsches und Europäisches Internationales Insolvenzrecht Kommentar, Kohlhammer, 2012, mn 14; Judicial perspective: Case C-341/04 *Eurofood IFSC Ltd* [2006] ECR I-03813 (*Eurofood*), Opinion of AG Jacobs, at 2; Case C-396/09 *Interedil Srl (in liquidation) v Fallimento Interedil Srl, Intesa Gestione Crediti SpA* [2011] ECR I-09915 (*Interedil*), Opinion of AG Kokott, at 63

[601] Moss, Fletcher & Isaacs, The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide (2nd ed.), Oxford University Press, 2009, para. 2.19

rulings concerning the interpretation of the Regulation,[602] who safeguards the coherent interpretation of autonomous meanings inherent in the Regulation. Fully aware of its the contribution in that regard, the EU Regulation (recast) even directly refers to the case law of the CJEU in its recitals.[603]

4.30 Considering the diversity of national legislations, the drafters of the Model Law placed text in italics between square brackets to "instruct" the national legislators to complete the text in their own way.[604] Although the spirit of a Model Law and the intention of its drafters, is that a State should stay as close as possible to the text of the Model Law to ensure a degree of certainty and predictability, the degree of harmony is likely to be lower than that resulting from a convention.[605] In order to tailor the Model Law to the national insolvency system, the modification to the uniform text is thus foreseeable. In light of interpreting the provisions of the Model Law, it is required under the Article 8 of the Model Law to take consideration its international origin so as to promote the uniformity in its application and the observance of good faith. Besides, CLOUT, the UNCITRAL Case Law database, also helps to harmonize interpretation of the Model Law in the way of providing information of relevant judicial decisions.[606] However, it can be an obstacle for CLOUT to collect the relevant cases if the enacted state does not have a specialized case database at the national level. In addition, the UNICTRAL secretariat also assists States with technical consultations for the preparation of legislation based on the Model Law.[607] Nonetheless, the UNICTRAL secretariat does not function as the CJEU to issue authoritative judgments, which can directly interfere with the interpretation of the Regulation in a uniform manner.

Ch.2 Jurisdiction

4.31 COMI and establishments are terms relating to determination of jurisdiction employed by both the Regulation and the Model Law. This chapter will introduce the two terms separately. For each of them, the introduction will start with their origins. Then I will move on to explain the reasons of ambiguity of the concept, in particular, COMI, and the problems incurred by application of the overlapping concepts, including the timing issues, under the EC Regulation and the Model Law in practice. I will further explore the development of interpretation under the EU Regulation (recast) as well as under the Model Law based on the legal texts and the case law.

2.1 COMI

2.1.1 Origin

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[602] TFEU, article 267 (ex article 234 EC Treaty)

[603] The EU Regulation, recital (18), (24)

[604] Berends, André, The UNCITRAL Model Law on Cross-border Insolvency: A Comprehensive Overview, in: 6 Tul. J. Int'l & Comp. L., pp. 320, 323.

[605] Wessels, Bob, International Insolvency Law (3rd ed.), Vol.X, Deventer: Kluwer, 2012, para. 10195; See also the Guide and Interpretation, para. 20.

[606] Guide and Interpretation, para. 107

[607] Guide and Interpretation, para. 242

4.32 By incorporating COMI into the respective texts,[608] the Regulation and the Model Law literally utilize the same terminologies to indicate the jurisdiction in cross-border insolvency. In fact, it is the EC Regulation that inspired both the contents and the formulations of COMI under the Model Law.[609] Therefore, to find the origins of the two concepts, it is necessary to trace the relevant sources in the EU context.

4.33 The EC Regulation does not contain a definition of COMI. Instead, it offers a presumption, which is rebuttable. What is the reason behind that kind of arrangement? It can be deemed as a balance between the real seat theory of the civil law and state of incorporation theory of the common law.[610] In Europe, there are two competing doctrines with respect to the domicile of companies,[611] incorporation vis-à-vis real seat. The place of incorporation prevailed in the common law system. Its reflection on cross-border insolvency law is that according to this theory, if there were to be proceedings in more than one country, the main proceedings would take place in the jurisdiction of the place of registration of the company, and proceedings in other jurisdictions would be ancillary to the main proceeding.[612] On the other hand, the real seat theory of jurisdiction espoused by the civil law prevails in Europe.[613] In the case of *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)*,[614] the CJEU mentioned the points of view of Germany's Bundesgerichtshof with respect to the weakness of the place of incorporation

"where the connecting factor is taken to be the place of incorporation, the company's founding members are placed at an advantage, since they are able, when choosing the place of incorporation, to choose the legal system which suits them best. Therein lies the fundamental weakness of the incorporation principle, which fails to take account of the fact that a company's incorporation and activities also affect the interests of third parties and of the State in which the company has its actual centre of administration, where that is located in a State other than the one in which the company was incorporated."[615]

"by contrast, where the connecting factor is taken to be the actual center of administration, that prevents the provisions of company law in the State in which the

[608] The EC Regulation, recital (13), article 3(1); the EU Regulation (recast), recital (28), (30), article 3(1); the Model Law, article 2

[609] Guide and Interpretation, para.81, 88

[610] Fletcher, Insolvency in Private International Law (Oxford University Press, 2005, supplement 2007), p. 367.

[611] Brussels I Regulation, article 60(1)

[612] In *re English Scottish and Australian Chartered Bank*, [1893] 3 Ch. 385, 394 (U.K.); qtd Moss, Group Insolvency – Choice of Forum and Law: the European Experience under the Influence of English Pragmatism, 32 Brook. J. Int'l L. 1005 2006-2007, pp.1008, ft. 17.

[613] Moss, Fletcher, Isaacs(ed.), The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide (2nd ed.), Oxford University Press, 2009, para. 3.12

[614] *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)*, C-280/00, 5 November 2002.

[615] *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)*, C-280/00, 5 November 2002, para.15

actual center of administration is situated, which are intended to protect certain vital interests, from being circumvented by incorporating the company abroad."[616]

4.34 It is considered that it will be of more advantages to lay emphasis on substance instead of formality so that the insolvency cases can be dealt with in a more appropriate court where the debtor has a genuine connection. Accordingly, it seems that the theory of real seat is most likely the idea behind the "center of main interests" concept. However, it is not directly applicable but a possibility of replacement to the place of incorporation under the EC Regulation. It is designed in such a way, which implied that a consensus was hard to be reached between the common law and the civil law at the beginning and thus a compromise was indispensible.

2.1.2 Rebuttal of Presumption

2.1.2.1 EU

4.35 The aforementioned compromise gives rise to a controversial problem concerning the meaning of COMI, which is how to rebut the presumption of registered office. In EU, elusive nature of COMI used to result in different points of view between theory and practice. As Wessels observed, the legal literature has suggested that presumption is strong and difficult to be rebutted "under very specific circumstances".[617] Nevertheless, in accordance with the empirical research conducted based on 104 cases collected all over EU from 2002 to 2009, more than 80 per cent of the Member State courts whose decisions form the basis of this study rebutted the presumption of the cases[618] since the factors that could determine COMI were diverse.[619] The tension was firstly eased by the CJEU in the *Eurofood* case.[620] *Eurofood* is an Irish subsidiary wholly owned by an Italian company, Parmalat. The Italian court also opened an insolvency proceeding against *Eurofood* in Italy, determining that the COMI of it was in Italy. Later the Irish court also opened the insolvency proceeding against *Eurofood*, ruling that the COMI of it was in Ireland where it was registered. The CJEU affirmed the jurisdiction of the Irish court by indicating that

"the presumption … whereby the center of main interests of that subsidiary is situated in the Member State where its registered office is located, can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established

[616] *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)*, C-280/00, 5 November 2002, para.16

[617] Wessels, International Insolvency Law, 3rd ed.,Vol.X, Deventer: Kluwer, 2012, para.10568

[618] Mevorach, Irit, Jurisdiction in Insolvency, A Study of European Courts' Decisions, in: Journal of Private International Law, vol. 6, no. 2, 2010, p. 343.

[619] Marshall, Jennifer (ed.), European Cross-border Insolvency Looseleaf, Allen & Overy, Sweet & Maxwell, Latest Release: December 19, 2013, at 1.8.225; For instance, the "head office function", where activities such as making strategic, executive and administrative decisions regarding accounting, IT, corporate marketing, branding etc. are performed, see Gabriel Moss and Tom Smith, Commentary on Council Regulation 1346/2000 on Insolvency Proceedings, in: Moss Fletcher, Isaacs (ed.), para. 8.81; in *King v. Crown Energy Trading AG,* the judge utilized the "central administration" and the "principal place of business" to determine the COMI, *King v. Crown Energy Trading AG* [2003] E.W.H.C. 163 (Comm), at 12-14

[620] Case C-341/04 *Eurofoods IFSC Ltd* [2006] ECR I-03813 (*Eurofood*)

that an actual situation exists which is different from that which location at that registered office is deemed to reflect. That could be so in particular in the case of a company not carrying out any business in the territory of the Member State in which its registered office is situated. By contrast, where a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by that Regulation."[621]

4.36 In its decision of *Eurofood*, the CJEU set very high threshold to rebut the presumption, which could therefore be understood to equate COMI with the registered office.[622] However, later in the cases law, the CJEU gradually deviated from the strict approach adopted by the *Eurofood* with respect to Article 3(1). The *Interedil* case is the one of the most significance. In 2001, *Interedil* transferred its registered office from Italy to UK. In 2002, the company ceased all activity and was removed from the UK register. One year later, *Intesa Gestione Crediti SpA* filed insolvency proceedings against *Interedil* in Italy. *Interedil* challenged the jurisdiction of the Italian court on the ground that only the UK courts would have jurisdiction following the company's transfer to the UK. The CJEU was asked to provide guidance on how the COMI under Articles 2 and 3 was to be interpreted. The court indicated that a debtor company's main center of interests must be determined by attaching greater importance to the place of the company's administration. This place must be identified by reference to criteria that are both objective and ascertainable by third parties, in particular by the company's creditors. Importantly, the court held that if the bodies responsible for the company's management and supervision are in the same place as its registered office, the presumption in article 3(1) cannot be rebutted. Under the circumstance that a company's central administration is not to be found in the same place as its registered office, the CJEU concluded that the presence of objective factors, such as "immovable property owned by the debtor company, lease agreements, and the existence in that Member State of a contract concluded with a financial institution … may be regarded as objective factors and, in the light of the fact that they are likely to be matters in the public domain, as factors that are ascertainable by third parties",[623] can be taken into consideration. However, these elements cannot be regarded as sufficient factors to rebut the presumption, unless

"a comprehensive assessment of all the relevant factors makes it possible to establish, in a manner that is ascertainable by third parties, that the company's actual center of management and supervision and of the management of its interests is located in that other Member State."[624]

4.37 Following *Interedil*'s decision, the CJEU rendered another judgment involving similar issues in the *Rastelli* case. The Commercial Court of Marseille (Tribunal de commerce de Marseille) opened a main proceeding of Médiasucre,

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[621] *Eurofood*, para. 34 - 36

[622] McCormack, Gerard, Jurisdictional Competition and Forum Shopping in Insolvency Proceedings, in: 68 Cambridge Law Journal 169, 2009, p.189.

[623] Case C-396/09 *Interedil Srl (in liquidation) v Fallimento Interedil Srl, Intesa Gestione Crediti SpA* [2011] ECR I-09915 (*Interedil*)

[624] *Interedil,* para. 53

the registered office of which is located in France. The liquidator of Médiasucre filed the application in order to put Rastelli, an Italian registered company, together into the liquidation proceeding because the property of the two companies were intermixed. The request was approved by the French Court of Appeal (Cour d'appel d'Aix-en-Provence), holding that the liquidator's application was not intended to open insolvency proceedings against Rastelli but to join it to the judicial liquidation already opened against Médiasucre.[625] The Cour de cassation decided to stay the proceedings and to refer to the Court of Justice for the preliminary ruling on the questions of the effectiveness of national substantive consolidation rules in the case of cross-border insolvency and the possibility of joining one company into another company's main proceeding because of intermix of companies property. With respect to the matter of COMI, the CJEU held that

"That presumption may be rebutted where, from the viewpoint of third parties, the place in which a company's central administration is located is not the same as that of its registered office. In that event, the simple presumption laid down by the European Union legislature in favor of the registered office of that company can be rebutted if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect."[626]

4.38 From *Eurofood* to *Interedil* and *Rastelli,* it seems that the CJEU, when assessing rebuttal of the registered office presumption, has attached more importance to the place where the company has its central administration[627] on the basis of a comprehensive assessment of all the relevant factors. Ascertainability by third parties, in particular the creditors, is also a crucial factor that needs to be taken into account.

2.1.2.2 The Model Law

4.39 Corresponding to the term in the Regulation, COMI is also contained in article 16 of the Model Law, which provides that "in the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the center of the debtor's main interests."[628] Although it serves a different purpose,[629] it is stated in the Guide and Interpretation of the Model Law that the jurisprudence with respect to interpretation of COMI in the EC Regulation may be relevant to its interpretation in the Model Law.[630]

4.40 Nevertheless, the practice told a different story of "may be not". The overlapping concepts are actually subject to divergent interpretation in different

[625] Case C-191/10 *Rastelli Davide e C. Snc v. Jean-Charles Hidoux* [2011] ECR I-13209 (*Rastelli*), para. 11
[626] *Rastelli* , para. 35; *Eurofood*, para. 34, and *Interedil*, para. 51
[627] Jennifer Marshall (ed.), European Cross-border Insolvency Looseleaf, Allen & Overy, Sweet & Maxwell, Latest Release: December 19, 2013, at 2.4.250
[628] The Model Law, Article 16 (3)
[629] Guide and Interpretation, para. 141
[630] Guide and Interpretation, para. 141

jurisdictions. The Model Law was introduced into UK via the Schedule 1 to the Cross-Border Insolvency Regulation 2006 (CBIR), which enacted almost verbatim the Model Law. In *Re Standford* case,[631] there are parallel insolvency proceedings concerning the group in the U.S.A and in Antigua and Barbuda, where the key entity (Stanford International Bank Ltd) is registered. Due to disagreement between the American Receiver and the Antiguan Liquidators, they both applied for recognition under the CBIR in UK, which enacted almost verbatim the Model Law, in order to control assets in the UK. With respect to the concept of COMI, the British Court of Appeal determined the meaning of COMI in accordance with the CJEU's decision in *Eurofood*[632] based on the Regulation and held that

… if there is any difference in the test promulgated by the ECJ in *Eurofood* and that applied by the courts in the US then it is right that the court in England should apply the *Eurofood* test.[633] … There is nothing in it to suggest that the COMI of SIB alone was not in Antigua.[634]

4.41 However, the flexibility inherent in the Model Law allows the enacting State to make adjustments to its uniform text. In the US, on the contrary, as indicated in *Re Tri-Continental Exchange Ltd.,*

"Congress chose to substitute "evidence" for "proof' and otherwise to adopt the Model Law provision word-for-word. The explanation was that the substitution conformed to United States terminology and made clear that the burden of proof of "center of main interests" is on the foreign representative who is applying for recognition of a foreign proceeding as a main proceeding. This comports with the concept of a rebuttable presumption for purposes of Federal Rule of Evidence 301. FED.R.EVID. 301"[635]

4.42 By replacing the word "proof" with "evidence" in the equivalent provision for the COMI presumption, the U.S courts began to part with the *Eurofood* approach. Especially in *Re Bear Stearns*, Judge Lifland distributed the burden of proof on the person who was asserting that particular proceedings were main proceedings[636] and considered that the registered office presumption would be rebutted if there was any evidence to the contrary, regardless of an objection raised by any interested parties.[637] According to the empirical study conducted by Westbrook, "the COMI requirement had reduced forum shopping after Bear Stearns primarily because of the rejection of haven filings". [638]

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[631] *Re Stanford International Bank* [2010] EWCA Civ 137; [2011] Ch 33
[632] The simple presumption laid down by the Community legislature in favour of the registered office of that company can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect. *Eurofood,* para. 34.
[633] *Re Stanford International Bank* [2010] EWCA Civ 137; [2011] Ch 33, at 54
[634] *Re Stanford International Bank* [2010] EWCA Civ 137; [2011] Ch 33, at 63; Critism to confusion with respect to the COMI in *Re Stanford* case, please see Wessels, Bob, International Insolvency Law (3rd ed.), Vol.X, Deventer: Kluwer, 2012, para. 10283e
[635] In *Re Tri-Continental Exchange Ltd* [2006] 349 BR 629, at 635
[636] In *Re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd* 374 BR 122, at 127
[637] In *Re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd* 374 BR 122, at 130
[638] See Westbrook, An Empirical Study of the Implementation in the United States of the Model Law on Cross-Border Insolvency, 87 Am. Bankr. L. J. 247, (2013), p.252

4.43 In the *Re Stanford* case,[639] by referring to Judge Lifland's opinion in *Re Bear Stearns,*[640] Lewison J, the judge of the High Court of Justice of UK, also pointed out that

"except where there is no contrary evidence the registered office does not have any special evidentiary value. This change in language of the enactment, as it seems to me, may well explain why the jurisprudence of the American courts has diverged from that of the ECJ"[641]

4.44 As States that both enacted the Model Law,[642] the literal distinction of COMI under the legislations of the USA and UK is visible. Although there are obvious similarities between the Model Law and the Regulation both in the definitions and the rebuttable presumptions, there are differences, too. For instance, there is nothing in the Model Law comparable to clarification of COMI under the EC Regulation, which indicates that "the 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties".[643] The definition of foreign main proceeding in the Model Law is wider than that of "insolvency proceedings" in the EC Regulation. The former comprehends at least some types of receivership but the latter does not. Bearing the difference in mind, the US Receiver submitted that Lewison J should have applied the head office functions test he had recognized in *Re Lennox Holdings Ltd* and not the objective and ascertainable test adopted by *Eurofood* he applied in this case.

4.45 The US proceedings were not the end of the story. In 2009, the Superior Court of Quebec reached conclusions opposite to the UK decision on Stanford.[644] The Quebec court recognized the US Receiver as the "foreign representative", holding that the center of interest is in Houston, which is indisputable.[645] Later the Quebec Court of Appeal dismissed the appeal of the Antiguan Liquidators because "the Court is of the view that petitioners' efforts to have this conclusion set aside shows no reasonable chance of success."[646]

2.1.3 Time to determine COMI

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[639] *Re Stanford International Bank* [2010] EWCA Civ 137; [2011] Ch 33 In *Re Standford* case, there are parallel insolvency proceedings concerning the group in the U.S.A and in Antigua and Barbuda, where the key entity (Stanford International Bank Ltd) is registered. Due to disagreement between the American Receiver and the Antiguan Liquidators, they both applied for recognition under the CBIR in UK in order to control the local assets.

[640] In *Re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd* 374 BR 122

[641] *Re Stanford International Bank* [2009] EWHC 1441 (Ch), at 65

[642] The Model Law was introduced into UK via the Schedule 1 to the Cross-Border Insolvency Regulation 2006 (CBIR). The US enacted the Model Law as Chapter 15 of the Federal Bankruptcy Code.

[643] The EC Regulation, recital (13).

[644] *Stanford International Bank Ltd.* (Syndic de), 2009 QCCS 4109

[645] Id. at 36, "L'importance du centre névralgique de Houston est incontestable. Et le plus équitable est que le Tribunal reconnaisse comme *foreign proceeding* le *receivership* et comme représentant étranger le US Receiver Janvey." (in French)

[646] *Stanford International Bank Ltd.* (Dans l'affaire de la liquidation de), 2009 QCCA 2475, at 31

4.46 Although fraudulent or abusive forum shopping is not allowed in general, it is not forbidden to relocate COMI to some place else. In practice, to evaluate whether or not the relocation is effective largely depends on the COMI's time of establishment.

2.1.3.1 EU

4.47 In the EU, the EC Regulation did not explicitly set up rules on the timing issue. It is the CJEU that gradually made the relevant interpretation. The first case is the *Staubitz-Schreiber*, which involved individual insolvency.[647] Ms Staubitz-Schreiber used to be resident in Germany and filed for opening of insolvency proceedings regarding her assets before a German court. After her request for the opening of insolvency proceedings was lodged, she moved to Spain before the court decided to open the proceedings.[648] Hence, the main issue of this case is whether COMI of Ms Staubitz-Schreiber should be assessed on the time of filing of the request. If not, the German court should no longer have jurisdiction to open the main proceedings since COMI of the applicant was shifted to Spain. The CJEU decided in favor of the time of the request for the opening of proceedings.[649] The reasons are mainly twofold. The first reason is to achieve the objective of preventing forum shopping and the second concerns legal certainty and the power to adopt preservation measures.[650] As pointed out by AG Colomer,

"to hold that it is legitimate for a debtor to transfer his center of main interests in the period between the request for the opening of proceedings and the opening of insolvency proceedings would undermine the foundations of the whole scheme of the Regulation. In graphic terms, that would ultimately lead to creditors and courts continually having to pursue insolvent debtors in a vicious circle of requests for the opening of insolvency proceedings and transfers of centers of main interests which would never reach a satisfactory conclusion. Such a fate would have more in common with the legend of the Flying Dutchman than with the proper application of the Regulation on insolvency proceedings."[651]

4.48 The second case is regarding corporate insolvency, which is the aforementioned *Interedil* case. With respect to the relevant date for the purpose of locating the COMI of the company, the court followed the *Staubitz-Schreiber* approach, holding

"in principle, it is the location of the debtor's main center of interests at the date on which the request to open insolvency proceedings was lodged that is relevant for the purpose of determining the court having jurisdiction."[652]

2.1.3.2 The Model Law

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[647] Case C-1/04, *Susanne Staubitz-Schreiber* [2006] ECR I-00701 (*Staubitz-Schreiber*)
[648] *Staubitz-Schreiber,* para.15-16
[649] *Staubitz-Schreiber,* para.29
[650] *Staubitz-Schreiber,* para.25,27,28;
[651] *Staubitz-Schreiber* Opinion of AG Colomer, para.82
[652] *Interedil,* para.55

4.49 The Model Law itself does not provide any rules concerning the date to determine COMI. It is stipulated under the Guide and Interpretation that the date relevant to COMI determination is the date of commencement of the foreign proceeding,[653] which is an approach different from European one. In accordance with the Model Law, COMI is utilized to facilitate the recognition of foreign insolvency proceedings. Although there can be pending period between the time of the application for commencement and the actual commencement of those proceedings, a request for recognition of foreign proceedings can only be made for existing proceedings, which are effectively opened. Hence, in the case of the Model Law, it is more appropriate to refer to the date of commencement of the foreign proceeding to determine COMI.[654]

4.50 In practice, the instruction is not always obeyed by the enacting States. For example, there is a split concerning the timing issue among the bankruptcy courts in the U.S. Some courts followed the Guide and Interpretation of the Model Law[655] but some did not, which considered that COMI should be determined as of the date of petition for recognition.[656] The first case set rules on the date is *Re Ran*, which involved an individual insolvency case. Ran was an Israeli businessman, who was put into an involuntary bankruptcy proceeding in 1997. Before the involuntary bankruptcy proceeding was commenced, Ran left Israel and moved to the U.S.A. and worked there. He has never returned to Israel. Nearly a decade after Ran's emigration, the receiver of Israeli insolvency proceeding filed a petition seeking recognition of the Israeli bankruptcy proceeding as a foreign main or non-main proceeding under Chapter 15 of the Bankruptcy Code in the U.S. Bankruptcy Court for the Southern District of Texas. The petition was dismissed and then it was appealed to the Court of Appeals for the Fifth Circuit.[657] In addition to the extreme fact in *re Ran* that almost a decade lapsed between the commencement of the foreign bankruptcy proceeding and petition for recognition,[658] the Court of the Fifth Circuit emphasized the grammar of the statute, holding

"Congress's choice to use the present tense requires courts to view the COMI determination in the present, i.e. at the time the petition for recognition was filed."[659]

4.51 Moreover, the Court of Appeals for the Fifth Circuit considered that it would be contrary to Congress's purpose for implementing Chapter 15, if COMI had to be assessed by focusing upon debtor's operational history, indicating

"a meandering and never-ending inquiry into the debtor's past interests could lead to a denial of recognition in a country where a debtor's interests are truly centered, merely

[653] Guide and Interpretation, para.141, 149, 159
[654] Guide and Interpretation, para.159, ft.34
[655] In *re Kemsley*, 489 B.R. 346 (Bankr. S.D.N.Y. 2013); In *re Millennium Global Emerging Credit*, 458 B.R. 63 (Bankr. S.D.N.Y. 2011); In *re Gerova Fin. Grp., Ltd.*, 482 B.R. 86 (Bankr. S.D.N.Y.2012)
[656] In *re Ran*, 607 F.3d 1017 (5th Cir. 2010); In *re Betcorp Ltd.*, 400 B.R. 266 (Bankr. D. Nev. 2009); In *re British American Isle of Venice (BVI), Ltd.*, 441 B.R. 713 (Bankr. S. D. Fla. 2010); In *re Fairfield Sentry Ltd.*, 440 B.R. 60, 64 (Bankr. S.D. N.Y. 2010), aff'd, 714 F.3d 127(2d Cir. 2013)
[657] In *re Ran*, 607 F.3d 1017 (5th Cir. 2010), at 1020
[658] In *re Ran*, 607 F.3d 1017 (5th Cir. 2010), at 1026
[659] In *re Ran*, 607 F.3d 1017 (5th Cir. 2010), at 1025

because he conducted past activities in a country at some point well before the petition for recognition was sought."[660]

4.52 Later in *re Kemsley*, Mr. Kemsley, who is British, has also been living and working in the United States for an extended period of time. He was ordered personal bankruptcy in London in January 2012 and his bankruptcy trustee filed a petition in the U.S.A under chapter 15, seeking an order recognizing the UK Proceeding as a foreign main or non-main proceeding. Judge Peck held that the date of commencement of a foreign insolvency proceeding is the proper date for determining COMI for a foreign debtor and refused to grant recognition accordingly.[661] In his analysis with respect to the timing issue, Judge Peck considered that the date of opening the bankruptcy proceeding is

"a fixed and readily verifiable date. In contrast, the date for filing a petition for recognition can vary greatly depending on circumstances and the diligence of the foreign representative."[662]

4.53 With respect to corporate insolvency, the two options concerning the date to determine COMI also co-exist. In *re Betcorp Ltd.,* the court, by referring to *re Ran*, used the time of the petition for recognition as the date for determining COMI of an Australian company.[663] Nevertheless, in *re Millennium*, Judge Groppe rejected the reasoning in *re Ran*. The case involved two funding companies, which were incorporated in Bermuda and was put into liquidation there three years prior to their Chapter 15 petitions. First of all, Judge Gropper considered that the "plain words" of the statute did not control the date to make COMI determination.[664] He further pointed out that the petition for recognition under Chapter 15 was ancillary or secondary in nature and thus the date of the petition for recognition was "a matter of happenstance",[665] whereas the substantive date for the determination of the COMI issue should be "at the date of the opening of the foreign proceeding for which recognition is sought".[666]

4.54 Secondly, Judge Gropper referred to the decision in *re Tri-Continental Exchange Ltd.* and determined that the term COMI "generally equates with the concept of principal place of business' in United States law."[667] Considering that a debtor does not continue to have a place of business after liquidation is ordered since the business stops operating, it is obvious that an entity's principal place of business should be determined before it was placed into liquidation.[668]

4.55 Thirdly, Judge Gropper took into account the international origin of Chapter 15, which adopted the Model Law almost verbatim. The term of COMI under the

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[660] In *re Ran*, 607 F.3d 1017 (5th Cir. 2010), at 1025; See also Westbrook, Locating the Eye of the Financial Storm*,* 32 BROOK. J. INT'L L. 1019, 2007, at 1020.
[661]In *re Kemsley*, 489 B.R. 346 (Bankr. S.D.N.Y. 2013), at 354
[662]In *re Kemsley*, 489 B.R. 346 (Bankr. S.D.N.Y. 2013), at 354
[663] In *re Betcorp Ltd.*, 400 B.R. 266 (Bankr. D. Nev. 2009), at 292
[664] In *re Millennium Global Emerging Credit*, 458 B.R. 63 (Bankr. S.D.N.Y. 2011), at 72
[665] In *re Millennium Global Emerging Credit*, 458 B.R. 63 (Bankr. S.D.N.Y. 2011), at 72
[666] In *re Millennium Global Emerging Credit*, 458 B.R. 63 (Bankr. S.D.N.Y. 2011), at 72
[667] In *re Tri-Continental Exchange Ltd.,* 349 B.R. 627 (Bankr. E.D.Cal.2006), at 634
[668] In *re Millennium Global Emerging Credit*, 458 B.R. 63 (Bankr. S.D.N.Y. 2011), at 72

Model Law corresponds to the formulation in article 3 of the EC Regulation. Judge Gropper indicated that the date of the opening of initial insolvency proceeding is the only date that the original drafters of the term for the EC Regulation could have contemplated.[669]

4.56 Fourthly, contrary to the opinions in *re Ran*,[670] Judge Gropper found inquiry "in the past" consistent with the "plain words of the statute" and stood in line with the stated purpose of Chapter 15, "to promote cooperation with foreign proceedings".[671] In particular, Judge Gropper mentioned that the fact the liquidator appeared before the U.S. court ten years after the commencement of the foreign proceeding could prevent him from being granted substantive relief, instead of using the date of Chapter 15 petition to deny recognition.[672] Fifthly, Judge Gropper considered that COMI determination as of the time of the petition for recognition could result in forum shopping because it "gives *prima facie* recognition to a change of residence between the date of opening proceedings in the foreign nation and the chapter 15 petition date".[673]

4.57 In *re Fairfield Sentry Ltd*., the Court of Appeals for the Second Circuit, reaffirmed that "a debtor's COMI is determined as of the time of the filing of the Chapter 15 petition."[674] The Second Circuit first pointed out that the statute text of the Chapter 15 did not invite the courts to take into consideration the debtor's entire operational history but signified the proper time, i.e. the filing date of the Chapter 15 petition, to trigger the COMI analysis.[675] Then the Second Circuit looked into the relevant case law of the federal courts, noting

"Most courts in this Circuit and throughout the country appear to have examined a debtor's COMI as of the time of the Chapter 15 petition."[676]

4.58 The Second Circuit further referred to *re Millennium,* in which the court attempted to equate COMI with principal place of business and consequently raised the expectation of debtor's operational history check at the time of commencement of the foreign proceedings.[677] The Second Circuit considered that the "principal place of business" approach, however, was intentionally abandoned by the Congress in enacting Chapter 15.[678] Besides, the Second Circuit also noticed that the Congress suggested to take into account its international origin of Chapter 15 in the event of interpretation. The Second Circuit turned to the Guide and Interpretation and the EC Regulation but indicated that international interpretation was of limited use in resolving the

[669] In *re Millennium Global Emerging Credit*, 458 B.R. 63 (Bankr. S.D.N.Y. 2011), at 74
[670] In *re Ran*, 607 F.3d 1017 (5th Cir. 2010), at 1025; *see also In re Betcorp Ltd*., 400 B.R. 266 (Bankr. D. Nev. 2009), at 291-292
[671] In *re Millennium Global Emerging Credit*, 458 B.R. 63 (Bankr. S.D.N.Y. 2011), at 75
[672] In *re Millennium Global Emerging Credit*, 458 B.R. 63 (Bankr. S.D.N.Y. 2011), at 76
[673] In *re Millennium Global Emerging Credit*, 458 B.R. 63 (Bankr. S.D.N.Y. 2011), at 75
[674] In *re Fairfield Sentry Ltd*., 714 F.3d 127(2d Cir. 2013), at 134
[675] In *re Fairfield Sentry Ltd*., 714 F.3d 127(2d Cir. 2013), at 135
[676] In *re Fairfield Sentry Ltd*., 714 F.3d 127(2d Cir. 2013), at 136
[677] In *re Millennium Global Emerging Credit*, 458 B.R. 63 (Bankr. S.D.N.Y. 2011), at 72
[678] In *re Fairfield Sentry Ltd*., 714 F.3d 127(2d Cir. 2013), at 137

timing problem the U.S. courts met, especially pointing out "the EU Regulation does not operate as an analog to Chapter 15".[679]

4.59 In the end, the Second Circuit tried to reconcile the split on the timing issues among the federal courts.[680] By taking into consideration the EC Regulation and other international interpretations, it is suggested "a court may consider the period between the commencement of the foreign insolvency proceeding and the filing of the Chapter 15 petition to ensure that a debtor has not manipulated its COMI in bad faith."[681]

2.1.4 Development of COMI

2.1.4.1 EU

4.60 It has been a well-acknowledged problem that the crucial concept of COMI is not defined under the EC Regulation.[682] In accordance with the EU Regulation (recast), the former Recital (13) under the EC Regulation,[683] which provided explanatory statement to COMI, is relocated to Article 3(1) of the EU Regulation (recast) with slight modification.[684] Such a "relocation" can at least be deemed as formal introduction of clarification concerning COMI into the main text. Moreover, the registered office presumption regarding a company or legal person has gone through tremendous content alteration. First of all, a look-back period has been set on the presumption in order to restrict the improper reincorporation of a company.[685] Reincorporation of less than three months prior to the application for insolvency proceedings is viewed as fraudulent or abusive forum shopping.[686] Accordingly, the registered office presumption can possibly be rebutted.[687] Besides, it seems that the EU Regulation (recast) changed the tone set on the presumption, which no longer shall be applied but is

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[679] In *re Fairfield Sentry Ltd.*, 714 F.3d 127(2d Cir. 2013), at 137

[680] Hon. Adler, Louise De Carl, Managing the Chapter 15 Cross-Border Insolvency Case (A Pocket Guide for Judges), 2nd ed., Federal Judicial Center, 2014, p.22

[681] In *re Fairfield Sentry Ltd.*, 714 F.3d 127(2d Cir. 2013), at 138

[682] EU Commission Staff Working Document the Impact Assessment Accompanying the document Revision of Regulation (EC) No 1346/2000 on insolvency proceedings, Strasbourg, 12.12.2012, SWD (2012) 416 final, p.19

[683] The EC Regulation, recital (13): The 'center of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.

[684] The EU Regulation (recast), article 3(1): The center of main interests shall be the place where the debtor conducts the administration of his interests on a regular basis and which is ascertainable by third parties.

In the case of a company or legal person, the place of the registered office shall be presumed to be the center of its main interests in the absence of proof to the contrary. This presumption shall only apply if the registered office has not been moved to another Member State within a period of 3 months prior to the request for the opening of insolvency proceedings.

[685] The EU Regulation (recast), article 3(1), para.2

[686] Rudbordeh, Amir Adl, An analysis and hypothesis on forum shopping in insolvency law: From the European Insolvency Regulation to its Recast, p.51, available at: https://www.iiiglobal.org/node/1932

[687] Moss, Gabriel, Fletcher, Ian F, Isaacs, Stuart (ed.), The EU Regulation on Insolvency Proceedings (3rd ed.), Oxford University Press, 2016, at 8.560 - 8.561

possible to be rebutted if certain conditions are met.[688] The EU Regulation (recast) offers in its renewed recitals additional explanations on those key conditions, which were left unresolved under the EC Regulation. It is noteworthy that the EU Regulation (recast) sets up all those conditions by literally codifying the case law handed down by the CJEU .[689]

4.61 The first decisive condition is what constitutes administration. In accordance with the EU Regulation (recast), it refers to central administration of a company where it conducts "actual center of management and supervision and of the management of its interests".[690] The second condition is COMI should be assessed comprehensively based on all the relevant factors.[691] Given the third condition that COMI shall be ascertainable by third parties, the EU Regulation (recast) also specifies that the creditors and their perception deserve special consideration. For instance, timely notification to the creditors in the case of relocation of COMI through appropriate means.[692]

2.1.4.2 The Model Law

4.62 In order to provide guidance concerning the interpretation of COMI, the Guide has been revised in accordance with the request of UNCITRAL at its forty-third session (2010)[693] and was adopted by the Commission as the "Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency" on 18 July 2013.[694] It is stipulated that the key indicators, considered as a whole, to determine the location of COMI are (1) central administration of the debtor; (2) ascertainability by creditors; (3) the date at which these factors should be analyzed,[695] which is the date of commencement of the foreign proceeding.[696] In case that the three indicators are not sufficient to locate COMI, the Model Law also allows additional factors, including "an unexhaustive list of relevant factors",[697] to be taken into consideration in individual cases. Further, the Model Law emphasizes that

"In all cases, however, the endeavor is an holistic one, designed to determine that the location of the foreign proceeding in fact corresponds to the actual location of the debtor's center of main interests, as readily ascertainable by creditors."[698]

4.63 Regardless of COMI under the two instruments serving different purposes,[699] the Model Law lays out quite identical criteria to EU Regulation

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[688] The EU Regulation (recast), recital (30)
[689] *Interedil,* para. 53
[690] The EU Regulation (recast), recital (30)
[691] The EU Regulation (recast), recital (30)
[692] The EU Regulation (recast), recital (28)
[693] Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17), para.259
[694] Guide and Interpretation, para.18
[695] Guide and Interpretation, para.145
[696] Guide and Interpretation, para.141, 149, 159
[697] Guide and Interpretation, para.147
[698] Guide and Interpretation, para.146
[699] Guide and Interpretation, para.141

(recast) with respect to determination of COMI. In reality, however, the enacting States do not strictly abide by those common rules. I hereby recall the *re Suntech Power* case,[700] which I have mentioned in section 1.3 of Part III. It involved parallel cross-border insolvency proceedings pending in China, the Cayman Islands and the United States. On 5 November 2013, provisional liquidation of Suntech Power was initiated in Cayman Islands (the Cayman proceeding). On 21 February 2014, a petition was filed for recognition of Suntech Power's provisional liquidation proceeding pending in Cayman Islands as a foreign main proceeding or non-main proceeding.[701] One of Suntech Power's American creditors, Solyndra, who brought antitrust litigation against the debtor, objected to the request.[702] On 17 November 2014, the United States Bankruptcy Court for the Southern District of New York (S.D.N.Y.) recognized the Cayman proceeding as the foreign main proceeding.[703]

4.64 The case was filed in New York merely based on a New York bank account established one day prior to the petition for recognition,[704] Solyndra contended that neither was Suntech Power's venue proper in New York, nor could Suntech Power's be qualified as debtor under section 109(a) of the Bankruptcy Code.[705] By referring to *Re Octaviar Admin. Pty Ltd.*, 511 B.R. 361, 372-73 (Bankr. S.D.N.Y. 2014)[706] and *Re Yukos Oil Co.*, 321 B.R. 396, 407 (Bankr. S.D. Tex. 2005), the court

[700] In *re Suntech Power Holdings Co., Ltd.*, Case No.: 14-10383(SMB), Written Opinion Signed On 17 November, 2014

[701] In *re Suntech Power Holdings Co., Ltd.*, Case No.: 14-10383(SMB), Written Opinion Signed On 17 November, 2014, p.14

[702] Objection of the Solyndra Residual Trust to Chapter 15 Petition of *Suntech Power Holdings Co., Ltd.* (in provisional liquidation) for Recognition of Foreign Main Proceeding Pursuant to Section 1517 of the Bankruptcy Code, In *re Suntech Power Holdings Co., Ltd.* (in Provisional Liquidation), Case No. 14-10383 (SMB), Related Docket Nos. 1, 2, 3, 4

[703] In *re Suntech Power Holdings Co., Ltd.*, Case No.: 14-10383(SMB), Written Opinion Signed On 17 November, 2014, p.3

[704] Objection of the Solyndra Residual Trust to Chapter 15 Petition of Suntech Power Holdings Co., Ltd. (in provisional liquidation) for Recognition of Foreign Main Proceeding Pursuant to Section 1517 of the Bankruptcy Code, In *re Suntech Power Holdings Co., Ltd*. (in Provisional Liquidation), Case No. 14-10383 (SMB), Related Docket Nos. 1, 2, 3, 4, at D Suntech Has Not Qualified as a Debtor Under 11 U.S.C. § 109(a), ii Suntech Cannot Rely on $500,000 Recently Placed in the KCC Trust Account as "Property"; See also Findings of Fact and Conclusions of Law Granting Petition for Recognition as Foreign Main Proceeding and Denying Cross-motion to Change Venue, In *re Suntech Power Holdings Co., Ltd.*, Case No.: 14-10383(SMB), Written Opinion Signed On 17 November, 2014, at D New York Proceeding, 2. The Chapter 15 Case

[705] Objection of the Solyndra Residual Trust to Chapter 15 Petition of Suntech Power Holdings Co., Ltd. (in provisional liquidation) for Recognition of Foreign Main Proceeding Pursuant to Section 1517 of the Bankruptcy Code, In *re Suntech Power Holdings Co., Ltd*. (in Provisional Liquidation), Case No. 14-10383 (SMB), Related Docket Nos. 1, 2, 3, 4, at Factual Background, p.7

[706] It has been suggested by the United States Court of Appeals Second Circuit in *re Barnet* that Section 109(a) of the Bankruptcy Code should be applied to cases filed under the Chapter 15. (See In *re Barnet*, 737 F.3d 238 (2d Cir. 2013) and Hon. Adler, Louise De Carl, Managing the Chapter 15 Cross-Border Insolvency Case A Pocket Guide for Judges (2nd ed.), Federal Judicial Center, 2014, p.9). *Re Octaviar* is the remand case of *Re Barnet* and thus followed the holding in *re Barnet.* Chapter 15 adopted the UNCITRAL Model Law almost in verbatim. Nonetheless, there is no threshold under the Model Law, requiring a foreign debtor must have a business or property in the state, where the petition of recognition is filed. The Second Circuit's conclusion that section 109(a) applies in Chapter 15 cases has received criticism by commentators. (See Seife, Howard and Vazquez, Francisco, The Octaviar Saga: The Chapter 15 Door Opens, Closes, and then Reopens on the Foreign Representatives, in: Norton Journal of Bankruptcy Law and

considered the New York bank account, as the only asset of the debtor in the United States,[707] sufficed to render the eligibility of the debtor under 11 U.S.C. § 109(a) through the establishment of the bank account in New York.[708]

4.65 Solyndra further argued that the debtor's center of main interests was not located in the Cayman Islands. As of the commencement of the Cayman proceeding,

"- Suntech was headquartered in China;
- All of Suntech's managers and employees resided outside of the Cayman Islands
-Suntech's (technically, those of its wholly-owned subsidiaries) manufacturing facilities were located in China;
-All of Suntech's creditors, suppliers, and customers were located outside the Cayman Islands;
- As the debtor's primary assets, all of Suntech's bank accounts were maintained in Hong Kong and the Mainland China"[709]

4.66 By referring to its former decisions on the similar issues, the United States Bankruptcy Court for the Southern District of New York considered that the following non-exhaustive list of factors, singly or combined, could be relevant to determining a debtor's COMI:

Practice, Vol.23, No.5, October 2014, p.576) It has been argued that the decision in *re Barnet* "limits international cooperation under chapter 15" and "is ill-suited for deciding the jurisdictional requirements for a chapter 15 case". (See Swick, R. Adam, Harle, Paul, Section 109(a)'s Jurisdictional Requirements Applied to Chapter 15, in: 33-MAR Am. Bankr. Inst. J. 30, 2014, p. 32). The decision is contrary to the former case law. For example, in *re Toft*, 453 B.R. 186 (Bankr, S.D.N.Y. 2011), at 193 and in re Fairfield, 458 B.R. 665 (Bankr. S.D.N.Y. 2011), at 679, no.5. Later in *re Bemarmara,* it is held that "This Court does not agree with the decision of the Second Circuit. And it is the Court's belief that there is a strong likelihood that the Third Circuit, likewise, would not agree with that decision." In *re Bemarmara Consulting A.S.*, No. 13-13037 (KG) (Bankr. D. Del. Dec. 17, 2013) *Re Barnet* will still have the binding effect on any court within the Second Circuit until the Bankruptcy Code is revised or the Supreme Court reconsiders the issue, although the Second Circuit has forwarded copies of its opinion of *Re Barnet* to Congress in order to report the technical deficiencies in the Bankruptcy Code. (In *re Barnet*, 737 F.3d 238 (2[d] Cir. 2013), at Conclusion. In accordance with the Long Range Plan for the Federal Courts adopted by the Judicial Conference, 91e: All courts of appeals should be encouraged to participate in the pilot project to identify technical deficiencies in statutory law and to inform Congress of same. In: Report of the Proceedings of the Judicial Conference Of the United States, Sept.19, 1995, p.62)

[707]In *re Suntech Power Holdings Co., Ltd.,* Case No.: 14-10383(SMB), Written Opinion Signed On 17 November, 2014, at Discussion A Eligibility to be a Debtor, p.18

[708] In *re Suntech Power Holdings Co., Ltd.,* Case No.: 14-10383(SMB), Written Opinion Signed On 17 November, 2014, at Discussion A Eligibility to be a Debtor, p.18-19. The court held that "Interpreting the Bankruptcy Code to prevent an ineligible foreign debtor from establishing eligibility to support needed chapter 15 relief will contravene the purposes of the statute to provide legal certainty, maximize value, protect creditors and other parties in interests and rescue financially troubled businesses. … Despite the lack of a United States presence, it owes a substantial amount of United States debt and requires recognition as a condition to the enforcement of the scheme of arrangement in the United States…"

[709] Objection of the Solyndra Residual Trust to Chapter 15 Petition of *Suntech Power Holdings Co., Ltd.* (in provisional liquidation) for Recognition of Foreign Main Proceeding Pursuant to Section 1517 of the Bankruptcy Code, In *re Suntech Power Holdings Co., Ltd.* (in Provisional Liquidation), Case No. 14-10383 (SMB), Related Docket Nos. 1, 2, 3, 4, p.2

"the location of the debtor's headquarters; the location of those who actually manage the debtor (which, conceivably could be the headquarters of a holding company); the location of the debtor's primary assets; the location of the majority of the debtor's creditors or of a majority of the creditors who would be affected by the case; and/or the jurisdiction whose law would apply to most disputes."[710]

4.67 First of all, the court admitted that up to 5 November 2013, when the Cayman proceeding was commenced, Suntech Power did "not conduct any activities in the Cayman Islands and maintained its principal executive offices in Wuxi, China from where it managed the Suntech Group".[711] Nevertheless, the court followed the decision of the Court of Appeal for the second circuit in *re Fairfield Sentry Ltd.*,[712] holding that a debtor's COMI should be determined based on its activities at the time the Chapter 15 petition is filed, i.e. on 21 February 2014. Secondly, the court laid emphasis on the liquidation activities of the Joint Provisional Liquidators by quoting *re Fairfield Sentry Ltd.,* holding that "any relevant activities, including liquidation activities and administrative functions may be considered in the COMI analysis".[713] The court indicated that the Appointment Order entered by the Cayman Court, which commenced the Cayman proceeding, appointed and authorized the Joint Provisional Liquidators to do all acts on behalf of the debtor, enabled the shift of COMI from China to Cayman Islands. Within less than four months between the initiation of the foreign liquidation proceeding and the filing of the Chapter 15 petition, necessary steps have been taken by the Joint Provisional Liquidators to centralize the administration of the proceeding in the Cayman Islands.[714]

4.68 Coleman and Johnson have done comprehensive analysis on the timing issue concerning COMI in the American jurisprudence, which highlighted that "at its core, COMI is a pre-insolvency concept."[715] I agree and would like to add a few points from a comparative perspective. Despite of the complex cross-border insolvency scenarios, COMI is an international standard, upon which a certain degree of consensus has been reached between the two international instruments specializing at cross-border insolvency law, i.e. the Regulation and the Model Law. Although those two instruments diverse from each other in many ways, with respect to the time to determine COMI, the EU Regulation (recast) provides that it should be assessed at the date of the request for opening of

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[710] In *re SPhinX, Ltd.*, 351 B.R. 103 (Bankr. S.D.N.Y. 2006), at 117; In *re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.,* 389 B.R. 325 (S.D.N.Y. 2008), at 336; In *re Basis Yield Alpha Fund (Master)*, 381 B.R. 37 (Bankr. S.D.N.Y. 2008), at 47

[711] In *re Suntech Power Holdings Co., Ltd.,* Case No.: 14-10383(SMB), Written Opinion Signed On 17 November, 2014, at Discussion C. COMI, p.25

[712] "[A] debtor's COMI is determined as of the time of the filing of the Chapter 15 petition," but, "[t]o offset a debtor's ability to manipulate its COMI, a court may also look at the time period between the initiation of the foreign liquidation proceeding and the filing of the Chapter 15 petition." In *re Fairfield Sentry Ltd.*, 714 F.3d 127, (2d Cir. 2013), at 133, 137.

[713] In *re Fairfield Sentry Ltd.*, 714 F.3d (2d Cir. 2013), at 137

[714] In *re Suntech Power Holdings Co., Ltd.*, Case No.: 14-10383(SMB), Written Opinion Signed On 17 November, 2014, at Discussion C. COMI, p.27

[715] Coleman, Sarah, Johnson, Jen, Journey to the Center of the Economic Universe: How the Current U.S. COMI Timing Determination Misses the Mark, 23 No. 6 J. Bankr. L. & Prac. NL Art. 4, December 2014, p.6

insolvency proceedings[716] and it is required pursuant to the Guide and Interpretation of the Model Law (2013) that it shall be at the date of commencement of the foreign proceeding.[717] It is evident that both of them opt for a pre-insolvency approach.

4.69 Moreover, based on objective observation, to allow assessment of COMI to start later after the commencement of insolvency proceedings, it will breed expansion of the scope of factors that can be taken into account to determine COMI so that liquidation activities and administrative functions can be validated as effective factors for the COMI determination. Consequently, more factors can be actually utilized for COMI relocation. The United States has adopted the Model Law almost verbatim by incorporating Chapter 15 into its bankruptcy code, including the concept of COMI, which can be deemed as a commitment to an international standard. If there is inconsistency between the rule of domestic statutory and a particular section of Chapter 15, the problem of proper interpretation arises. Deviation from its original international approach on proper interpretation of a common concept would compromise the goal of achieving uniformity and facilitating cross-border cooperation in insolvency matters and would reduce certainty and predictability in the application of the international standard.

2.2 Establishment

2.2.1 Origin

4.70 The term "establishment" under the Model Law was also inspired by the relevant provision under the EC Regulation.[718] The concept of establishment under the Regulations is connected to opening of territorial proceedings, including territorial insolvency proceedings (prior to the opening of the main proceedings) and secondary proceedings. According to the Virgós/Schmit Report, whether or not to encompass such a concept incurred heated debate throughout the negotiations of the Convention on Insolvency Proceedings (EC Convention),[719] which was adopted nearly verbatim by the EC Regulation.[720] The main issue was in addition to establishment, some Member States suggested enclosing the mere presence of assets of the debtor, which could also serve as the basis of opening territorial proceedings.[721] That approach has been adopted in Article 17 of the European Convention on Certain Aspects of Bankruptcy (the Istanbul Convention)[722] and was finally abandoned by the EC Convention.[723] The

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[716] The EU Regulation (recast), recital (31) (with the objective of preventing fraudulent or abusive forum shopping), Article 3(1), para.2

[717] Guide and Interpretation, para.141, 149, 159

[718] Guide and Interpretation, para.88

[719] Virgós/Schmit Report (1996), para.70

[720] Virgós, Miguel and Garcimartín, Francisco, The European Insolvency Regulation: Law and Practice, Kluwer Law International, 2004, nr. 4

[721] Virgós/Schmit Report (1996), para.70

[722] Fletcher, Ian F., Insolvency in Private International Law. National and International Approaches, Oxford Private International Law Series, Oxford University Press 2nd ed. 2005, at 6.20

[723] Virgós/Schmit Report (1996), para.70

reason is that opening of territorial proceedings was considered a deviation from the principle of universality[724] and accordingly the main tone set on the conditions to commence the territorial proceedings was restriction.[725] It is necessary to seek a balance between preservation of the legal certainty and economic transaction stability for the local potential creditors[726] and reduction on possibilities for the local creditors to place themselves in a more advantageous position.[727]

4.71 The concept of establishment pursuant to the Model Law is not related to opening of local proceedings (jurisdiction) but a decisive factor in determining recognition of a non-main proceeding.[728] It is held under the Guide and Interpretation that proceedings commenced on the presence of assets without establishment would not qualify for recognition under the Model Law scheme.[729]

2.2.2 Definition of Establishment

2.2.2.1 Components of the Definition

4.72 In EU, the term establishment has already been used under the Article 5(5) of the 1968 Brussels Convention,[730] i.e. Article 7(5) of the current Brussels I (recast), which refers to the place of domicile of the defendant. Nevertheless, the establishment under the EC Regulation should be given its own meaning.[731] It is a concept, which corresponds to "any place of operations" on a "non-transitory" basis,[732] requires manifest externality instead of the subjective intention of the debtor.[733] According to Viimsalu, from the external perspective, it should reflect a distinct presence of the debtor in the market; from the internal perspective, it should involve a certain degree of operational organization.[734] In the case of *Interedil*, the CJEU held that

> The term 'establishment' within the meaning of Article 3(2) of Regulation No 1346/2000 must be interpreted as requiring the presence of a structure consisting of a minimum level of organization and a degree of stability necessary for the purpose of

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[724] Balz, M, The European Union Convention on Insolvency Proceedings, in: American Bankruptcy Law Journal, Vol.70, 1996, p. 494

[725] *Eurofood*, para. 28; Case C-444/07, *MG Probud Gdynia sp. z o.o*. [2010] ECR I-00417, para.22

[726] Virgós/Schmit Report (1996), para.71

[727] Fletcher, Ian F., Insolvency in Private International Law. National and International Approaches, Oxford Private International Law Series, Oxford University Press 2nd ed. 2005, at 7.54

[728] Guide and Interpretation, para.85

[729] Guide and Interpretation, para.32

[730] Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 27 September 1968

[731] Virgós/Schmit Report (1996), para.70 See also Viimsalu, Signe, The Meaning and Functioning of Secondary Insolvency Proceedings (doctoral dissertation), Tartu University Press, 2011, p.42

[732] EC Regulation, Article 2(h): 'establishment' shall mean any place of operations where the debtor carries out a non-transitory economic activity with human means and goods.
The Model Law Article 2(f): "Establishment" means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.

[733] Virgós/Schmit Report (1996), para.71

[734] Viimsalu, Signe, The Meaning and Functioning of Secondary Insolvency Proceedings (doctoral dissertation), Tartu University Press, 2011, p.43

pursuing an economic activity. The presence alone of goods in isolation or bank accounts does not, in principle, meet that definition.[735]

4.73 It seems that the CJEU narrowed the definition of establishment by setting up certain degree of ascertainability as one of its determinative requirements, which was equivalent to determination of COMI[736]. Further, the CJEU emphasized in *Interedil* that in order to ensure legal certainty and foreseeability concerning the determination of the courts with jurisdiction, the existence of an establishment must be determined, in the same way as the location of the COMI, on the basis of objective factors which are ascertainable by third parties.[737]However, that interpretation concerning COMI has not been adopted into the EU Regulation (recast), which does not introduce ascertainability into the definition of establishment.[738]

4.74 In addition, the economic activity should be carried out with "human means and goods".[739] In *Re Stojevic*, the Higher Regional Court of Vienna held that

"The human means referred to in Article 2(h) must, it is submitted, be understood as referring to activities conducted by persons for whom the debtor is legally responsible, either as employer or as principal."[740]

4.75 It is also pointed out in *Re Stojevic* that the term goods in Art 2(h) of the English version is a mistranslation of the French "*biens*" and the German "*Vermögenswerten*".[741] By quoting the discussion in *Newham v. Khatun*,[742] Moss and Smith submitted that "goods" would have been better translated into "assets".[743] In accordance with the EU Regulation (recast), the word "goods" is now replaced with "assets".[744]

4.76 The term of establishment under the Model Law was also enlightened by the EC Regulation.[745] As stated by Wessels, "the only difference being the latter part"(or service).[746] The Guide and Interpretation did not provide substantive analysis of the term "establishment" but directly cited Virgós/Schmit Report to

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[735] *Interedil*, para.64

[736] The EC Regulation, recital (13): The 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.

[737] *Interedil*, para.63

[738] The EU Regulation (recast), article 2(10): 'establishment' means any place of operations where a debtor carries out or has carries out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets.

[739] The EC Regulation, article 2(h)

[740] *Re Stojevic*, Higher Regional Court of Vienna, 9 Nov. 2004, 28 R 225/04w

[741] *Re Stojevic*, Higher Regional Court of Vienna, 9 Nov. 2004, 28 R 225/04w

[742] *Newham v. Khatun* [2005] 1 QB 37, paras.68 – 70, 78

[743] Moss, Fletcher & Isaacs, The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide (2nd ed.), Oxford University Press, 2009, para.8.45

[744] The EU Regulation (recast), article 2(10)

[745] The Model Law, article 2(f): "Establishment" means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services. See also Guide and Interpretation, para.88

[746] Wessels, Bob, International Insolvency Law (3rd ed.), Vol.X, Deventer: Kluwer, 2012, para. 10534

make clarification.[747] It is specified in the Guide and Interpretation that the mere presence of property cannot be equal to establishment.[748] It also considers the inquiry into establishment is "purely factual in nature".[749]

2.2.2.2 Time to Determine Establishment

4.77 The EC Regulation did not provide a temporal framework for determining establishment. In *Shierson v. Vlieland-Boddy*,[750] the debtor was a qualified accountant, who moved from U.K to Spain for 9 months prior to the opening of insolvency proceedings.[751] Based on the evidences, the Court concluded that the debtor's center of main interests had moved to Spain.[752] As for whether the court could assume jurisdiction to open territorial proceedings against him in UK, it would depend on the reference date to determine establishment.[753] The Court of Appeal referred to para.70 of Virgós/Schmit Report, holding that establishment should be determined "at the time the registrar opened territorial insolvency proceedings".[754]

4.78 It is stipulated under the Guide and Interpretation that the date of commencement of the non-main foreign proceeding is the relevant date to be considered to determine the existence of an establishment.[755] In *re Millennium*, Judge Groppe addressed the issue of the appropriate date to determine whether the foreign debtor has an establishment in the foreign nation should be on or about the date of the commencement of the foreign proceeding.[756]

4.79 The EU Regulation (recast) provides that the reference date to determine whether an establishment exists should be three months prior to the request to open main insolvency proceedings.[757] Between the date of the request to open main proceedings and the date of the request to open secondary proceedings, there used to be a gap period under the original wording of the definition in Article 2(h) of the EC Regulation. It might be the case that an establishment by the time of the request to open secondary proceedings had been shut down or had ceased to operate or deal with third parties at the time of the opening of main proceedings. The added temporal requirement concerning the establishment under the EU Regulation (recast) helps to resolve the problem caused by the gap period. Before the EU Regulation (recast) was adopted, some national court assumed that "jurisdiction under Article 3(2) could only be exercised if the alleged establishment was continuing to operate as a place of

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[747] Guide and Interpretation, para.89
[748] Guide and Interpretation, para.90
[749] Guide and Interpretation, para.90
[750] *Shierson v. Vlieland-Boddy*, [2005] EWCA Civ. 974, [2005] W.L.R. 3966 (2005)
[751] *Shierson v. Vlieland-Boddy*, [2005] EWCA Civ. 974, [2005] W.L.R. 3966 (2005), at 20
[752] *Shierson v. Vlieland-Boddy*, [2005] EWCA Civ. 974, [2005] W.L.R. 3966 (2005), at 56
[753] *Shierson v. Vlieland-Boddy*, [2005] EWCA Civ. 974, [2005] W.L.R. 3966 (2005), at 64
[754] *Shierson v. Vlieland-Boddy*, [2005] EWCA Civ. 974, [2005] W.L.R. 3966 (2005), at 68; See also Fletcher, Ian F, Insolvency in Private International Law. National and International Approaches, Oxford Private International Law Series, Oxford University Press 2nd ed. 2005, at 7.56
[755] Guide and Interpretation, para.160
[756] In *re Millennium Global Emerging Credit*, 458 B.R. 63 (Bankr. S.D.N.Y. 2011), at 76
[757] The EU Regulation (recast), article 2(10)

business at the time of the request to open territorial proceedings"[758]. Olympic Airlines SA[759] is such an example. On 2 October 2009, the main proceeding of Olympic Airlines SA started in Greece.[760] In order to seek compensation under the Pensions Act 2004 from the UK's Pension Protection Fund, the trustees of the company's pension scheme presented a winding-up petition against the company in England on 20 July 2010 because such compensation is payable from the date when a "qualifying insolvency event" occurred.[761] Nevertheless, due to a change in legislation under the Pensions Act 2004, the new insolvency event applied and it was deemed to occur on the fifth anniversary of the commencement of the Greek proceedings, i.e. on 2 October 2014, after the Court of Appeal handed down its decision in this case refusing to make a winding-up order on the basis of lack of jurisdiction.[762] To open a secondary proceeding, the key issue is whether there is an establishment in accordance with the EC Regulation within the territory of UK. The UK Supreme Court of made its decision on the basis of the definition of establishment under the EC Regulation, holding

"Olympic was not carrying on any business activity at 11 Conduit Street on the relevant date (namely 20 July 2010, the date of filing in UK, added by the author) The last of the company's business activities had ceased some time before. All that Mr Savva and Mr Platanias were doing was handling matters of internal administration associated with the final stages of the company's disposal of the means of carrying on business. The company cannot therefore be said to have had an "establishment" in the United Kingdom."[763]

4.80 However, if the same case was decided in accordance with the EU Regulation (recast), the result could not be the same. Then the relevant date to determine whether the company has had a UK establishment would be three months prior to the request to open the main insolvency proceeding in Greece (i.e. on 2 October 2009). At that time, the business of Olympic Airlines SA was still operating in the UK[764] and therefore the UK court could probably exercise its territorial jurisdiction provided that the establishment was in active operation in the period prior to the request to open Greek main proceeding. According to Fletcher, the incorporation of temporal condition into the definition of establishment under the recast EU Regulation "remove any doubt about the

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[758] Moss, Gabriel, Fletcher, Ian F, Isaacs, Stuart (ed.), The EU Regulation on Insolvency Proceedings (3rd ed.), Oxford University Press, 2016, at 3.31

[759] *Trustees of the Olympic Airlines SA Pension and Life Assurance Scheme v Olympic Airlines SA* [2015] UKSC 27

[760] *Trustees of the Olympic Airlines SA Pension and Life Assurance Scheme v Olympic Airlines SA* [2015] UKSC 27, at 4

[761] *Trustees of the Olympic Airlines SA Pension and Life Assurance Scheme v Olympic Airlines SA* [2015] UKSC 27, at 5

[762] *Trustees of the Olympic Airlines SA Pension and Life Assurance Scheme v Olympic Airlines SA* [2015] UKSC 27, at 8

[763] *Trustees of the Olympic Airlines SA Pension and Life Assurance Scheme v Olympic Airlines SA* [2015] UKSC 27, at 15

[764] On 28 September 2009, shortly before the commencement of the liquidation proceedings in Greece, the area manager for Olympic in London was instructed that the company would cease all commercial operations as from 00.01 on the following day. *Trustees of the Olympic Airlines SA Pension and Life Assurance Scheme v Olympic Airlines SA* [2015] UKSC 27, at 8

possibility of opening territorial proceedings".[765] Besides, it seems that the relevant date of the request to open main proceedings now has a direct impact on determination of establishment because it becomes a decisive factor to the opening of secondary proceedings. In my view, that kind of arrangement more or less reflects the subordinate nature of territorial proceedings under the Regulation.

2.2.3 Development of Establishment-based Proceedings in EU

4.81 The territorial proceedings, which can be opened on the basis of establishment under the Regulation, mainly bear two functions. One is the function of protection, which can shield domestic creditors from the effects of foreign insolvency proceedings.[766] The other is the function of assistance, which facilitates the administration of the proceedings and realization of the debtor's local assets in close cooperation with the main proceedings.[767] There are two types of territorial proceedings can be opened on the basis of establishment under the Regulation: territorial insolvency proceedings and secondary proceedings. The effects of the territorial proceedings are restricted to the assets located within the Member State where the establishment of the debtor is located.[768]

2.2.3.1 Territorial Insolvency Proceedings

4.82 Territorial insolvency proceedings can only be commenced prior to the opening of main proceedings.[769] Moreover, territorial insolvency proceeding shall be transferred into secondary proceedings as soon as the main insolvency proceedings are opened.[770] Considering that territorial insolvency proceedings serve the sole purpose of protection of local interests, it is required to open territorial insolvency proceedings under limited circumstances and such restrictions are considered absolutely necessary.[771] In the first situation, territorial insolvency proceedings may only be initiated under the circumstance that the main proceedings cannot be opened in accordance with the law of the Member State where the debtor has the center of his main interest.[772] In the second situation, territorial insolvency proceedings can only be commenced by certain specific applicants. Under the EC Regulation, only the local creditors

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[765] Moss, Gabriel, Fletcher, Ian F, Isaacs, Stuart (ed.), The EU Regulation on Insolvency Proceedings (3rd ed.), Oxford University Press, 2016, at 3.31

[766] Viimsalu, Signe, The Meaning and Functioning of Secondary Insolvency Proceedings (doctoral dissertation), Tartu University Press, 2011, p.23-25

[767] Viimsalu, Signe, The Meaning and Functioning of Secondary Insolvency Proceedings (doctoral dissertation), Tartu University Press, 2011, p.25-27

[768] The EC Regulation, recital (12), article 3(2); the EU Regulation (recast), recital (23), article 3(2)

[769] The EC Regulation, article 3(4); the EU Regulation (recast), article 3(4)

[770] The EC Regulation, Recital (17), article 3(4); the EU Regulation (recast), recital (38), article 3(4)

[771] The EC Regulation, recital (17); the EU Regulation (recast), recital (37)

[772] The EC Regulation, article 3(4)(a); the EU Regulation (recast), article 3(4)(a)

within the territory of which the establishment is situated, or whose claim arises from the operation of that establishment, can file petitions.[773]

4.83 In the case of *Zaza Retail*,[774] the CJEU made very important interpretations with respect to the conditions governing the opening of the territorial insolvency proceedings. *Zaza Retail* was a company, which had an establishment in Belgium and the COMI of which was situated in the Netherlands. The Belgian Public Prosecutor requested commencement of territorial insolvency proceedings in Belgium nearly two years prior to the opening of the main proceedings in the Netherlands. The Supreme Court of Belgium (Hof van Cassatie van België) referred several questions to the CJEU. One of the main issues was whether the term 'creditor' in Article 3(4)(b) of the EC Regulation included the public authority, such as Public Prosecutor, who under the national law of that State is to act in the public interest and with a view to safeguard the interests of all the creditors.[775] Without a definition of the term creditor, the CJEU held that the condition for opening territorial insolvency proceedings should be interpreted in a narrow and restrictive manner. Therefore, the public authority does not fall in the ambit of the creditor under the Article 3(4)(b) of the EC Regulation. However, it is also indicated by the CJEU that

"the intervention of that public authority helps to address an undertaking's difficulties in a timely manner, by making up for the debtor's and its creditors' failure to act where that is appropriate."[776]

4.84 The recast EU Regulation has extended the scope of persons empowered to request the opening of territorial insolvency proceedings to public authority, who has the right to make a request under the law of the Member State within the territory of which the establishment is situated.[777]

2.2.3.2 Secondary Insolvency Proceedings

4.85 The secondary insolvency proceedings are territorial proceedings opened subsequent to the commencement of the main proceedings and can be requested by insolvency practitioner in the main proceedings or any other person or authority empowered under the national law of that Member State.[778] The secondary insolvency proceedings can be opened upon the request of

"(a) insolvency practitioner in the main proceedings
(b) any other person or authority empowered under the national law of that Member State"[779]

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[773] The EC Regulation, article 3(4)(b); the EU Regulation (recast), article 3(4)(b)(i)

[774] Case C–112/10, *Zaza Retail* [2011] ECR I-11525 (*Zaza Retail*), para.30

[775] *Zaza Retail*, para.27

[776] *Zaza Retail*, para.32

[777] The EU Regulation (recast), article 3(4)(b)(ii)

[778] The EC Regulation, recital (18), (37), article 29; the EU Regulation (recast), recital (38), article 37(1)

[779] The EC Regulation, article 29; the EU Regulation (recast), recital (38), article 37(1). As aforementioned, the liquidators under the EC Regulation have been changed into insolvency

4.86 In *Burgo* case,[780] the CJEU made further explanation on the condition, under which the secondary proceedings can be opened. The decision is also linked to the relevant amendment under the EU Regulation (recast).[781] In *Burgo* case, the corporate group, Illochroma, commenced its main proceedings in France. Its Italian creditor, Burgo Group, requested to open secondary proceedings against Illochroma in Belgium. One of the main questions referred to the CJEU is whether it is appropriate to open secondary proceedings in the Member State of the registered office, if the main proceedings concerning a legal person or company have been opened in a Member State other than that of its registered office. By referring to its decision in *Interedil*,[782] the CJEU examined the criteria set out under Article 2(h) of EC Regulation, noticing that the registered office is not precluded from the definition of establishment.[783]

4.87 Fully aware of the protection function seized by establishment, the CJEU went on to emphasize that the local interests, in connection with the legitimate expectation of a creditor,[784] may also exist where the registered office of the debtor company concerned is situated,[785] which deserve equal protection by comparison with local interests established in other Member States in which the debtor may have other establishments.[786] Hence, the CJEU held that the definition of establishment should include the registered office.[787] The decision of the CJEU in *Burgo* case is relevant for the new amendment to the Recital under the EU Regulation (recast), which allows secondary proceedings concerning a legal person or company in the Member State of the registered office to be opened, if the debtor is carrying out an economic activity with human means and assets in that State and main proceedings have been opened in a Member State other than that of its registered office.[788]

2.2.3.3 Intervention in Secondary Insolvency Proceedings

4.88 The ideal of the Regulation is to achieve "a single exclusive universal form of insolvency proceedings for the whole of the Community",[789] which are established on the basis of the principle of unity (i.e. "concentrating cross border

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practitioners pursuant to the EU Regulation (recast), which reflected the shift of attitudes from liquidation to rescue.

[780] Case C-327/13, *Burgo Group SpA v Illochroma SA and Jérôme Theetten* [2014] (*Burgo*)

[781] The EU Regulation (recast), recital (24): Where main proceedings concerning a legal person or company have been opened in a Member State other than that of its registered office, it should be possible to open secondary proceedings in the Member State of the registered office, provided that the debtor is carrying out an economic activity with human means and assets in that State, in the light of the case law of the Court of Justice of the European Union.

[782] *Interedil*, para.62

[783] *Burgo*, para.31, 32

[784] *Burgo*, para.37

[785] *Burgo*, para.36

[786] *Burgo*, para.38

[787] *Burgo*, para.39

[788] The EU Regulation (recast), recital (24)

[789] Virgós/Schmit Report (1996), para.12

insolvencies within a single proceeding"[790]) and the principle of universality ("extending those proceedings to all the debtor's assets, wherever they may be situated"[791]).[792] Therefore, opening of secondary proceedings inevitably disrupts these underlying principles of the Regulation. Nevertheless, owing to pre-existing rights created under diverse local laws as well as different priority rules governed by various domestic insolvency systems, secondary proceedings are considered as "a necessary evil"[793] and subordinate to the main proceedings under the Regulation. Accordingly, the secondary insolvency proceedings possessing both the function of protection of local interests and the auxiliary function can be opened as well as intervened for the purpose of the efficient administration of the insolvency estate and the effective realization of the total assets.

2.2.3.3.1 Intervention under the EC Regulation

4.89 The EC Regulation provides a few measures for the main liquidators to intervene with the secondary proceedings. First of all, the main liquidator shall be given an early opportunity of submitting proposals on the liquidation or use of the assets in the secondary proceedings.[794] Secondly, the liquidator in the main proceedings can apply for realization of assets in the secondary proceedings to be suspended[795] or request an order for stay of the process of liquidation for a certain period.[796] Thirdly, although the secondary proceedings must be winding-up proceedings under the EC Regulation,[797] the main liquidator is empowered to propose a rescue plan, a composition or a comparable measure in order to close the secondary proceedings if such a measure is allowed under the law applicable to secondary proceedings.[798] If someone else other than the main liquidator proposes such a measure, the consent of the main liquidator is required in order to become final; failing his agreement, it may become final if the financial interests of the creditors in the main proceedings are not affected by the measure proposed.[799] Last but not least, the main liquidators and the liquidators in the secondary proceedings are duty bound to cooperate and communicate with each other.[800]

4.90 After over ten years of implementation, the European Commission summarized that the opening secondary proceedings could result in

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[790] Arts, Robert, Main and Secondary Proceedings in the recast of the European Insolvency Regulation – the only good secondary proceeding is a synthetic secondary proceeding, 2015, p.2, available at: http://iiiglobal.org/iii-prize-in-insolvency.html (Last visited on 14 June 2016)
[791] Case C-328/12, *Ralph Schmid v. Lilly Hertel* [2013] Opinion of Advocate General Sharpston, ft.6
[792] Case C-328/12, *Ralph Schmid v. Lilly Hertel* [2013] Opinion of Advocate General Sharpston, para.22
[793] Pottow, John A.E., A New Rule for Secondary Proceedings in International Bankruptcies, in: 46 Tex. Int'l L.J. 579, 2011, p. 582
[794] The EC Regulation, article 31(3)
[795] The EC Regulation, recital (20)
[796] The EC Regulation, article 33(1)
[797] The EC Regulation, article 31(1)
[798] The EC Regulation, article 34(1)
[799] The EC Regulation, article 34(1)
[800] The EC Regulation, article 31(1), (2)

segmentation of the assets from the main proceedings and disruption to the efficient administration of the entire estate,[801] which could consequently jeopardize the principle of universality. Besides, the Commission pointed out that the disadvantage of opening of secondary proceedings also related to additional costs of proceedings incurred substantially.[802] The 2015 World Bank report may serve as supportive reference. The cost of insolvency proceedings,[803] irrespective of domestic or cross-border, was about 9% of the value of the debtor's estate in France, 8% in Germany, 4% in the Netherlands, 22% in Italy and 6% in United Kingdom.[804]

4.91 Nevertheless, sometimes opening of secondary proceedings is used as counter-measures against main insolvency proceedings, which stems from disagreement on the location of COMI. In the case of Illochroma, it involved a French group Illochroma, which had a subsidiary in Italy (Illochroma Italy). After the French court decided that the COMI of Illochroma Italy was located in France and accordingly opened a main proceeding, the Italian court commenced a secondary proceeding on the same company to prevent the assets of Illochroma Italy from being at disposal of the French main proceeding.[805] That kind of motivation to commence a secondary proceeding simply adds nothing but complexity and costs to the entire proceedings.

4.92 In addition, according to the Commission, coordination between main and secondary proceedings is not sufficient in practice.[806] This is partly due to limited content of cooperation and communication as prescribed under the Article 31 and the need for specific guidelines and best practice in that regard.[807]

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[801] EU Commission Staff Working Document the Impact Assessment Accompanying the document Revision of Regulation (EC) No 1346/2000 on insolvency proceedings, Strasbourg, 12.12.2012, SWD(2012) 416 final, p.23

[802] EU Commission Staff Working Document the Impact Assessment Accompanying the document Revision of Regulation (EC) No 1346/2000 on insolvency proceedings, Strasbourg, 12.12.2012, SWD(2012) 416 final, p.23

[803] The costs include court fees and government levies; fees of insolvency administrators, auctioneers, assessors and lawyers; and all other fees and costs. See Word Bank, Doing Business 2015 - Going Beyond Efficiency, Washington, DC: World Bank, 2014, p.140

[804] Word Bank, Doing Business 2015 - Going Beyond Efficiency, Washington, DC: World Bank, 2014, p.167-230

[805] C-327/13, *Burgo Group SpA v Illochroma SA and Jérôme Theetten* [2014]; See also Corte d'Appello Torino, 10/3/2009, IL Fallimento, 11/2009,1296, cases reported by Caponi, Remo, Mucciarelli, Federico Maria (Italy); See also MG Rover case reported by Veder, Michael (Netherlands) in: Hess, Burkhard, Oberhammer, Paul, Pfeiffer, Thomas, European Insolvency Law-The Heidelberg-Luxembourg-Vienna Report on the Application of Regulation No.1346/2000/EC on Insolvency Proceedings (External Evaluation JUST/2011/JCIV/PR/0049/A4), C.H.Beck.Hart.Nomos, 2014, Annex Systematic Summary of National Reports, Q.29: Could you give examples of cases where the opening of secondary proceedings was considered as a useful tool to protect the interests of local creditors or to facilitate the administration of the main proceedings and instances in which it has not? Are you aware of cases in which secondary proceedings have been opened abusively?

[806] EU Commission Staff Working Document the Impact Assessment Accompanying the document Revision of Regulation (EC) No 1346/2000 on insolvency proceedings, Strasbourg, 12.12.2012, SWD(2012) 416 final, p.23

[807] EU Commission Staff Working Document the Impact Assessment Accompanying the document Revision of Regulation (EC) No 1346/2000 on insolvency proceedings, Strasbourg, 12.12.2012, SWD(2012) 416 final, p.24

Moreover, the tension flowing from main and secondary proceedings, i.e. the interests of the local creditors pursuant to *lex fori secundarii* and the universal effect of the main proceedings based on *lex fori concursus*, is sometimes difficult to be reconciled. Secondary proceedings are more frequently initiated for the interest of local creditors, in particular, employees, who usually receive privileged protection under the domestic insolvency system due to socio-political consideration.[808]

4.93 In fact, there is also specialized regime at EU level, which is Directive 2008/94/EC on the protection of employees in the event of the insolvency of their employer, to ensure payment of employees' outstanding claims in the event of employer insolvency by requiring Member States to set up an institution to guarantee the payments. According to Arts, protecting the interests by means of opening of secondary proceedings, which are already adequately guaranteed by other instruments, could "result in an unjustified diminution of the insolvency estate".[809] It seems that the mere fact of the existence of secondary proceedings, which results in depart from the principles of unity and universality and difficulty in coordination, turns itself into a big problem.

2.2.3.3.2 Intervention under the EU Regulation (recast)

4.94 Under the recast EU Regulation, in addition to the interfering powers granted to the main insolvency practitioners as the main liquidators under the EC Regulation, such as an early opportunity to submit proposals on the realization or use of the assets in the secondary insolvency proceedings[810] or closing a secondary proceeding with a restructuring plan, a composition or a comparable measure if so permitted under the law of that Member State,[811] intervention with the secondary proceedings has been further strengthened. First of all, duties of cooperation and communication have been broadened for the insolvency practitioners and extended to the courts involved.[812] (I will discuss about that point later in the Cooperation and Communication Section) Secondly, the courts are empowered, upon the request of the main insolvency practitioners, to postpone or refuse the opening of secondary proceedings. Thirdly, the main insolvency practitioner shall be given an immediate notice and an opportunity to be heard if a request to open secondary insolvency

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808 In EU See national reports to Q.29 from Austria, Germany, Netherlands, Portugal, Spain, Sweden and UK, in: Hess, Burkhard, Oberhammer, Paul, Pfeiffer, Thomas, European Insolvency Law-The Heidelberg-Luxembourg-Vienna Report on the Application of Regulation No.1346/2000/EC on Insolvency Proceedings (External Evaluation JUST/2011/JCIV/PR/0049/A4), C.H.Beck.Hart.Nomos, 2014, Annex Systematic Summary of National Reports

809 Arts, Robert, Main and Secondary Proceedings in the recast of the European Insolvency Regulation – the only good secondary proceeding is a synthetic secondary proceeding, 2015, p.15, available at: http://iiiglobal.org/iii-prize-in-insolvency.html (Last visited on 14 June 2016)

810 The EU Regulation (recast), article 41(2)(c)

811 The EU Regulation (recast), article 47(1)

812 Wessels, Bob, Contracting out of Secondary Insolvency Proceedings: The Main Liquidator's Undertaking in the Meaning of Article 18 in the Proposal to Amend the EU Insolvency Regulation, in: Brooklyn Journal of Corporate, Finance & Commercial Law, vol.9, issue 1, 2014, p.87

proceedings is presented to a court,[813] which functions as a procedural guarantee for the intervention.

2.2.3.3.2.1 Undertaking

4.95 The first innovation is to introduce the so-called synthetic secondary proceedings.[814] It aims at preventing the potential opening of the secondary proceedings, which is framed in a way that insolvency practitioners can promise to the local creditors in the form of an undertaking that they will be treated as if secondary proceedings had been opened.[815] The origin of synthetic secondary proceedings are rooted in practice, in particular practice of common law.

4.96 The motivation of such an invention was twofold by then. One related to the liquidation nature of the secondary proceedings opened under the EC Regulation.[816] The other was linked with the fact that due to lack of specific rules concerning a group of companies, in practice, a subsidiary of a group of company is treated as establishment,[817] on the basis of which the secondary proceedings can be opened. The two factors combinedly stimulated the pursuit of a more preferable solution to prevent incoherence between the main proceedings and the secondary proceedings and accordingly the piecemeal of the debtor's assets, which was detrimental to rescue of the same company in difficulty or the entire group.

4.97 A typical example is *Collins & Aikman*.[818] It involved a group company, whose ultimate parent of the enterprises group was in U.S.A. It has very complicate structure with 24 companies in 10 European countries. Again the English court decided that the COMI of the 24 European companies were in UK on the ground that "the cash management functions for the plant were managed from London and other administrative functions were based in England and strategic management in respect of the company took place by way of the Strategy Committee based in England."[819] Aiming at rescue the companies as going concerns and seek to achieve a better result for the companies' creditors and to avoid the opening of secondary proceedings, the administrators gave oral assurances to creditors at creditors' meetings and creditors' committees' meetings that if there were no secondary proceedings in the relevant jurisdiction

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[813] The EU Regulation (recast), article 38(1)

[814] EU Commission Staff Working Document the Impact Assessment Accompanying the document Revision of Regulation (EC) No 1346/2000 on insolvency proceedings, Strasbourg, 12.12.2012, SWD(2012) 416 final, p.36

[815] Pottow, John A.E., A New Role for Secondary Proceedings in International Bankruptcies, 46 Tex. Int'l L.J., 2011, p.585. Those "as if" proceedings are referred to as virtual territoriality by Janger. See Janger, Edward, Virtual Territoriality, 48 Colum. J. Transnat'l L. 2010, p.401; referred to as virtual contractual proceedings by Dammann and Menjucq, see also Menjucq, Michael & Dammann, Reinhard, Regulation No. 1346/2000 on Insolvency Proceedings: Facing the Companies Group Phenomenon, 9 Bus. L. Int'l. 145, 2008, p.154

[816] The EC Regulation, article 3(3)

[817] Fasquelle, Daniel, Les faillites des groupes de sociétés dans l'Union européenne : la difficile conciliation entre approches économique et juridique, Bulletin Joly Sociétés 2006, n°2, p.151-167

[818] *Re Collins & Aikman Corp Group*, [2006] B.C.C. 606

[819] *Re Collins & Aikman Corp Group*, [2006] B.C.C. 606, at 1

then their respective financial positions as creditors under the relevant local law would as far as possible be respected in the English administration, was of critical importance to the successful execution of the administration strategy.[820] How did the administrators keep their promise? They relied on the Article 4 (1) of the Regulation,[821] which required the application of English Law, and successfully convinced the English court with three grounds for justifying the giving of assurances and their fulfillment.[822] The three grounds are

(1) the rule in Exp. James (1873–74) L.R. 9 Ch. App. 609, which was described in McPherson's Law of Company Liquidation (4th ed., 1999, Lawbook Co) as "this elusive and difficult principle is based on morality. At the center of the principle is that if an officer of the Court is under an obligation of conscience, then the Court will direct the officer to fulfill that obligation."[823]

(2) express powers of the English legislation,[824] and

(3) the inherent jurisdiction of the court[825]

4.98 Without equivalent legal basis as those provided under the common law system, the approach adopted by the administrators in *Collins & Aikman* could not have worked. In particular, the courts of civil law countries in the continental Europe might not be given the discretion to allow the administrators to keep the assurance they made in advance and fulfill the obligation. Now the EU Regulation (recast) set out the specific legal basis for an undertaking as well as formulates detailed conditions.[826]

4.99 An undertaking is proposed by insolvency practitioners in the main insolvency proceedings.[827] The main content of an undertaking is concentrated on distribution or the proceeds received as a result of their realization from the local assets to the creditors in a way as if secondary insolvency proceedings had been opened.[828] It should also be stated in the undertaking the factual assumptions on which it is based, in particular the value of the assets located in the Member State concerned and the options available to realize such assets.[829] The assets shall be determined at the moment the undertaking is given.[830] The undertaking shall be made in the form of writing[831]and in the official language or

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[820] *Re Collins & Aikman Europe SA*, [2006] B.C.C. 861, at 8

[821] The EC Regulation, article 4(1): Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened, hereafter referred to as the 'State of the opening of proceedings'.

[822] Moss, Group Insolvency - Choice of Forum and Law: The European Experience under the Influence of English Pragmatism, 32 Brook. J. Int'l L., 2006-2007, p.1018

[823] *Re Collins & Aikman Europe SA*, [2006] B.C.C. 861, at 15

[824] *Re Collins & Aikman Europe SA*, [2006] B.C.C. 861, at 21-26

[825] *Re Collins & Aikman Europe SA*, [2006] B.C.C. 861, at 18 - 20

[826] The EU Regulation (recast), article 36, 38(2)

[827] The EU Regulation (recast), recital (42), article 36(1)

[828] The EU Regulation (recast), article 36(1)

[829] The EU Regulation (recast), article 36(1)

[830] The EU Regulation (recast), article 36(2)

[831] The EU Regulation (recast), article 36(4)

one of the official languages of the Member State where secondary insolvency proceedings could have been opened.[832] Other formality requirements concerning an undertaking are governed by the law of the State of the opening of the main insolvency proceedings.[833]

4.100 One of the most significant problems arising from synthetic proceedings is concerning the applicable law rules. A synthetic proceeding is not a real secondary proceeding but in essence an agreement between the main and the virtual secondary proceedings, in which the estate is fictionally split[834] to prevent the formal opening of secondary insolvency proceedings. In accordance with the EU Regulation (recast), the main effects of the undertakings, including realization of assets, the ranking of creditors' claims and the rights of creditors in relation to the assets, are governed by the law of the Member State, in which secondary insolvency proceedings could have been opened (*lex fori concursus secondarii*).[835] Meanwhile, the main insolvency practitioner may exercise all the powers conferred on it, by the law of the State of the opening of proceedings (*lex fori concursus*), in another Member State, as long as no other insolvency proceedings have been opened there and no preservation measure to the contrary has been taken there further to a request for the opening of insolvency proceedings in that State.[836] Accordingly, it seems that *lex fori concursus* and *lex fori concursus secondarii* will go hand-in-hand in the context of the synthetic proceedings. However, since the wording under the Article 36(1) of the EU Regulation (recast), especially such as the rights of creditors in relation to the assets (to which extent those rights should be?), is quite general and vague. Without detailed rules, it is expected that there will be conflicts between the powers granted to the main insolvency practitioner and protection exclusively guaranteed to the local creditors in the synthetic proceedings.

4.101 Moreover, Wessels pointed out the possible influences of the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) and Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), which provide rules of applicable law governing contractual obligations and non-contractual obligations. Their influences on the undertaking are not direct but are decisive on the law governing the rights of creditors in relation to the assets. Both Rome I and Rome II are based on the principle of freedom of choice.[837] In particular under Rome I, the applicable law to a contract, upon consensus between the parties concerned, may be changed at any time.[838] Technically speaking, it is possible that the majority of the known local creditors can choose a more

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[832] The EU Regulation (recast), article 36(3)
[833] The EU Regulation (recast), article 36(4)
[834] Arts, Robert, Main and Secondary Proceedings in the recast of the European Insolvency Regulation – the only good secondary proceeding is a synthetic secondary proceeding, 2015, p.19, available at: http://iiiglobal.org/iii-prize-in-insolvency.html (Last visited on 14 June 2016)
[835] The EU Regulation (recast), article 36(2)
[836] The EU Regulation (recast), article 21(1)
[837] Rome I, Article 3; Rome II, Article 14
[838] Rome I, Article 3(2)

favorable law to their contracts according to Rome I upon the agreement of the main insolvency practitioners because the right of approval of the undertaking is conferred on the known local creditors.[839] Hence, Wessels suggested to create specialized applicable law rules for an undertaking and advocated amendments to both Rome I and Rome II, which shall explicitly exclude undertakings from their scope of application.[840] In short, the synthetic secondary proceedings make the landscape of rules of applicable law more complicated because they enable *lex fori concursus*, *lex fori concursus secondarii* and relevant EU law to run parallel to each other. A clearer line is expected to sort out those problems.

4.102 Protection of local creditors is the key concern arising out of an undertaking. First of all, the right of approval of the undertaking is conferred on the known local creditors.[841] Secondly, the local creditors have the rights to be informed about the undertaking, of the rules and procedures for its approval, and of the approval or rejection of the undertaking[842] as well as the intended distributions prior to distributing the assets and proceeds provided in accordance with the undertaking.[843] Thirdly, the local creditors are given the right to apply to the courts of the Member State in which main insolvency proceedings have been opened or secondary insolvency proceedings could have been opened in order to seek suitable measures necessary to ensure compliance with the terms of the undertaking and the applicable law.[844] Besides, any damage caused to local creditors should be ascribed to non-compliance of the insolvency practitioner with the obligations and requirements.[845] Fourthly, in order to facilitate the creditors to exercise the voting rights, they can vote by distance means of communication where national law so allows.[846] Nevertheless, given all those crucial rights conferred on them in the context of synthetic proceedings the EU Regulation (recast) did not define who can be referred to as "local creditors",[847] (for example can a creditors, who already lodged claims in the main proceedings, also count as a local creditor?), which will probably cause troubles in practice.

2.2.3.3.2.2 Temporary Stay of the Opening of Secondary Insolvency Proceedings

4.103 In addition to an undertaking, the court can temporarily stay the opening of secondary insolvency proceedings for the purpose of preservation of the efficiency of moratorium granted in the main proceedings,[848] which allows for

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[839] The EU Regulation (recast), article 36(5)
[840] Wessels, Bob, Contracting out of Secondary Insolvency Proceedings: The Main Liquidator's Undertaking in the Meaning of article 18 in the Proposal to Amend the EU Insolvency Regulation, in: Brooklyn Journal of Corporate, Finance & Commercial Law, vol.9, issue 1, 2014, p.104 -110
[841] The EU Regulation (recast), article 36(5)
[842] The EU Regulation (recast), article 36(5)
[843] The EU Regulation (recast), article 36(7)
[844] The EU Regulation (recast), article 36(7), (8), (9)
[845] The EU Regulation (recast), article 36(10)
[846] The EU Regulation (recast), article 36(5)
[847] Wessels, Bob, Contracting out of Secondary Insolvency Proceedings: The Main Liquidator's Undertaking in the Meaning of Article 18 in the Proposal to Amend the EU Insolvency Regulation, in: Brooklyn Journal of Corporate, Finance & Commercial Law, vol.9, issue 1, 2014, p.98-99
[848] The EU Regulation (recast), recital (45)

negotiations between the debtor and its creditors in order to promote the prospects of a restructuring of the debtor's business.[849] The insolvency practitioner or the debtor in possession can make such a request.[850] The most important condition that needs to be satisfied before a temporary stay on the commencement of secondary proceedings is granted is that suitable measures are in place to protect the interests of local creditors,[851] including "protective measures ordered by the court by requiring the insolvency practitioner or the debtor in possession not to remove or dispose of any assets which are located in the Member State where its establishment is located unless this is done in the ordinary course of business, or other measures ordered by the court during a stay, which are compatible with the national rules on civil procedure".[852]

4.104 The temporary stay on the commencement of secondary proceedings is also subject to limitations. (1) The stay can only last for a period not longer than three months.[853] (2) If a consensus has been built in the negotiations during the stay, the court on its own motion or upon the request of any creditor shall revoke the stay.[854] (3) The court shall on its own motion or at the request of any creditor lift the stay if

"(a) the continuation of the stay is detrimental to the creditor's rights, in particular if the negotiations have been disrupted or it has become evident that they are unlikely to be concluded; or
(b) the insolvency practitioner or the debtor in possession has infringed the prohibition on disposal of its assets or on removal of them from the territory of the Member State where the establishment is located."[855]

2.2.3.3.2.3 Right to Challenge the Opening of Secondary Insolvency Proceedings

4.105 It is required under the EU Regulation (recast) that the court shall immediately give notice to the insolvency practitioner or the debtor in possession in the main proceedings and give him an opportunity to be heard on the pending request to open secondary proceedings.[856] In *Nortel Network*, due to the highly integrated trading relationships between group companies, the joint administrators also planned to avoid any secondary proceedings so as to achieve a coordinated reorganization of the entire group in Europe.[857] The joint administrators applied to the court for a letter of request to be sent to the courts of a number of EU Member States, requesting

(1) to be given notice of any application for the opening of secondary insolvency proceedings in respect of any of the companies in administration;

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[849] The EU Regulation (recast), article 38(3), para.1
[850] The EU Regulation (recast), article 38(3), para.1
[851] The EU Regulation (recast), recital (45)
[852] The EU Regulation (recast), article 38(3), para.2
[853] The EU Regulation (recast), article 38(3), para.1
[854] The EU Regulation (recast), article 38(3), para.3
[855] The EU Regulation (recast), article 38(3), para.4
[856] The EU Regulation (recast), article 38(1)
[857] *Re Nortel Networks SA*, [2009] B.C.C. 343

(2) to be given an opportunity for the administrators to be heard on any such application and to enable them to explain to the foreign court why such proceedings would not be in the interests of the creditors prior to the opening of any secondary insolvency proceedings[858]

4.106 Now the EU Regulation (recast) provides the procedural legal basis that the insolvency practitioner in the main proceedings may challenge the decision to open secondary proceedings before the courts of the Member State where secondary proceedings have been opened, if his rights to be heard are not be satisfied.[859] Besides, the insolvency practitioner in the main insolvency proceedings can also request the court to open a different type of secondary insolvency proceedings as listed in Annex A other than the type initially requested if the conditions for opening a different type of secondary insolvency proceedings are satisfied under the national law and that type of proceedings is considered the most appropriate for the interests of the local creditors and coherence between the main and secondary insolvency proceedings.[860]

2.2.4 Influences of the Concurrent Proceedings under the Model Law

4.107 Contrary to its functions under the Regulation, establishment merely serves as a criterion for recognition of non-main proceedings in accordance with the Model Law. Upon recognition of a foreign main proceeding, the Model Law actually imposes no limitations on the jurisdiction of the courts in the enacting State to commence or continue concurrent insolvency proceedings on the basis of establishment or mere presence of assets.[861] However, the Model Law also explicitly welcomes a more restrictive approach, which allows the initiation of the local proceeding only if the debtor has an establishment in the State.[862] In principle, the effects of the concurrent proceedings are restricted to the assets of the debtor that are located in the State.[863] There is also possibility that the effects of a local proceeding can be extended to assets located abroad if both of the following conditions are met.

(i) to the extent necessary to implement cooperation and coordination to other assets of the debtor;
(ii) those foreign assets must be subject to administration in the enacting State under the law of the enacting State[864]

4.108 In addition, a concurrent proceeding can also be opened in accordance with the law of the enacting State relating to insolvency and the court involved should seek cooperation and coordination pursuant to Chapter IV of the Model Law.[865] The underlying principle is the commencement of a local proceeding

[858] *Re Nortel Networks SA*, [2009] B.C.C. 343
[859] The EU Regulation (recast), article 39
[860] The EU Regulation (recast), article 38(4)
[861] The Model Law, article 28; Guide and Interpretation, para.224-226
[862] Guide and Interpretation, para.226
[863] Guide and Interpretation, para.227
[864] The Model Law, article 28, Guide and Interpretation, para.227
[865] The Model Law, article 29

does not prevent or terminate the recognition of a foreign proceeding.[866] It is suggested that intervention with the local proceedings under the Model Law can be conducted in a different scenario "by tailoring the relief to be granted to the foreign main proceeding and cooperating with the foreign court and foreign representative".[867] (I will discuss about reliefs in detail in the next Chapter "Recognition and Reliefs").

4.109 If the concurrent proceeding is commenced prior to application for recognition of the foreign proceeding concerning the same debtor, any discretionary reliefs granted to the foreign proceedings should be in consistent with the concurrent proceeding in the enacting State.[868] Moreover, automatic recognition and reliefs granted to a foreign main proceeding based on Article 20 of the Model Law does not apply if the foreign proceeding is recognized as a foreign main proceeding in this enacting State where a concurrent proceeding has already been opened.[869] If the concurrent proceeding is opened after recognition or after the petition for recognition of the foreign proceeding, any discretionary reliefs should be reviewed by the court and should be modified or terminated if inconsistent with the concurrent proceeding in this enacting State.[870] In case that the foreign proceeding is a foreign main proceeding, the stay and suspension in accordance with Article 20(1) should be modified or terminated pursuant to Article 20(2) if inconsistent with the proceeding in this enacting State.[871]

4.110 It is observed that the local proceeding, regardless opened before or after recognition of a foreign proceeding, can result in modification or termination of reliefs to be granted to the foreign proceedings, including the foreign main proceedings.[872] It entail that the foreign main proceeding pursuant to the Model Law does not have the same superior status as the main insolvency proceedings under the Regulation. Besides, it is emphasized that the Model Law is not intent to establish "a rigid hierarchy" between the proceedings in order to facilitate cooperation of the court.[873]

Ch.3 Recognition and Reliefs

4.111 Upon request for recognition of a foreign judgment, a receiving court has to determine (1) Whether or not to recognize a foreign judgment? (2) Once recognized, to which extent the effect of the foreign judgment should be accorded? (3) If the judgment is recognized, how to enforce it? This section will answer the three questions in the context of cross-border insolvency and identify the difference concerning recognition, effects and enforcement between the Regulation and the Model Law.

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[866] Guide and Interpretation, para.230
[867] Guide and Interpretation, para.226
[868] The Model Law, article 29(a)(i)
[869] The Model Law, article 29(a)(ii)
[870] The Model Law, article 29(b)(i)
[871] The Model Law, article 29(b)(ii)
[872] Guide and Interpretation, para.231
[873] Guide and Interpretation, para.231

3.1 Automatic Recognition and Universal Effects under the Regulation

4.112 The recognition system under the Regulation is based on a singular criterion, which is directly linked to jurisdiction. A judgment commencing a main insolvency proceeding rendered by a court of a Member State shall be automatically recognized in all other Member States as long as the court that opened the proceeding has jurisdiction pursuant to Article 3.[874] To understand that kind of arrangement, it should be explained from three aspects. First of all, that arrangement accords with the general rule concerning recognition under private international law, which is "no state recognizes the judgment of another state rendered without jurisdiction over the judgment debtor".[875] Secondly, from the perspective of cross-border insolvency, the aim of the Regulation is universalism though alongside with some compromise.[876] The rationale behind that principle is to administrate all of the assets and debts of the debtor through one central jurisdiction. Accordingly, the Regulation provides a system of automatic recognition concerning the main proceeding throughout the EU. Thirdly, that arrangement is peculiar to EU because automatic recognition is guaranteed by the principle of mutual trust.[877] (For discussion concerning the principle of mutual trust, please refer to section 2.2.1) It requires that grounds for non-recognition should be reduced to the minimum necessary (See section 3.3 Public Policy Exception.) In the case that the courts of two Member States both claim competence to open the main insolvency proceedings, the principle of mutual trust should also serve as the proper foundation for jurisdiction dispute settlement in the course of recognition.[878] In *Eurofood* case, the CJEU makes clear that

"the principle of mutual trust requires that the courts of the other Member States recognize the decision opening main insolvency proceedings, without being able to review the assessment made by the first court as to its jurisdiction."[879]

4.113 On the ground the principle of mutual trust, the effects flowing from automatic recognition are universal to the extent the exception applies, which means without further formalities, the effects of the main proceeding are extended to all other Member States.[880] Besides, the scope of the effects of cross-border insolvency proceedings is also connected with choice of law rules. In order to approach the universal effect, the Regulation adopted *lex fori concursus* as the fundamental rule of its uniform choice of law system, which requires that

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[874] The EC Regulation, article 16(1); the EU Regulation (recast), article 19(1): Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognized in all other Member States from the moment that it becomes effective in the State of the opening of proceedings.

[875] American Law Institute, Restatement of the Law Third: The Foreign Relations Law of the United States, Vol.1, St. Paul: American Law Institute Publishers, 1987, p.591

[876] Virgós/Schmit Report (1996), para.12; the EC Regulation, recital (11), (12); the EU Regulation (recast), recital (22), (23)

[877] The EC Regulation, recital (22); the EU Regulation (recast), recital (65)

[878] The EC Regulation, recital (22); the EU Regulation (recast), recital (65)

[879] *Eurofood*, para.42; the EU Regulation (recast), recital (65)

[880] The EC Regulation, article 17(1); the EU Regulation (recast), article 20(1)

the law of the State of the opening of proceedings shall determine the conditions for the opening, conduct and closure of insolvency proceedings.[881] Meanwhile, aware of the fact that it is difficult to implement a single exclusive regime of universality without modifying,[882] the effects of the main proceedings will be limited by the opening of secondary proceedings in another Member State.[883] Although the rule of applicable law on the secondary proceedings is also *lex fori concursus*,[884] the effects, instead of being universal, are restricted to the assets located in the State of the opening of secondary proceedings (hence, in fact, *lex fori concursus secondarii*).[885]

4.114 Upon recognition, the effects are mainly realized by the insolvency practitioners, who exercise the powers vested in them under the Regulation.[886] If an insolvency practitioner is appointed by the opening of the main proceedings, the nature, content and extent of his power is determined subject to the *lex fori concursus* automatically exercisable in other Member States.[887] There are also built-in exceptions. First of all, if the main insolvency practitioners exercise the powers in foreign Member States, they shall be subject to both substantive and procedural restrictions. For instance, there are explicit bars on coercive measures and rights to rule on legal proceedings and disputes. In addition, they should take action in the manner according to the local law.[888]

4.115 Secondly, the power of the main insolvency practitioners to remove the debtor's assets from the territory of the Member State in which they are situated is deemed as "the most common reason for attempting to exercise powers and perhaps the most sensitive in terms of local interests".[889] Therefore, it is stipulated under the Regulation that third parties' rights in rem and rights involving reservation of title are not affected by the effects of the main proceedings[890] and accordingly fall out of the reach of the powers of the main insolvency practitioners.

4.116 Thirdly, if preservation measure has been taken in order to open secondary proceedings, the main insolvency practitioners cannot exercise their powers conflicting with those measures.[891] Last but not least, once the secondary proceedings are opened, the powers of the main insolvency practitioners will no longer be effective as against those local assets. The secondary insolvency practitioners have the power to claim in any other Member State that moveable

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[881] The EC Regulation, recital (23), article 4; the EU Regulation (recast), recital (66), article 7
[882] Virgós/Schmit Report (1996), para.12
[883] The EC Regulation, article 3(2)(3); the EU Regulation (recast), article 3(2)(3)
[884] The EC Regulation, recital (23); the EU Regulation (recast), recital (66)
[885] The EC Regulation, recital (12); the EU Regulation (recast), recital (23)
[886] The EC Regulation, article 18; the EU Regulation (recast), article 21
[887] The EC Regulation, article 18(1); the EU Regulation (recast), article 21(1)
[888] The EC Regulation, article 18(3); the EU Regulation (recast), article 21(3)
[889] Moss, Fletcher, Isaacs (ed.), The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide (2nd ed.), Oxford University Press, 2009, para.8.276
[890] The EC Regulation, article 5,7; the EU Regulation (recast), article 8,10
[891] The EC Regulation, article 18(1); the EU Regulation (recast), article 21(1)

property was removed from the State where the territorial proceedings were commenced to after the opening of those insolvency proceedings [892]

3.2 Recognition and Reliefs under the Model Law

3.2.1 Recognition

4.117 Instead of establishing a comprehensive framework as under the Regulation, the Model Law narrowed its scopes and goals to some of the most crucial issues concerning cross-border insolvency, including facilitation of recognition of foreign insolvency proceedings. [893] Under the Model Law, recognition will be "granted as a matter of course" [894] if recognition is not contrary to the public policy of the enacting States and if the application meets the basic criteria set out in Article 17(1), including

(1) the proceeding must be a foreign proceeding (within the meaning of article 2 (a));
(2) applied by a foreign representative (within the meaning of article 2 (d));
(3) the application meets the requirements (provided under article 15 (2));
(4) has been submitted to the competent court (article 4).

4.118 Those simple recognition criteria reflects the core philosophy of the Model Law, which is "there is no time to waste, as the recognition must take place as expeditiously as possible".[895] In particular, it is advised that based on any of those criteria a proceeding could be deemed a main proceeding. If more than one criterion is included, it "would raise the risk of competing claims from foreign proceedings for recognition as the main proceeding".[896] The receiving court is not given the opportunity to judge the merits of the foreign proceedings.[897] Further, it has been stressed that to obtain early recognition is often the guarantee for effective protection of the assets of the debtor from dissipation and concealment. For that reason, the court is obliged to decide on the application "at the earliest possible time".[898] In addition, the Model Law also uses the jurisdictional basis, i.e. COMI and establishment, for the court to distinguish recognition of the foreign proceedings as the main or non-main proceedings.[899]
To be recognized as main or non-main proceeding differ quite substantially in the legal consequences because the effects and reliefs flowing from recognition may depend upon the category into which a foreign proceeding falls.

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[892] The EC Regulation, article 18(2); the EU Regulation (recast), article 21(2)
[893] UNCITRAL Secretariat, Report on UNCITRAL-INSOL Colloquium on Cross-Border Insolvency, U.N. Doc. A/CN.9/398 (May 19, 1994), paras.17-18
[894] Guide and Interpretation, para.150
[895] Berends, André, The UNCITRAL Model Law on Cross-border Insolvency: A Comprehensive Overview, in: 6 Tul. J. Int'l & Comp. L., pp. 320
[896] Guide and Interpretation, para. 155
[897] Guide and Interpretation, Para. 151
[898] The Model Law, Article 17(3); See also the Guide and Interpretation, para. 163: the phrase "at the earliest possible time" has a degree of elasticity. Some cases may be so straightforward that the recognition process can be completed within a matter of days. In other cases, particularly if recognition is contested, "the earliest possible time" might be measured in months. Interim relief will be available in the event that some order is necessary while the recognition application is pending.
[899] The Model Law, Article 17(2)(a)(b)

3.2.2 Reliefs

4.119 Due to various insolvency systems from State to State influenced by respective social, political, financial and other considerations, UNCITRAL found it difficult to provide uniform choice of law rules on global level in the process of drafting the Model Law and thus choice of law rules fall outside of the ambit of the Model Law.[900] Without harmonized choice of law rules, the applicable law that governs the effect of recognition is unpredictable and uncertain. To fill in the gap and give necessary support to the recognized proceedings, the Model Law introduced a "minimum" list of automatic or discretionary effects and measures that would be triggered by recognition, while at the same time leaving room for the recognizing court to provide additional effects or measures.[901] Those effects or measures are addressed as reliefs in the context of the Model Law.

3.2.2.1 Automatic Reliefs

4.120 Automatic reliefs are mandatory and solely granted upon recognition of main proceedings alone. The types of those automatic reliefs are certain and specific under Article 20(1) of the Model Law, including

(a) Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;
(b) Execution against the debtor's assets is stayed; and
(c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.[902]

4.121 As emphasized in the Guide and Interpretation, recognition of the main proceedings set up under the Article 20 has its own effects rather than importing the consequences of the foreign law into the insolvency system of the enacting State. That entails the imposition on the insolvent debtor of the consequences of article 20 in the enacting State is justified, even if the automatic effects of the insolvency proceeding in the country of origin are different from the effects of article 20 in the enacting State.[903] Meanwhile, notwithstanding the "automatic" or "mandatory" nature, the automatic reliefs upon recognition of the main proceedings might be subject to certain exceptions, limitations, modifications or termination in accordance with the law of the enacting State.[904]

3.2.2.2 Discretionary Reliefs

[900] Clift, Jenny, Choice of Law and the UNCITRAL Harmonization Process, Brooklyn Journal of Corporate, Finance & Commercial Law, Vol.9, Issue1, 2014, p.22
[901] UNCITRAL, Working Group on Insolvency Law, Report on its 18th Session, Oct.30–Nov.10, 1995, U.N Doc A/CN.9/419 (Dec. 1, 1995), paras. 55-56
[902] The Model Law, article 20 (1)
[903] Guide and Interpretation, para.178
[904] The Model Law, article 20 (2)

4.122 In addition to the automatic reliefs under the article 20, the Model Law also provides discretionary reliefs. The scope of discretionary reliefs are much wider, including provisional reliefs under Article 19 of the Model Law and any appropriate relief available upon recognition under the laws of the Enacting State.[905] Provisional relief deals with "'urgently needed' relief that may be ordered at the discretion of the court and is available as of the moment of the application for recognition".[906] Provisional reliefs include stay of execution against the debtor's assets; transfer of the administration or realization of the debtor's assets to the foreign representative or another person designated by the court, suspension of the right to transfer, encumber, or dispose of any assets of the debtor, providing for the examination of witness, the taking of evidence or the delivery of information concerning the debtor's assets etc., and granting additional relief.[907] Unless granted extension in accordance with Article 21 (f), provisional reliefs terminate when the application for recognition is decided upon.[908]

4.123 Following the recognition of main or non-main proceedings, the court may, at the request of the foreign representative, grant any appropriate relief,[909] which means the court may "subject the relief granted to any conditions it considers appropriate".[910] Unlike a representative of a foreign main proceeding, who normally seeks to gain control over all assets of the insolvent debtor, a representative of a foreign non-main proceeding normally have narrower interests and limited authority.[911] Relief granted to a foreign non-main proceeding should be limited to assets that are to be administered in that non-main proceeding, and if the foreign representative seeks information concerning the debtor's assets or affairs, the relief must concern information required in that non-main proceeding.[912] In order not to interfere with the administration of another insolvency proceeding, in particular the main proceeding, the court is advised when granting relief in favor of a foreign non-main proceeding, the court "should not give unnecessarily broad powers to the foreign representative".[913] Moreover, it is stipulated under the Model Law "granting any additional relief that may be available under the laws of this State".[914] In accordance with the Guide and Interpretation of the Model Law,

"The proviso 'under the law of this State' reflects the principle underlying the Model Law that recognition of a foreign proceeding does not mean extending the effects of the foreign proceeding as they may be prescribed by the law of the foreign State. Instead, recognition of a foreign proceeding entails attaching to the foreign proceeding consequences envisaged by the law of the enacting State."[915]

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[905] The Model Law, article 21,
[906] Guide and Interpretation, para.170
[907] The Model Law, article 19(1), 21 (c), (d), (g)
[908] Guide and Interpretation, para. 174
[909] The Model Law, article 21(1)
[910] Guide and Interpretation, para.191
[911] Guide and Interpretation, para. 193
[912] The Model Law, article 21(3),
[913] Guide and Interpretation, para. 193
[914] The Model Law, article 21(1)(g)
[915] Guide and Interpretation, para.194

4.124 The Model Law did not specify whether “the law” includes private international law of the enacting state. Nevertheless, a few relevant recommendations concerning discretionary reliefs find their ways in the Legislative Guide.[916] If private international law is included into “the law”, a question arises whether the recognizing court can grant the reliefs on the basis of *lex fori* or *lex fori concursus*. The general rule adopted by the Legislative Guide to apply to the insolvency proceedings is the *lex fori concursus*, which entails insolvency proceedings shall be governed by the law of the State in which those proceedings are commenced.[917]

4.125 In the meantime, it also provides a couple of exceptions to the *lex fori concursus* in order to respect the rights and claims established under the domestic law,[918] to maintain the certainty of ordinary transactions relying on a determined legal environment[919] or to safeguard certain rights subject to special protection.[920] It is pointed out under the Legislative Guide that the general application of the *lex fori concursus* can better achieve the goal of maximizing the value of the debtor’s assets and an exception to the *lex fori concursus* may distort the universal insolvency effects on similarly situated creditors owing to varied applicable law.[921] The Model Law aims at fairly and efficiently administrating cross-border insolvency proceedings for the benefit of all creditors on an equal basis rather than specific individual creditors.[922] Hence, any exception to the general rule of the *lex fori concursus* is suggested to be limited and clearly elaborated.[923]

4.126 In UK, it is stated under the Schedule I of the UK Cross-border Insolvency Regulations 2006,

“references to the law of Great Britain include a reference to the law of either part of Great Britain (including its rules of private international law)”[924]

4.127 As indicated by Ho, there is possibility that choice of law rules may direct an English court to use (foreign law) *lex fori concursus* when granting relief.[925] *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings (Cambridge Gas)*[926] is such a typical example. The UK Privy Council granted relief in accordance with Chapter 11 of the US Bankruptcy Code instead of a scheme of arrangement under section 152 of the

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[916] The Legislative Guide, Part Two, I, Recommendations 30-34
[917] The Legislative Guide, Part Two, I, paras.83-84; Recommendation 31
[918] The Legislative Guide, Part Two, I, paras.81-82; Recommendation 30
[919] The Legislative Guide, Part Two, I, paras.85-86, 88-90; Recommendations 32
[920] The Legislative Guide, Part Two, I, paras.87; Recommendations 33
[921] The Legislative Guide, Part Two, I, paras.91
[922] The Legislative Guide, Part Two, I, paras.91
[923] The Legislative Guide, Part Two, I, Recommendations 34
[924] Schedule I UNCITRAL Model Law on Cross-border Insolvency, article 2(q)
[925] Ho, Look Chan, Applying Foreign Law-Realising the Model Law’s Potential, [2010] J.I.B.L.R. 552, p.557
[926] *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings* [2006] UKPC 26; [2007] 1 AC 508

Companies Act 1931. There are two main conditions that enabled the UK Privy Council to grant a relief in accordance with the US Bankruptcy Code: (1) the underlying principle of the common law in matters of judicial assistance in international insolvency is the principle of universality, which entails universal application.[927] (2) In the present case, exactly the same result could have been achieved by a scheme of arrangement under section 152 of the Companies Act 1931 as under the Chapter 11 plan.[928]

4.128 Nevertheless, the decision in the *Cambridge Gas* was overturned by the Supreme Court in the case of *Rubin v Eurofinance*[929]. The principal issue is whether the rules at common law or under the foreign law regulating those foreign courts, which are to be regarded as being competent for the purposes of enforcement of judgments, apply to judgments in avoidance proceedings in insolvency.[930] The main finding in *Rubin* was that orders in insolvency matters are either *in personam* or *in rem*[931] "but not *sui generis* in terms of the private international law rules of insolvency"[932]. When enforcing foreign insolvency orders at common law in England, the principles in the *Dicey* rules are applicable unless the judgment is considered subject to a separate rule.[933] It was pointed out that prior to *Cambridge Gas* and the present cases, there had been no suggestion that there might be a different rule for judgments in personam[934] in insolvency proceedings and other proceedings.[935] Further, the Supreme Court held that there was no reason to class avoidance judgments relating to insolvency proceedings any differently to any other type of foreign judgment in the interests of the universality of bankruptcy.[936] Accordingly, the decision in the *Cambridge Gas* was deemed as "a radical departure from substantially settled law"[937] and wrongly decided.[938]

4.129 On 10 November 2014, the Privy Council handed down its decision in *Singularis Holdings Limited (Singularis) v PricewaterhouseCoopers (PwC)*[939]. *Singularis*, incorporated in the Cayman Island, was ordered by the Grand Court of

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[927] *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings* [2006] UKPC 26; [2007] 1 AC 508, para.16

[928] *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings* [2006] UKPC 26; [2007] 1 AC 508, at 24

[929] *Rubin v Eurofinance* [2012] UKSC 46

[930] *Rubin v Eurofinance* [2012] UKSC 46, at 87

[931] *Rubin v Eurofinance* [2012] UKSC 46, at 103-104

[932] Dessain, Anthony, Wilkins, Michael, How Strong and How Long Is "the Golden Thread"? Jurisdictional Issues in a Globalized World, in: The Jersey & Guernsey Law Review, Issue 1, 2014, p.74

[933] *Rubin v Eurofinance* [2012] UKSC 46, at 106

[934] The avoidance orders in the present case was held in personam. The judge in the Court of Appeal accepted that the judgment was in personam and the *Rubin* respondents have not sought to argue that it was not an in personam judgment. See *Rubin v Eurofinance* [2012] UKSC 46, at 104, 105

[935] *Rubin v Eurofinance* [2012] UKSC 46, at 107

[936] *Rubin v Eurofinance* [2012] UKSC 46, at 115

[937] *Rubin v Eurofinance* [2012] UKSC 46, at 129

[938] *Rubin v Eurofinance* [2012] UKSC 46, at 132

[939] *Singularis Holdings Limited v PricewaterhouseCoopers* [2014] UKPC 36. This case is closely connected with its decision in *PricewaterhouseCoopers v Saad Investments Company Limited* [2014] UKPC 35.

the Cayman Islands to be wound up. The Bermudan court issued an order recognizing in Bermuda the status of the Cayman liquidators. The Bermudan court then exercised what it termed a common law power "by analogy with the statutory powers contained in section 195 of the Companies Act" to order PwC to provide information under section 195.[940] The Court of Appeal set aside this order on the basis that this was not an appropriate exercise of discretion because this would be an order made in support of a Cayman liquidation, which could not have been made by the Cayman court.[941] In deciding this case, the Privy Council addressed the apparent conflict between the *Cambridge Gas* case and the *Rubin* case and gave guidance as to whether the principle of modified universalism as articulated by Lord Hoffman in Cambridge Gas was correct. The Privy Council considered

"The primary way in which the case was put by the liquidators was that the common law develops to meet changing circumstances and that in international insolvencies the common law should be developed by the adoption of a principle that where local legislation does not provide for relevant assistance to a foreign officeholder, the legislation should be applied by analogy "as if" the foreign insolvency were a local insolvency. This argument was accepted by the Chief Justice. But it involves a fundamental misunderstanding of the limits of the judicial law-making power, and should not go unanswered. "

4.130 Although the aforementioned cases involved different kinds of reliefs, such as recovery of assets, transaction avoidance and access to information, there is no material difference on the principal issue invoked among them. In each case, the main issue was whether the local legislation should be applied and if so, to which extent. The Privy Council in *Singularis* held that the principle of modified universalism is a recognized principle of the common law.[942] However, the principle is much more limited in scope than articulated in *Cambridge Gas*. This is because the principle of modified universalism is subject to local law and local public policy and the domestic court can only ever act within the limits of its own statutory and common law powers.[943] To that extent, *Cambridge Gas* is overruled.[944] As indicated by Lord Collins,

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[940] *Singularis Holdings Limited v PricewaterhouseCoopers* [2014] UKPC 36, at 6

[941] The Grand Court of the Cayman Islands has power under section 103 of the Cayman Islands Companies Law to order any person, whether or not resident in the Islands, who has a relevant connection to a company in liquidation (including its former auditor) to "transfer or deliver up to the liquidator any property or documents belonging to the company". The equivalent power of the Bermuda court stipulated under section 195 of the Companies Act 1981 is in wider terms, which are not limited to information belonging to the company. However, it is exercisable only in respect of a company, which that court has ordered to be wound up. See *Singularis Holdings Limited v PricewaterhouseCoopers* [2014] UKPC 36, at 3-7

[942] *Singularis Holdings Limited v PricewaterhouseCoopers* [2014] UKPC 36, at 23

[943] As for the limits of the power to compel the production of necessary information, this power was subject to the following limitations:

(i) It is only available to assist the officers of a foreign court of insolvency jurisdiction or equivalent public officers;

(ii) it is a power of assistance. It exists for the purpose of enabling those courts to surmount the problems posed for a world-wide winding up of the company's affairs by the territorial limits of each court's powers. It is not therefore available to enable them to do something, which they could not do even under the law by which they were appointed.

"It is a principle of the common law that the court has the power to recognize and grant assistance to foreign insolvency proceedings… Those powers can be extended or developed from existing powers through the traditional judicial law-making techniques of the common law… The very limited application of legislation by analogy does not allow the judiciary to extend the scope of insolvency legislation to cases where it does not apply."[945]

4.131 As a result, the appeal was dismissed because the liquidators would not have had the power to require PwC to produce the requested documentation under Cayman Islands law. [946]

4.132 In U.S., *lex fori concursus* used to be applied when granting relief. In *re Schimmelpenninck*,[947] a Dutch Curator, a position akin to a trustee in a United States bankruptcy proceeding, filed an ancillary proceeding in the United States Bankruptcy Court in the Northern District of Texas, requesting declaratory and injunctive relief in order to preserve for the estate the value of the debtor's.[948] The United States Court of Appeals for the Fifth Circuit overturned the decision made by the bankruptcy court and the district court on appeal, granting declaratory and injunctive relief to the Dutch curator. After having examining the related Dutch law, the court adopted the comity-based approach for application of the foreign law, considering

"the foreign laws need not be identical to their counterparts under the laws of the United States; they merely must not be repugnant to our laws and policies ... As we have already found sufficient congruity between Dutch and American bankruptcy laws to eschew such repugnance, we conclude that principles of comity weigh in favor of granting the injunction sought by the Curators."[949]

4.133 The case was heard in 1999 on the basis of Section 304 of the U.S. Bankruptcy Code, which has been replaced by Chapter 15. Case law applying that section remains relevant. Some of the American courts continuously followed that point of view after 2005 when Chapter 15 came into effect[950] but some

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(iii) It is available only when it is necessary for the performance of the foreign office holder's functions.
(iv) The order must be consistent with the substantive law and public policy of the assisting court.
(v) As with other powers of compulsion exercisable against an innocent third party, its exercise is conditional on the applicant being prepared to pay the third party's reasonable costs of compliance
Singularis Holdings Limited v PricewaterhouseCoopers [2014] UKPC 36, at 15, 25

[944] *Singularis Holdings Limited v PricewaterhouseCoopers* [2014] UKPC 36, at 18

[945] *Singularis Holdings Limited v PricewaterhouseCoopers* [2014] UKPC 36, at 38

[946] *Singularis Holdings Limited v PricewaterhouseCoopers* [2014] UKPC 36, at 30, 31

[947] *Re Schimmelpenninck*, 183 F.3d 347 (5th Cir. 1999)

[948] *Re Schimmelpenninck*, 183 F.3d 347 (5th Cir. 1999), at 350

[949] *Re Schimmelpenninck*, 183 F.3d 347 (5th Cir. 1999), at 365; See also *Overseas Inns S.A. P.A. v. United States*, 911 F.2d 1146 (5th Cir. 1990), at 1149; In *re Petition of Garcia Avila*, 296 B.R. 95 (Bankr. S.D.N.Y. 2003), at 112

[950] In *re Metcalfe & Mansfield Alternative Investments*, 421 B.R. 685 (Bankr. S.D.N.Y. 2010), at 697; In *re Qimonda AG*, 462 B.R. 165 (Bankr. E.D.Va. 2011), at 184 n.17; In *re Sivec SRL*, 476 B.R. 310 (Bankr. E.D. Okla. 2012), at 324

courts don't. *Re Vitro*[951] is such a notable example. In *re Vitro*, it involved recognition and enforcement of a Mexican reorganization plan (the Concurso Approval Order).[952]

4.134 The United States Court of Appeals for the Fifth Circuit pointed out "whether any relief under Chapter 15 will be granted is a separate question from whether a foreign proceeding will be recognized by a United States bankruptcy court"[953] and recognized the Mexican reorganization proceeding as a foreign main proceeding.[954] However, it denied the enforcement of the reorganization plan, which would discharge obligations held by non-debtor guarantors and did not provide the protections afforded to creditors under the Bankruptcy Code.[955] The Fifth Circuit admitted that comity is central to Chapter 15[956] and "an important factor in determining whether relief will be granted"[957]. Nevertheless, the Fifth Circuit also found that

"Chapter 15 does impose certain requirements and considerations that act as a brake or limitation on comity, and preclude granting the relief requested by a foreign representative."[958]

4.135 It therefore developed a hierarchical three-step framework of statutory analysis, which governs whether a relief should be granted or precluded.[959] They are

"Step (1): a court should check whether the relief requested falls within the ambit of one of the explicit provisions enumerated under § 1521(a)(1)-(7).
Step (2): if § 1521(a)(1)-(7) and (b) does not list the requested relief, a court should decide whether it can be considered "appropriate relief" under § 1521(a).
Step (3): if the requested relief goes beyond the relief afforded under § 1521, a bankruptcy court then should consider whether "additional assistance" is appropriate under § 1507."[960]

4.136 As addressed by Honorable Justice Louise De Carl Adler, with §304 of the Bankruptcy Code replaced by Chapter 15 in 2005, comity has been elevated from one of six factors under §304(c) to the introductory text of §1507.[961] Nevertheless, the three-step framework adopted by the Fifth Circuit in *re Vitro* gives more weight to the law of the U.S.A. (*lex fori*), who seems to depart from its former *lex fori concursus* approach on the basis of comity. Besides, Chapter 15 instructs the US courts to take into account its international origin and the need to promote an application of this chapter that is consistent with the application

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951 *Ad Hoc Grp of Vitro Noteholder v. Vitro SAB de CV*, 12-10542 (5th Cir. 2012)
952 In *re Vitro, SAB De CV*, 455 B.R. 571 (Bankr. N.D. Tex. 2011), at 575
953 *Ad Hoc Grp of Vitro Noteholder v. Vitro SAB de CV*, 12-10542 (5th Cir. 2012), at 16
954 *Ad Hoc Grp of Vitro Noteholder v. Vitro SAB de CV*, 12-10542 (5th Cir. 2012), at 16
955 *Ad Hoc Grp of Vitro Noteholder v. Vitro SAB de CV*, 12-10542 (5th Cir. 2012), at 2
956 *Ad Hoc Grp of Vitro Noteholder v. Vitro SAB de CV*, 12-10542 (5th Cir. 2012), at 14, 31
957 *Ad Hoc Grp of Vitro Noteholder v. Vitro SAB de CV*, 12-10542 (5th Cir. 2012), at 32
958 *Ad Hoc Grp of Vitro Noteholder v. Vitro SAB de CV*, 12-10542 (5th Cir. 2012), at 32
959 *Ad Hoc Grp of Vitro Noteholder v. Vitro SAB de CV*, 12-10542 (5th Cir. 2012), at 36,39
960 *Ad Hoc Grp of Vitro Noteholder v. Vitro SAB de CV*, 12-10542 (5th Cir. 2012), at 36-38
961 Adler, Louise De Carl, Managing the Chapter 15 Cross-Border Insolvency Case (A Pocket Guide for Judges), 2nd ed., Federal Judicial Center, 2014, ft.48

of similar statutes adopted by foreign jurisdictions,[962] whereas the restrict interpretation of Chapter 15 in *re Vitro* are more subordinate to the peculiarities of jurisprudence in U.S.A. Moreover, to seek relief, extra requirements are set for foreign representatives to satisfy, which previously have not been required by Chapter 15.

3.3 Public Policy

3.3.1 Public Policy in the Context of Cross-border Insolvency

4.137 Public policy is applied in both the Regulation and the Model Law to refuse the recognition of the foreign insolvency proceedings. Public policy is the only ground for refusing recognition under the EC Regulation[963] and the EU Regulation (recast) follows this approach,[964] which reflects the fact that the Regulation is based on a presumption that a judgment opening insolvency proceedings is valid.[965] Hence, public policy is interpreted by the CJEU in a very restrict manner and is expected to be applied in exceptional cases. The CJEU set the tone with respect to public policy in the *Eurofood* case, in which it directly referred to its case law on the Brussels Convention (*Bamberski v Krombach* (Case C-7/98 [2000] E.C.R.I – 1935; [2001] Q.B. 709). As stated in *Bamberski v Krombach*, the CJEU based on the Brussels Convention (Brussels I and II) ruled that

> "recourse to that clause can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. The infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognized as being fundamental within that legal order.[966]
> …
> …on a proper interpretation of Art. 26 of the Regulation, a Member State may refuse to recognize insolvency proceedings opened in another Member State where the decision to open the proceedings was taken in flagrant breach of the fundamental right to be heard, which a person concerned by such proceedings enjoys."[967]

4.138 In practice, courts of the Member States often refer to the case law of the CJEU in matters of the public policy exception in a consistent way.[968] In addition, based on the national reports collected in the Study of Interpretation of the

[962] 11 U.S. Code § 1508
[963] The EC Regulation, article 26
[964] The EU Regulation (recast), article 33
[965] Moss, Fletcher, Isaacs, (ed.), The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide (2nd ed.), Oxford University Press, 2009, pp. 106.
[966] Case C-7/98, *Dieter Krombach v André Bamberski* [2000] ECR I-01935, paras.23, 37
[967] *Eurofood,* para.67
[968] Hess/Pfeiffer, Interpretation of the Public Policy Exception (IP/C/JURI/IC/2010-076), pp. 30 et seqq. & pp.167-168.

Public Policy Exception, the policy exception is applied narrowly at the national level.[969]

4.139 Public policy has not been defined in Article 6 of the Model Law on purpose since the notion of public policy is "grounded in national law and may differ from State to State". [970] It is emphasized under the Guide and Interpretation that the genuine intent of Article 6 was expected to "be invoked under exceptional circumstances".[971] Nonetheless, Wessels indicated that the scope under Article 6 of the Model Law is wider than that under the Regulation because the latter only involve negative condition of recognition whereas Article 6 of the Model Law "provides the possibility of invoking public policy against any decision of a foreign court".[972]

4.140 A notable example is that public policy is not only an exception for recognition but also has been frequently applied to entitlement to relief in the American jurisprudence. In *re Cozumel Caribe*,[973] the dispute involved the effect of insolvency proceedings opened against *Cozumel Caribe,* a Mexican corporation, in Mexico (the *concurso*). The debtor, *Cozumel Caribe*, together with its non-debtor Mexican affiliates, was jointly under the debt repayment obligations in connection with a $103 million secured loan. The loan was guaranteed through the Cash Management Account governed by New York law. The Account was controlled by CTIM, as special servicer for the loan. When the debtor and the non-debtor affiliates had defaulted on the loans, CTIM sought to recover some or all of the funds in the Cash Management Account before the United States District Court for the Southern District of New York. Meanwhile, the foreign representative filed a petition for recognition of the *concurso* and a stay of the adversary proceeding brought by the foreign representative. Although the US Bankruptcy Court for the Southern District of New York recognized the *concurso* as foreign main proceedings and granted a stay of the adversary proceeding, Judge Glenn considered that a bankruptcy court can grant the relief if it "sufficiently protects parties in interest in accordance with §1522"[974], and must deny the relief if it is "manifestly contrary to United States public policy under §1506".[975] Judge Glenn is not the first American bankruptcy judge and not the last one, who has extended the public policy exception to granting relief. I will turn to this issue later in the Section 3.3.2.2.

3.3.2 Basic Content of Public Policy

3.3.2.1 Procedural contents

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[969] This result was confirmed by the national reports from Austria, France, Germany, Italy, Netherlands, Poland, Portugal and the UK. According to the Austrian Report, the narrow approach is supported by the Annexes A and B to the Regulation as the proceedings listed there are generally recognized. See Hess/Pfeiffer, Interpretation of the Public Policy Exception (IP/C/JURI/IC/2010-076), ft.713.

[970] Guide and Interpretation, para.101

[971] Guide and Interpretation, para.104

[972] Wessels, International Insolvency Law (3rd ed.), Vol.X, Deventer: Kluwer, 2012, para. 10247

[973] In *re Cozumel Caribe, S.A de C.V.*, 482 B.R. 96 (2012)

[974] In *re Cozumel Caribe, S.A de C.V.*, 482 B.R. 96 (2012), at 113

[975] In *re Cozumel Caribe, S.A de C.V.*, 482 B.R. 96 (2012), at 113

4.141 The content of public policy is left to each Member State to decide and has not been unified by the Regulation. As explained in the Virgós-Schmit Report, public policy under the Regulation is governed by fundamental principles of both substance and procedure.[976] Thus public policy can embody procedural and substantive contents. With respect to procedural contents, the importance of due process has been highlighted. Failure to observe due process, including the adequate opportunity to be heard and the rights of participation in the proceedings, will consequently incur the violation of the equality of arms principle, which probably hamper the substantial rights of the parties concerned.

4.142 What constitutes public policy is also an unanswered question under the Model Law but governed by various national laws.[977] It has been acknowledged that the majority limits the public policy exception to fundamental principles of law, in particular constitutional guarantees.[978] Whether or not due process will be considered manifestly contrary to public policy is not resolved by the Model Law but also depends on the laws of the enacting states.[979] Although the Model Law does not mandate due process, it is also emphasized "in a number of jurisdictions, fundamental principles of due process, in some cases enshrined in the constitution".[980] For instance, in *re Silvec*, an Italian debtor did not give a U.S. creditor notice of Italian insolvency proceedings. The US court noted that there were no procedures in Italy that would allow for the protection of the creditor's rights of notice and opportunity to be heard. Consequently, the court modified the automatic stay of the Italian insolvency proceedings, holding that fundamental public policy under U.S. law is that parties in a legal proceeding are entitled to due process and notice and denying those rights, therefore, is manifestly contrary to that policy.[981]

3.3.2.2 Substantive Contents

4.143 Procedural contents are more foreseeable, whereas substantive contents are more variable. As incorporated into the systematic context of the Regulation, the public policy exception shall also be guided by the principle of universality[982] and of equal treatment of creditors,[983] which are "opposed to any unnecessary fragmentation of insolvency proceedings based on a non-recognition of foreign insolvency proceedings".[984] Accordingly, the threshold set out by the Regulation for the Member States to refuse to recognize insolvency proceedings is very

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[976] Virgós/Schmit Report (1996), para. 206
[977] Guide and Interpretation, para.30, 101
[978] Guide and Interpretation, para.102
[979] Guide and Interpretation, para.136
[980] Guide and Interpretation, para.135
[981] In *re Sivec SRL*, WL 3651250 (E.D. Okla. Aug. 18, 2011), para.7.
[982] The EC Regulation, recital (11); the EU Regulation (recast), recital (21)
[983] The EC Regulation, recital (21); the EU Regulation (recast), recital (59)
[984] Hess, Burkhard, Oberhammer, Paul, Pfeiffer, Thomas, European Insolvency Law-The Heidelberg-Luxembourg-Vienna Report on the Application of Regulation No.1346/2000/EC on Insolvency Proceedings (External Evaluation JUST/2011/JCIV/PR/0049/A4), C.H.Beck.Hart.Nomos, 2014, para.976

high.[985] According to Hess and Pfeiffer's statistical information, there are only a few cases where the public policy exception was raised successfully out of substantive contents.[986] For instance, in the case of *Re Rover France SAS*,[987] it involved a British holding company, MG Rover, which had subsidiaries registered in different European countries. The holding company, together with some of its subsidiaries, applied for the opening of the main insolvency proceedings in UK in order to put the entire group into joint administration.[988] The effects of the English main proceedings met resistance in France, where the French Public Prosecutor attempted to initiate parallel main insolvency proceedings.[989] The French Public Prosecutor considered the English main proceedings should not be recognized because recognition, which could amount to the negative influences on the rights of French employees, would constitute a manifest breach of French public policy.[990] As pointed out by Norris QC,

"In general, in striking the balance between the interests of employees on the one hand and the interests of finance and trade creditors on the other, English insolvency law treats the claims of employees less favourably than the law of other Member States."[991]

4.144 Nevertheless, the Commercial Court of Nanterre (the Tribunal de commerce, Nanterre) and the Court of Appeal of Versailles (Cour d'Appel, Versailles) held against the French Public Prosecutor and did not think the public policy objection could be properly raised in this case. First of all, in accordance with the Regulation, the employment contract was governed by the law of contract, i.e. French law, which required that the works committee and the staff representatives should be consulted where insolvency proceedings affected contracts of employment and labor relations.[992] The fact that the British court had the jurisdiction to open main proceedings would not change the applicable law or consequently undermine the adequate protection of employees. Secondly, the English administrators gave certain undertakings to ensure that the French employees would receive the same treatment as they could receive under French law.[993]

4.145 There is no related statistics or survey into all the enacting states of the Model Law on how they interpret public policy with respect to substantive contents on international level. The case law in American jurisprudence can be viewed as an exemplar, which illustrates the scope of substantive contents concerning the public policy exception. Substantive rights, which are guaranteed under the constitution, are included. In *re Toft*,[994] it involved a request applied by

[985] Moss, Fletcher, Isaacs(ed.), The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide (2nd ed.), Oxford University Press, 2009, para.5.86

[986] Hess/Pfeiffer, Interpretation of the Public Policy Exception (IP/C/JURI/IC/2010-076), p.119-120

[987] *Re Rover France SAS* [2005] EWHC 874

[988] *Re Rover France SAS* [2006] B.C.C. 599

[989] *Public Prosecutor v Segard (As Administrator for Rover France SAS)* [2006] I.L.Pr. 32, at H3

[990] *Public Prosecutor v Segard (As Administrator for Rover France SAS)* [2006] I.L.Pr. 32, at H5

[991] *Re Rover France SAS* [2006] EWCH 3426 (Ch), at 8

[992] *Public Prosecutor v Segard (As Administrator for Rover France SAS)* [2006] I.L.Pr. 32, at H5

[993] Samad, Mahmud, Court Application under the Company Acts, Dublin: Bloomsbury, 2013, p.1251

[994] In *re Toft*, 453 B.R. 186 (S.D.N.Y. 2011).

the foreign representative in a Germany Insolvency proceeding to get access to the debtor's e-mail accounts under Chapter 15, which were stored on servers in the United States.[995] While German law permitted such mail interception,[996] the ex parte interception of electronic communications is illegal under two U.S. statutes.[997] The Court held that the relief sought would be manifestly contrary to public policy because "the relief sought would directly compromise privacy rights subject to a comprehensive scheme of statutory protection, available to aliens, built on constitutional safeguards incorporated in the Fourth Amendment as well as the constitutions of many [s]tates."[998]

4.146 In addition, the public policy exception is also extended to fundamental policy of the United States. In the aforementioned *re Vitro* case, the Fifth Circuit refused to grant reliefs to the Mexican reorganization plan (the *Concurso* Approval Order), holding

"The expression by Congress in §524, paired with the case law in this Circuit, lead this Court to conclude that the protection of third party claims in a bankruptcy case is a fundamental policy of the United States. The *Concurso* Approval Order does not simply modify such claims against non-debtors, they are extinguished. As the *Concurso* plan does not recognize and protect such rights, the *Concurso* plan is manifestly contrary to such policy of the United States and cannot be enforced here."[999]

4.147 The other typical instance related to fundamental policy is *re Qimonda AG*, which was appealed to the Supreme Court of the U.S.A. In *re Qimonda AG*, a German manufacturer of semiconductor memory devices (Qimonda) obtained recognition of the German proceeding as a foreign main proceeding in the United States under Chapter 15.[1000] The specific question presented was whether Chapter 15 permits a foreign administrator to avoid the application of Section 365(n) of the Bankruptcy Code, which was enacted by Congress with the explicit goal of furthering the public policy of supporting the high-tech industry by providing protection for intellectual property license agreements.[1001] The court concluded that Congress enacted section 365(n) to protect American technology, and that this is direct evidence of a "strong" U.S. policy favoring technological innovation.[1002] In reaching this conclusion, the Court conducted a balancing test between the relief that may be granted to the foreign representative and the interests of the persons that may be affected by such relief. The Court noted that failure to apply section 365(n) would "slow the pace of innovation, to the detriment of the U.S. economy" and "would severely impinge an important statutory protection ... and thereby undermine a fundamental U.S. public

[995] In *re Toft*, 453 B.R. 186 (S.D.N.Y. 2011), para. 188-189.
[996] In *re Toft*, 453 B.R. 186 (S.D.N.Y. 2011), para. 197-198.
[997] The two Statutes referred to the Wiretap Act, 18 U.S.C. § 2511 (2012) and the Privacy Act, 18 U.S.C. § 2701 (2012) . See In *re Toft*, 453 B.R at 196-197.
[998] In *re Toft*, 453 B.R. 186 (S.D.N.Y. 2011), para. 198.
[999] In *re Vitro, S.A.B. de C.V.,* 473 B.R. 117 (Bankr. N.D. Tex. 2012), at 1070
[1000] In *re Qimonda AG*, 433 B.R. 547 (Bankr. E.D. Va. 2010), at 552.
[1001] See Chung, John J., In Re Qimonda AG: The Conflict between Comity and the Public Policy Exception in Chapter 15 of the Bankruptcy Code, in: 32 B.U. Int'l L.J. 2013, pp.91 In *re Qimonda AG*, 462 B.R. 165, 183 (Bankr. E.D. Va. 2011).
[1002] In *re Qimonda AG*, 462 B.R. 165 (Bankr. E.D. Va. 2011), para.185

policy."[1003] Accordingly, the bankruptcy court denied the motion of the foreign administrator, who then appealed to the United States Court of Appeals for the Fourth Circuit.

4.148 The Fourth Circuit affirmed the Bankruptcy Court's decision and concluded that the Bankruptcy Court reasonably exercised its discretion in balancing the interests of the licensees against the interests of the foreign debtor and finding that the application of section 365(n) of the Bankruptcy Code was necessary to protect the licensees' rights under Qimonda's US patents.[1004] The Fourth Circuit recognized both the importance of the chapter 15 of the Bankruptcy Code to the global economy and the United States' commitment to cooperate with foreign insolvency proceedings. Nevertheless, such commitment, according to the Fourth Circuit, was not untempered.[1005] The Fourth Circuit held that a bankruptcy court is required to ensure sufficient protection of creditors under section 1522(a) of the Bankruptcy Code, and at a more general level, a bankruptcy court may refuse to grant comity or take an action that would be manifestly contrary to the United States' public policy under section 1506 of the Bankruptcy Code.[1006] The foreign administrator then appealed to the Supreme Court of the United States for review of the decision of the Fourth Circuit. On 6 October, 2014, the Supreme Court denied the petition for a writ of certiorari.[1007]

4.149 It seems that public policy under the Model Law could be interpreted in a much broader way if it might relate to any mandatory rule of the local law or protection of the interests of local creditors, although it is expected that the public policy exception will be rarely used and shall be understood more restrictively than domestic public policy. [1008]

Ch. 4 Enterprise Groups

4.1 A Blank in the Text

4.150 Neither the EC Regulation[1009] nor the Model Law[1010] provides the specific rules governing the enterprise groups. In Europe, the Commission has summed

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[1003] Id

[1004] *Jaffé v. Samsung Electronics Co.,* 737 F.3d 14 (4th Cir. 2013), at 6

[1005] *Jaffé v. Samsung Electronics Co.,* 737 F.3d 14 (4th Cir. 2013), at 41

[1006] *Jaffé v. Samsung Electronics Co.,* 737 F.3d 14 (4th Cir. 2013), at 27, 33

[1007] *Jaffé v. Samsung Electronics Co.,* 135 S.Ct. 66 (2014)

[1008] Guide and Interpretation, para.21(e), 30, 103-104

[1009] Virgós/Schmit Report (1996), para. 76:

The Convention (now the Regulation) offers no rules for groups of affiliated companies (parent-subsidiary schemes).

The general rule to open or to consolidate insolvency proceedings against any of the related companies as a principal or jointly liable debtor is that jurisdiction must exist according to the Convention (now the Regulation) for each of the concerned debtors with a separate legal entity.

[1010] UNCITRAL Model Law Legislative Guide on Insolvency Law, Part three Treatment of enterprise groups in insolvency, 2010, para.1: "The Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law (UNCITRAL Model Law), which is relevant to cross-border insolvency proceedings with respect to an individual group member, but does not address issues pertinent to the insolvency of different group members in different States."

up the three reasons for the omission. First of all, the current EC Regulation contains a very similar text to the Convention on Insolvency Proceedings, which was open for signature in 1995 but failed in the end. At that time, the phenomenon of groups of companies was not as widespread as it is today. Moreover, the reorganization or rescue of companies was not a prevailing option in the domestic insolvency laws of Member States and liquidation was the norm. Finally, the creation of rules for groups of companies raised complex problems and it may have been considered more appropriate to postpone it to a later date.[1011] As for the Model Law, when the text of what became the UNCITRAL Model Law on Cross-Border Insolvency was debated, groups were also regarded as "a stage too far".[1012] Paulus regarded this blank as a "veritable sin of omission".[1013]

4.151 In fact, instead of a lack of appreciation, the issues of enterprise groups in cross-border insolvency have not been addressed mainly because it is considered to be too complex. The complicated organizational structure of enterprise groups made itself a definition difficult to tell precisely. This is reflected, as pointed out by Mevorach, in an absence of consistent definitions of groups in legal systems. Normally, no general definition is offered, not even for domestic groups.[1014] As a topic "extremely relevant to cross-border insolvencies",[1015] there are various opinions and recommendations that attempt to provide the solutions. Some suggestions focus on the definition of COMI. Paulus suggested that

"'The centre of a debtor's main interests' for the purposes of Article 3(1) shall mean, in the case of companies and legal persons, the place of the registered office, or, if shown to be in a different Member State, the place where the debtor conducts the administration of his interests on a regular basis and which is therefore ascertainable by third parties, except for cases where the debtor is part of a group of companies or legal persons which operate as an economic unit ("an economic unit case"). In an economic unit case, the centre of a debtor's main interests for the purposes of Article 3(1) shall mean the place where the head office functions of the debtor are carried out, provided that place is ascertainable by prospective creditors as the place where such head office functions are carried out."[1016]

4.152 Bufford went even further and proposed what he described as "a bold solution."[1017] He recommended the adoption of a new ECOMI[1018] system for the

[1011] EU Commission Staff Working Document the Impact Assessment Accompanying the document Revision of Regulation (EC) No 1346/2000 on insolvency proceedings, Strasbourg, 12.12.2012, SWD(2012) 416 final, p.16

[1012] United Nations, A/CN.9/WG.V/WP.90 - Treatment of enterprise groups in insolvency, 2009, para.3

[1013] Paulus, Christoph, Die europaische Insolvenzverordnung, und der deutsche Insolvenzverwalter, NZI 2001, p.505, cite: Pannen, Klaus (ed.), European Insolvency Regulation, Berlin: De Gruyter Recht, 2007, ft.144

[1014] Mevorach, Insolvency within Multinational Enterprise Groups, Oxford University Press, 2009, at 26

[1015] Pannen, Klaus (ed.), European Insolvency Regulation, Berlin: De Gruyter Recht, 2007, p.49

[1016] Moss & Paulus, Insolv. Int. 2006, 19(1), p. 3

[1017] Bufford, Samuel L., Coordination of Insolvency Cases for International Enterprise Groups: A Proposal, 86 AMBKRLJ 2012, p. 691

recognition of insolvency cases for multinational enterprise groups, which draws upon the U.S. courts' substantial experience with the coordination of domestic and international bankruptcy cases for related entities[1019] and encourages the integrated way for all bankruptcy cases in the form of one single court before one single judge. For example, according to the ECOMI system,

"The country where an enterprise groups' ECOMI is located is the presumptively proper country for the commencement of main insolvency proceedings or cases for each member of the group. Any such case shall be assigned to the same judge for supervision and administration. Once such a main proceeding is commenced in the ECOMI State, no main insolvency proceeding for such an entity may be commenced or proceed in any other State, unless the appropriate court in the ECOMI country gives authorization."[1020]

4.153 In *Re Daisytek*,[1021] the court opted for the centralization of proceedings in the context of enterprise group, which was built upon the head office function approach to determine COMI. It has been followed by several countries, such as Germany,[1022] France,[1023] Hungary,[1024] UK,[1025] although it has been argued that the head office function is based on an inaccurate presumption and deviated from the EC Regulation (recital 13).[1026]

4.154 Vallender and Deyda are not convinced by the possibility of defining an international jurisdiction norm for insolvency of international groups of companies. Such a definition will not bring enough clarity and certainty, with as a result interpretation problems leading to certain exceptions to the given rule.[1027] Another jurisdictional approach in that regard is to treat a subsidiary

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[1018] The term "ECOMI" has been used by other writers to discuss this concept. See e.g. Mabey, Ralph R. & Johnston, Susan Power, Coordination Among Insolvency Courts in the Rescue of Multinational Enterprises, 2009 Norton Rev. of Int'l Insolvency 33, 48 n.53

[1019] Bufford, Samuel L., Coordination of Insolvency Cases for International Enterprise Groups: A Proposal, 86 AMBKRLJ 2012, p. 700

[1020] Bufford, Samuel L., Coordination of Insolvency Cases for International Enterprise Groups: A Proposal, 86 AMBKRLJ 2012, p. 692

[1021] *Re Daisytek-ISA Ltd*., [2003] B.C.C. 562 Daisytek was the holding company of the European group of companies whose parent company was an American company declared bankrupt in the U.S.A. The European group companies, including three German companies and a French company, petitioned for administration orders in UK to achieve a more advantageous realization of the assets than would be achieved in a winding-up.

[1022] *Amtsgericht Mtinchen* [AG] May 4, 2004, ZIP 20/2004, 962 (F.R.G.), qtd: Moss, Group Insolvency - Choice of Forum and Law: The European Experience under the Influence of English Pragmatism, 32 Brook. J. Int'l L., 2006-2007, ft.48

[1023] *Tribunal de grande instance* [T.G.I.] [ordinary court of original jurisdiction] Nanterre, Feb. 15, 2006 [2006] B.C.C. 681 (Fr.), qtd: Moss, Group Insolvency - Choice of Forum and Law: The European Experience under the Influence of English Pragmatism, 32 Brook. J. Int'l L., 2006-2007, ft. 54

[1024] Municipal Court of Fejer/Szekesfehervar 14 June 2004, ZInsO 2004, 861, qtd: Wessels, Bob, International Insolvency Law (3rd ed.), Vol.X, Deventer: Kluwer, 2012, para. 10595

[1025] High Court of Justice Chancery Division Birmingham 18 April 2005 (MG Rover I), qtd: Wessels, Bob, International Insolvency Law (3rd ed.), Vol.X, Deventer: Kluwer, 2012, para. 10595

[1026] *Re Daisytek-ISA Ltd*., [2003] B.C.C. 562, at 14

[1027] Vallender, Heinz, & Deyda, Stephan, Brauchen wir einen Konzerninsolvenzgericthsstand?, Neue Zeitschrift fur das Recht der Insolvenz uns Sanierung (NZI), 4 December 2009, p 825 - 834; qtd: Wessels, Bob, International Insolvency Law (3rd ed.), Vol.X, Deventer: Kluwer, 2012, para. 10425f (ii)

company as establishment.[1028] However, it is not supported by the fact that the Member States expressly rejected the concept of establishment found in Art 5 (5) of the 1968 Brussels Convention, which allows a subsidiary to be classified as an establishment.[1029] Nevertheless, the liquidator of the foreign main proceedings that was opened in favor of the subsidiary could request the opening of secondary proceedings in the Member State where its registered office is located pursuant to article 29 of the EC Regulation.[1030] Hence, the local creditors will be protected under their domestic law since the local law will be applicable to the secondary proceedings.[1031]

4.155 There are also suggestions without defining COMI or referring to establishment. Van Galen proposed a group insolvency regime, under which emphasis is laid on the power of the liquidators of the parent company. When a parent and one or more subsidiaries have entered into insolvency proceedings, the parent company's liquidator should have powers of coordination with respect to the subsidiary's proceedings as well as the power to effect the coordinated sale of the assets of the companies in question.[1032] Tollenaar further called for the introduction of the concept of a group liquidator for dealing with groups, who shall be appointed in the foreign main and secondary proceedings of all group companies.[1033] Mevorach advocates "global group-wide solutions" applied to integrated group companies[1034] and "an adaptive approach" to match economic realities of groups.[1035] According to Mevorach, if a group is classified as "business integration", in which the business was operated in the way of financial and administrative interdependence but the assets and liabilities are kept separate,[1036] procedural consolidation suffices.[1037] If a group is "asset integrated", in which the assets and liabilities are interwoven,[1038] it is suggested that substantive consolidation shall be applied.[1039] Fully aware of global nature of the group companies, Mevorach pointed out that "cooperative spirit" among

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[1028] Fasquelle, Daniel, Les faillites des groupes de sociétés dans l'Union européenne : la difficile conciliation entre approches économique et juridique, Bulletin Joly Sociétés 2006, n°2, p.151-167

[1029] Pannen, European Insolvency Regulation, Berlin: De Gruyter Recht, 2007, p.65

[1030] Menjucq, Michel, EC-Regulation No 1346/2000 on Insolvency Proceedings and Groups of Companies, ECFR 2, 2008, p. 142

[1031] Dammann, R., et Podeur, G., "Le mandat ad hoc, une porte d'entrée pour l'application aux groupes de sociétés du règlement européen relatifs aux procédures d'insolvabilité", Revue Lamy droit des affaires, 10/2006, p. 104.

[1032] Van Galen, Robert, The European Insolvency Regulation and Groups of Companies, INSOL Europe Annual Congress Cork, Ireland October 16 – 18, 2003, p. 20.

[1033] Tollenaar, Nicolaes W.A., Proposals for Reform: improving the ability under the European Insolvency Regulation to rescue multinational enterprises, IILR 2011, p. 252.

[1034] Mevorach, Insolvency within Multinational Enterprise Groups, Oxford University Press, 2009, p. 327

[1035] Mevorach, Towards a Consensus on the Treatment of Multinational Enterprise Groups in Insolvency, 18 Cardozo J. Int'l & Comp. L., 2010, 359

[1036] Mevorach, Insolvency within Multinational Enterprise Groups, Oxford University Press, 2009, p. 132

[1037] Mevorach, Insolvency within Multinational Enterprise Groups, Oxford University Press, 2009, p. 212-215

[1038] Mevorach, Insolvency within Multinational Enterprise Groups, Oxford University Press, 2009, p. 132

[1039] Mevorach, Insolvency within Multinational Enterprise Groups, Oxford University Press, 2009, p. 224-229

courts and insolvency representatives could be deemed as one of the main challenges in dealing with international insolvencies in general and suggested that courts and insolvency representatives "refrain from a narrow national perspective".[1040]

4.2 Development of Legal Texts

4.156 The main concern about dealing with group insolvencies relates to whether it is possible to concentrate multiple group members within a single jurisdiction and how to achieve that goal. There are basically two solutions: one is to find the COMI of the entire group; the other is to accept the merits of corporate separateness in the group context and solve the problem through cooperation and coordination.

4.2.1 COMI-Based Solution

4.157 The EU Regulation (recast) does not prevent a court to open insolvency proceedings for members belonging to the same group in a single jurisdiction if the court considers that the center of main interests of those group members is located in a single Member State. In such cases, the court should also be able to appoint, if appropriate, the same insolvency practitioner in all proceedings concerned, provided that this is not incompatible with the rules applicable to them.[1041] The EU Regulation (recast), however, does not give any explanation concerning COMI of group companies.

4.158 The Working Group V (insolvency law) of UNCITRAL also gradually developed some draft legislative provisions to facilitate the cross-border insolvency of multinational enterprise groups.[1042] It is pointed out that several cases have occurred in practice in which the center of main interests (COMI) of a number of group members has been determined to be located in the same jurisdiction.[1043] In the group context, determination of COMI is suggested to refer to the factors relevant to determination of COMI concerning a single debtor (paragraphs 145-147 of the Guide to Enactment and Interpretation of the Model Law).[1044] In addition, it can also depend on the group structure, business model, degree and level of integration and reliance between the particular group members[1045] because the more decentralized the group is, the more dispersed

[1040] Mevorach, Insolvency within Multinational Enterprise Groups, Oxford University Press, 2009, p. 331-332

[1041] The EU Regulation (recast), recital (53)

[1042] To date, the latest version was released in May 2015. Working Group V (insolvency law), UNCITRAL, Facilitating the Cross-border Insolvency of Multinational Enterprise Groups, A /CN.9/WG.V/WP.128, 2015

[1043] Working Group V (insolvency law), UNCITRAL, Facilitating the Cross-border Insolvency of Multinational Enterprise Groups, A /CN.9/WG.V/WP.128, 2015, para.15

[1044] Working Group V (insolvency law), UNCITRAL, Facilitating the Cross-border Insolvency of Multinational Enterprise Groups, A /CN.9/WG.V/WP.128, 2015, para.16

[1045] Working Group V (insolvency law), UNCITRAL, Facilitating the Cross-border Insolvency of Multinational Enterprise Groups, A /CN.9/WG.V/WP.128, 2015, para.5, 15

the proceedings are, the more likely coordination and cooperation, instead of COMI-based solution, is to be of considerable assistance.[1046]

4.2.2 Cooperation and Communication

4.159 In December 2012, the European Commission presented its proposals of amendments to the EC Regulation. With respect to the group companies,[1047] it is recommended that

"This Regulation should ensure the efficient administration of insolvency proceedings relating to different companies forming part of a group of companies. Where insolvency proceedings have been opened for several companies of the same group, these proceedings should be properly coordinated. The various liquidators and the courts involved should therefore be under the same obligation to cooperate and communicate with each other as those involved in main and secondary proceedings relating to the same debtor. In addition, a liquidator appointed in proceedings relating to a member of a group of companies should have standing to propose a rescue plan in the proceedings concerning another member of the same group to the extent such a tool is available under national insolvency law."[1048]

4.160 In 2014, the Parliament made relevant proposal with respect to the group companies as follows:

"This Regulation should ensure the efficient administration of insolvency proceedings relating to different companies forming part of a group of companies. Where insolvency proceedings have been opened for several companies of the same group, these proceedings should be properly coordinated**,** in particular in order to avoid the possibility of the insolvency of one group member jeopardizing the future of other members of the group. The various insolvency representatives and the courts involved should therefore be under the same obligation to cooperate and communicate with each other as those involved in main and secondary proceedings relating to the same debtor."[1049]

4.161 It seems that the focus of both the Commission and the Parliament is not to solve group companies problems from the jurisdictional perspective because as aforementioned, it is quite difficult to reach consensus on a precise definition of "group" and thus "it is so far insoluble to determine which entity is to be the lead

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[1046] Working Group V (insolvency law), UNCITRAL, Facilitating the Cross-border Insolvency of Multinational Enterprise Groups, A /CN.9/WG.V/WP.128, 2015, para.18(f)

[1047] EU Commission Explanatory Memorandum, Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings, Strasbourg, 12.12.2012, COM(2012) 744 final, p.9

[1048] European Parliament legislative resolution of 5 February 2014 on the proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings (COM(2012)0744 – C7-0413/2012 – 2012/0360(COD)), Amendment 10

[1049] European Parliament legislative resolution of 5 February 2014 on the proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings (COM(2012)0744 – C7-0413/2012 – 2012/0360(COD)), Amendment 10

company (and the court of its COMI to host the lead proceeding)".[1050] Both the Commission and the Parliament have adopted the cooperation and communication approach. Moreover, it is noteworthy that the obligation of cooperation and communication has been extended to the courts of parallel proceedings as well. It has been demonstrated in the aforementioned case law that cooperation and communication is a neutral and more pragmatic way to overcome the obstacles set up by different legal systems and domestic legislations. Finally, the EU Regulation (recast) provides a new chapter concerning insolvency proceedings of group of companies, which is composed of two sections: Section 1 cooperation and communication; Section 2 coordination.

4.162 The Model Law itself does not address the issues of group of companies but in 2010, UNCITRAL released the Legislative Guide on Insolvency Law, Part III Treatment of enterprise groups in insolvency (hereinafter the Legislative Guide Part III) to assist national countries in handling cross-border insolvency of enterprise groups[1051]. The Legislative Guide Part III is composed of three parts. Part I introduces the general features of enterprise groups. Part II provides recommendations to the domestic legislation concerning insolvency of enterprise groups. Part III focuses on cross-border insolvency of enterprise groups based on the UNCITRAL Model Law. The Legislative Guide Part III lays emphasis on cooperation and communication of proceedings between courts and insolvency representatives. In fact, it has been envisaged to introduce a group COMI into this Legislative Guide Part III but this attempt has been given up in the end. It is stated in the report of the Working Group V that

"It was generally agreed that, although perhaps desirable, it would be difficult to reach a definition of an enterprise group COMI in order to limit, for example, the commencement of parallel proceedings or to facilitate coordination and cooperation of multiple proceedings commenced with respect to group members. It was emphasized that one key issue with respect to a definition of enterprise group COMI would be the extent to which that definition was accepted, widely adopted and voluntarily enforced by the courts of States affected by it in particular cross-border insolvency cases."[1052]

4.163 Both the EU Regulation (recast) and the Legislative Guide Part III attached importance to cooperation of insolvency proceedings concerning different entities of the same group by utilizing cooperation and communication measures. In fact, the relevant provisions under the EU Regulation (recast) have been greatly influenced by the Legislative Guide Part III, which share quite a lot in common with the latter.

4.164 Generally speaking, the actors, involved in the process of cooperation and communication concerning members of a group of company, are insolvency

[1050] Moss, A very decent proposal: the European Commission's proposals for reforming the EC Regulation on insolvency proceedings 1346/2000, Insolv. Int. 2013, 26(4), 56

[1051] Legislative Guide Part III, para.4(a): "Enterprise group": two or more enterprises that are interconnected by control or significant ownership

[1052] UNCITRAL Report of Working Group V (Insolvency Law) on the work of its thirty-fifth session, A /CN.9/666, Vienna, 29 June-17 July 2009, para.26

practitioners[1053] (insolvency representatives, as addressed under the Model Law[1054]) and the courts.[1055] Cooperation is deemed necessary as long as such cooperation is appropriate to facilitate the fair and effective administration of the proceedings, is not incompatible with the rules applicable to them and does not entail any conflict of interests.[1056]

4.165 The contents of cooperation and communication between the insolvency practitioners (insolvency representatives) mainly include:

(1) timely communication of any relevant information concerning the group members subject to insolvency proceedings, provided appropriate arrangements are made to protect confidential information;[1057]
(2) coordination of the administration and supervision of the affairs of the group members subject to insolvency proceedings;[1058]
(3) coordination of the proposal and of reorganization plans;[1059]
(4)allocation of powers or responsibilities between insolvency representatives;[1060]
(5) by means of agreements or protocols[1061]

4.166 With respect to cooperation and communication involving courts, it is suggested under the Legislative Guide Part III that the proper time to cooperate and communicate shall not depend on the formal recognition of foreign proceedings, which allows communication to take place before, or irrespective of whether, an application for recognition is made.[1062] In accordance with the EU Regulation (recast), cooperation and communication with the participation of courts shall be initiated based on a pending request for the opening of proceedings or the proceedings that have been commenced.[1063] Courts can

[1053] The EU Regulation (recast), article 2(5):"insolvency practitioner" means any person or body whose function, including on an interim basis, is
(i) to verify and admit claims submitted in insolvency proceedings;
(ii) to represent the collective interest of the creditors;
(iii) to administer, either in full or in part, assets of which the debtor has been divested;
(iv) to liquidate the assets referred to in (iii); or
(v) to supervise the administration of the debtor's affairs.
Those persons and bodies are listed in Annex B
[1054] The Model Law, article 2 (d): a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding
[1055] The EU Regulation (recast), article 56-58; Legislative Guide Part III, Ch.3, para.7
[1056] The EU Regulation (recast), article 56(1), 57(1), 58 last paragraph; Legislative Guide Part III, Ch.3, para.7
[1057] The EU Regulation (recast), article 56(2)(a); Legislative Guide Part III, Recommendation 250(a)
[1058] The EU Regulation (recast), article 56(2)(b); Legislative Guide Part III, Recommendation 250(d)
[1059] The EU Regulation (recast), article 56(2)(c); Legislative Guide Part III, Recommendation 250(e)
[1060]The EU Regulation (recast), article 56(2), second paragraph; Legislative Guide Part III, Recommendation 250(c)
[1061] The EU Regulation (recast), article 56(1); Legislative Guide Part III, Recommendation 250(b)
[1062] Legislative Guide Part III, para.15
[1063] The EU Regulation (recast), article 57(1), 58(a)

communicate with each other or request information or assistance from each other on a direct basis.[1064] Courts can also appoint a court representative, acting on their behalf, to fulfill its duties in case of any hesitance or reluctance with respect to direct communication with courts from different jurisdictions.[1065] They can communicate and cooperate with each other by any appropriate means they consider appropriate.[1066] They can cooperate in matters of coordination of the administration and supervision of the assets and affairs of the members of the group,[1067] coordination of the conduct of hearings[1068] as well as coordination in the approval of protocols where necessary.[1069]

4.167 Between the insolvency practitioners (insolvency representatives) and the courts, the insolvency practitioners (insolvency representatives) are given the rights to directly request information or seek assistance from the courts concerning the proceedings regarding the other member of the group.[1070] Under the EU Regulation (recast), the insolvency practitioners can only request assistance concerning the proceedings in which he has been appointed.[1071]

4.168 As for the costs, the Legislative Guide Part III merely raised some concern about the costs of cooperation and communication in proceedings concerning members of a group of companies.[1072] It is stipulated under the EU Regulation (recast) that costs and expenses incurred in the process of cooperation and communication shall be borne by the respective proceedings.[1073]

4.2.3 Coordination

4.169 The single insolvency practitioner approach has been introduced into the EU Regulation (recast), which further substantiates that approach by establishing the system of group coordination proceedings.[1074] Provisions concerning the group coordination proceedings can be classified as twofold: rules on the procedure and rules on the group coordinator. Accordingly, there are also two main kinds of relationship, which play a crucial role in the group coordination proceedings. One is the relationship between the participant members of a group of companies in the group coordination proceedings and those members of non-participants. The other the relationship between the group coordinator and the insolvency practitioners appointed in relation to members of the group.

[1064] The EU Regulation (recast), article 57(2); Legislative Guide Part III, Recommendation 241(c)
[1065] The EU Regulation (recast), Article 57(1), 57(3)(a); Legislative Guide Part III, Ch.3, para.37
[1066] The EU Regulation (recast), article 57(3)(b); Legislative Guide Part III, Recommendation 241(a)
[1067] The EU Regulation (recast), article 57(3)(c); Legislative Guide Part III, Recommendation 241(b)
[1068] The EU Regulation (recast), article 57(3)(d); Legislative Guide Part III, Recommendation 245
[1069] The EU Regulation (recast), article 57(3)(e); Legislative Guide Part III, Recommendation 241(d)
[1070] The EU Regulation (recast), article 58(b); Legislative Guide Part III, Recommendation 248
[1071] The EU Regulation (recast), article 58(b);
[1072] Legislative Guide Part III, Ch.3, para.33
[1073] The EU Regulation (recast), article 59
[1074] The EU Regulation (recast), recital (50), Ch.5 Section II

4.170 Group coordination proceedings can be initiated by an insolvency practitioner appointed in insolvency proceedings opened in relation to a member of the group.[1075] Under the circumstance that the law applicable to the insolvency so requires, this insolvency practitioner should obtain the necessary authorization before making such a request.[1076] The competent court, which can assume its jurisdiction over group coordination proceedings, is either decided by the insolvency practitioner, who filed for the opening of the proceedings,[1077] or later chosen by two-thirds of all insolvency practitioners appointed in insolvency proceedings of the members of the group upon joint agreement.[1078]

4.171 Not all of the members of a group of companies have to participate in the group coordination proceedings. Objections to the inclusion within group coordination proceedings or to the person proposed as a coordinator can be raised within 30 days of receipt of notice of the request for the opening of group coordination proceedings.[1079] The court seized of the request will make its decision after considering appropriateness of the opening of such proceedings, no financial disadvantage on the creditor and eligibility of the proposed group coordinator.[1080] Upon the objection raised by the insolvency practitioner appointed in respect of any group member to the inclusion of the proceedings, the group coordination proceedings shall have no effect as regards that member.[1081] Nevertheless, the EU Regulation (recast) also provides for an alternative mechanism to achieve a coordinated restructuring of the group between the members of a group of companies, which are participating in the group coordination proceedings and those non-participants.[1082] Once a restructuring plan is presented for the members of the group concerned, which are subject to the group coordination proceedings, an insolvency practitioner should have standing to request a stay of any measure related to the realization of the assets in the proceedings opened with respect to any other member of the same group, including those that are not subject to group coordination proceedings.[1083]

4.172 The eligibility of the group coordinator shall be determined in accordance with the law of a Member State, in which they can be appointed to act as an insolvency practitioner.[1084] In order to avoid potential conflict of interest, it is stipulated that "the group coordinator must not be one of the insolvency practitioners appointed to act in respect of any of the group members, and shall have no conflict of interest in respect of the group members, their creditors and the insolvency practitioners appointed in respect of any of the group

[1075] The EU Regulation (recast), article 61(1)
[1076] The EU Regulation (recast), recital (52)
[1077] The EU Regulation (recast), article 61(1)
[1078] The EU Regulation (recast), article 66(1), (2)
[1079] The EU Regulation (recast), article 64(1), (2)
[1080] The EU Regulation (recast), article 63(1), 68(1)
[1081] The EU Regulation (recast), article 64, 65
[1082] The EU Regulation (recast), recital (56)
[1083] The EU Regulation (recast), recital (56), article 60(1)(b)(i)
[1084] The EU Regulation (recast), article 71(1)

members."[1085] The group coordinator has been vested with substantial rights and obligations.[1086] The relationship between the insolvency practitioners appointed in relation to members of the group and the group coordinator are required to cooperate with each other.[1087] The main tasks of the group coordinator are to outline recommendations for the coordinated conduct of the insolvency proceedings and propose a group coordination plan.[1088] However, an insolvency practitioner is not obliged to follow in whole or in part the coordinator's recommendations or the group coordination plan by reporting the reasons to coordinator and other persons or bodies concerned under his national law.[1089] Moreover, at the request of the insolvency practitioner, the court shall revoke the coordinator, who is considered to act to the detriment of the creditors of a participating group member or fail to comply with his obligations.[1090] Meanwhile, it is the duty of the insolvency practitioners to communicate any information that is relevant for the coordinator to perform his tasks.[1091]

4.173 With respect to the costs, they are estimated and proposed by the insolvency practitioner, who requests for the opening of the group coordination proceedings.[1092] The estimated costs and shares to be paid by each member concerned will be decided by the court that opens the group coordination proceedings.[1093] If it is estimated that a significant increase in the costs will occur and in any case, where the costs exceed 10% of the estimated costs, the coordinator shall inform without delay the participating insolvency practitioners and seek the prior approval of the court opening coordination proceedings.[1094] The final statement of costs and the share to be paid by each member shall be drafted by the group coordinator.[1095] The insolvency practitioners can raise objections to the statement within 30 days of receipt. Otherwise, it will be deemed to be agreed and submitted to the court opening coordination proceedings for confirmation.[1096]Upon receipt of application for objection, the court of opening the group coordination proceedings shall decide on the costs and the share.[1097]

4.174 UNCITRAL drafted an "enterprise group insolvency solution", which means

"a proposal for coordinated reorganization, sale as a going concern or liquidation (of the whole or part of the business or assets) of two or more members of an enterprise group

[1085] The EU Regulation (recast), article 71(2)
[1086] The EU Regulation (recast), article 69(2), 72
[1087] The EU Regulation (recast), article 74(1)
[1088] The EU Regulation (recast), article 72(1)(a)(b)
[1089] The EU Regulation (recast), article 70
[1090] The EU Regulation (recast), article 75
[1091] The EU Regulation (recast), article 74(2)
[1092] The EU Regulation (recast), article 61(3)(d)
[1093] The EU Regulation (recast), article 68(1)(c)
[1094] The EU Regulation (recast), article 72(6)
[1095] The EU Regulation (recast), article 77(2)
[1096] The EU Regulation (recast), article 77(3)
[1097] The EU Regulation (recast), article 77(4)

that would, or would be likely to, either maintain or add value to the enterprise group as a whole or to those group members."[1098]

4.175 The competent court to coordinate enterprise group insolvency solution shall be located in a State, which is the center of main interests of at least one enterprise group member.[1099] It is also stipulated that a single or the same insolvency representative can be appointed so as to facilitate coordination of multiple insolvency proceedings of the same group in different States as a whole.[1100] In light of that recommendation, whether or not the coordination can be carried out successfully depends greatly on the level of integration of its members and its business structure as well as the qualification of that single or the same insolvency representative.[1101] Considering that there may be potential conflicts of interest within the group members or different obligations of the insolvency representative under different insolvency laws, it is also suggested to include specialized provisions to prevent those conflicts from arising.[1102]

Ch.5 Cooperation and Communication

4.176 The Model Law has established more systematic framework concerning cooperation and communication to coordinate fair and efficient administration of cross-border insolvency proceedings than the EC Regulation has done. In the EU Regulation (recast), cooperation and communication has been stressed in particular by extending cooperation to courts,[1103] courts and insolvency practitioners in the insolvency proceedings involving the same debtor and group companies,[1104] in particular introducing the use of protocols.[1105] Cooperation and communication in the context of group companies has already been discussed in the former chapter.). Hence, in this chapter, the focus will be comparison of rules and development of cooperation and communication concerning the same debtor.

5.1 General Rules under the Two International Regimes

5.1.1 The Model Law

4.177 Considering the lack of cooperation and communication between different jurisdictions in matters of cross-border insolvency, the Model Law provides a

[1098] Working Group V (insolvency law), UNCITRAL, Facilitating the Cross-border Insolvency of Multinational Enterprise Groups, A /CN.9/WG.V/WP.128, 2015, Article 2(i)
[1099] Working Group V (insolvency law), UNCITRAL, Facilitating the Cross-border Insolvency of Multinational Enterprise Groups, A /CN.9/WG.V/WP.128, 2015, Article 2(i)
[1100] Working Group V (insolvency law), UNCITRAL, Facilitating the Cross-border Insolvency of Multinational Enterprise Groups, A /CN.9/WG.V/WP.128, 2015, Article 18(1); Legislative Guide Part III, Recommendation 251
[1101] Working Group V (insolvency law), UNCITRAL, Facilitating the Cross-border Insolvency of Multinational Enterprise Groups, A /CN.9/WG.V/WP.128, 2015, Article 18(1); Legislative Guide Part III, Ch.3, para.44
[1102] Legislative Guide Part III, Ch.3, para.47, Recommendation 252
[1103] The EU Regulation (recast), recital (45), article 42, 57
[1104] The EU Regulation (recast), recital (45), article 43, 58
[1105] The EU Regulation (recast), recital (46), article 42(3)(e), 57(3)(e)

legislative framework for cooperation between the courts and insolvency representatives from two or more countries in order to "prevent dissipation of assets, to maximize the value of assets or to find the best solutions for the reorganization of the enterprise".[1106] Further, in 2009, UNCITRAL released Practice Guide on Cross-Border Insolvency Cooperation (the Practice Guide on Cooperation), which aims at introduction of information relating to cooperation and communication based on global development in recent years, including case law.

4.178 For national laws lacking rules providing a legal basis for cooperation by local courts with foreign courts in dealing with cross-border insolvencies, the Model Law mandates cross-border cooperation by stating that the court and the insolvency representative "shall cooperate to the maximum extent possible".[1107] The phrase "cooperate to the maximum extent possible", as pointed out by Berends, "provide a sufficient degree of flexibility".[1108]

4.179 For the States, which has already established the cross-border judicial cooperation framework, regardless of its legal basis that is either comity or reciprocity, Chapter IV of the Model Law may serve as a model for the development of such international cooperation. In the process of cooperation, the courts are left with discretion in matters of appropriate involvement of the parties, in either a direct or indirect way. It is suggested by UNCITRAL referring to reports of a number of cases involving judicial cooperation that the courts can take into consideration the following key points, when they use the discretion:

"(a) the protection of substantive and procedural rights of the parties;
(b) transparency of communication, including advance notice delivered to the parties involved;
(c) variety of communications that might be exchanged;
(d) means of communication; and
(e) considerable benefits for the persons involved in communication."[1109]

4.180 In accordance with article 25 and 26 of the Model Law, cooperation and communication can be established between courts, between courts and foreign representatives and between insolvency representatives. The participation of the courts in cooperation and communication has been emphasized because their involvement can significantly contribute to efficiency, which can "help to simplify the formalities and get rid of the use of time-consuming procedures, such as letters rogatory."[1110] In case of urgency, it is even suggested by UNCITRAL that the enacting State may consider to include "an express provision, which would authorize the courts, when they engage in cross-border communications, to forgo use of the formalities".[1111]

[1106] Guide and Interpretation, para. 211
[1107] The Model Law, article 25, 26
[1108]Berends, André, The UNCITRAL Model Law on Cross-border Insolvency: A Comprehensive Overview, in: 6 Tul. J. Int'l & Comp. L., at 357.
[1109] Guide and Interpretation, para. 217
[1110] Guide and Interpretation, para. 40
[1111] Guide and Interpretation, para. 218

4.181 Article 27 of the Model Law provides a list of possible forms of cooperation on a general basis. Further, in 2009, UNCITRAL released Practice Guide on Cross-Border Insolvency Cooperation (Practice Guide on Cooperation), which aims at introduction of information relating to cooperation and communication based on a collection of global development in recent years. It illustrates experience on the use of the instruments listed under the Article 27, in particular, cross-border insolvency agreements, which will be discussed later in this chapter.

5.1.2 Development in EU

5.1.2.1 Article 31 of the EC Regulation

4.182 In order to achieve the effective realization of the total assets, the EC Regulation designed the cooperation model through the liquidators' from both main proceeding and secondary proceeding as intermediary, which reduces the overall complexity.[1112] Article 31 provides that as a general principle the liquidator in the main proceedings and the liquidators in any secondary proceeding should communicate information to each other and in particular should immediately communicate any information, which might be relevant to the other proceedings. The information to be communicated includes information relating to the lodging and verification of claims and relating to the termination of the proceedings. However, it is merely a duty without specific measures.

4.183 Under the EC Regulation, liquidators from either the main proceeding or the secondary proceedings are obliged to cooperate and communicate, which is necessary to ensure the smooth course of operations in the proceedings.[1113] Unlike the Model Law, the EC Regulation does not allow cooperation and direct communication between the courts as well as between the courts and the foreign representatives.[1114] However, in EU's practice, the cooperation and communication has been extended to courts. In *Re Stojevic*, the Vienna Higher Regional Court considered that

> Although the wording of Article 31 of the EU Insolvency Regulation only obliges the trustees in bankruptcy to cooperate, this also applies to the court according to the prevailing opinion and under the UNCITRAL Model Law.[1115]

4.184 This judgment has been referred to in *Re Nortel Networks*, in which the High Court of UK was requested by the joint administrators to send letters of request to the courts of Member States in EU asking those courts to give notice of any application for the opening of the secondary proceedings and permit the joint administrators to make submissions on any such applications. The High Court considered there was an inherent jurisdiction of the court to issue a letter of request to a foreign court in appropriate circumstances,[1116] holding

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[1112] Virgós/Schmit Report (1996), at 34
[1113] Virgós/Schmit Report (1996), at 230
[1114] The Model Law, article 25, 26
[1115] *Re Stojevic*, 9 November 2004, 28 R 225/04w
[1116] *Re Nortel Networks SA*, [2009] B.C.C. 343, at 9

(1) The request for the assistance of the various foreign courts stems directly from the duty of co-operation imposed by art.31(2) of the EC Regulation;[1117]

(2) Although framed in terms of cooperation between office-holders, the duty has been treated by the courts of Member States as incorporating or reflecting a wider obligation which extends to the courts which exercise control of insolvency procedures in their respective jurisdictions ((*Re Stojevic* November 9, 2004, 28 R 225/04w considered));[1118]

(3) For this obligation to be effective it is obviously desirable for the court dealing with an application to open secondary insolvency proceedings to be provided with the reasons why such proceedings might have an adverse impact on the main proceedings. By referring to Court of Appeal of Versailles in *Public Prosecutor v Segard* (Administrator of Rover France SAS) [2006] I.L.Pr. 32, the High Court pointed out the advantage of permitting the joint administrators in English main proceedings to be heard in relation to the opening of secondary proceedings in another Member State[1119]

(4) In accordance with art.33(1) of the Regulation, the liquidator in the main proceedings can request the court which has opened the secondary proceedings to stay the process of liquidation. But it would not prevent the continuation of winding-up proceedings in the Member States in which each of the companies is incorporated and the effect of the commencement and continuation of such proceedings is likely to be to cause the relevant company to cease to trade save for the purposes of winding-up. The joint administrators take the view that the continuation of trading is necessary in order to achieve the re-organization of the Nortel Group, which is planned.[1120]

4.185 Nevertheless, it has been pointed out by Wessels that Austria lists the bankruptcy court in Annex C, which is the catalogue for lists of liquidators.[1121] That's why the bankruptcy court in Vienna can observe the cooperation and communication obligations under the EC Regulation since it has been listed in Annex C as liquidator. Thus it has been submitted by Vallender that the wording of Art. 31 of the EC Regulation unequivocally only speaks of the liquidators' duties to cooperate and communicate information, which cannot be interpreted as extending the scope of obliged cooperation and coordination to the courts.[1122] However, it is obvious in *Re Nortel Networks* case that it is necessary for the liquidators to be granted assistance and permission by the courts to prevent any side-effect on the rescue procedure of the main proceeding. There is also some example of cooperation between the courts.

4.186 In Germany, discussion on the feasibility of court-to-court cooperation and communication in a civil law jurisdiction has been invoked. Three German judges and a legal advisor to the German Ministry of Justice published an article to

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[1117] *Re Nortel Networks SA*, [2009] B.C.C. 343, at 10
[1118] *Re Nortel Networks SA*, [2009] B.C.C. 343, at 11
[1119] *Re Nortel Networks SA*, [2009] B.C.C. 343, at 12
[1120] *Re Nortel Networks SA*, [2009] B.C.C. 343, at 13
[1121] Wessels, Bob, International Insolvency Law (3rd ed.), Vol.X, Deventer: Kluwer, 2012, para. 10846b
[1122] Vallender, Heinz, Judicial Cooperation within the EC Insolvency Regulation, p. 2 http://www.insolvenzrecht.jura.uni-koeln.de/fileadmin/sites/insolvenzrecht/ieei/discussion_papers/judicial_cooperation.pdf (Last visited on 14 June 2016)

defend the possibility.[1123] As Member State of EU, the EC Regulation is binding on Germany, under which duty of communication is only levied on liquidators. [1124] It has been argued that it falls in the ambit of the objective of procedural law, which is to find a way efficiently and fairly realizing substantial rights. Although it has not been explicitly permitted, it is not forbidden if the court considers it necessary to conduct cross-border communication between the courts to "the best possible satisfaction of the creditors".[1125] In addition, by referring to the principle of ex officio-investigation under section 5 of the German Insolvency Act, they consider that the courts are thus left with discretion to decide whether communicating with courts or liquidators abroad is admissible to the insolvency proceedings in order to "ascertain the essential facts" and "avoid inconsistent decisions".[1126] In *BenQ* case, the debtor applied for surséance van betaling as listed in Annex A to the Regulation in Amsterdam. Two days later, it also filed a petition for opening of an insolvency proceeding (Insolvenzverfahren) in Germany. The German Judge phoned the judge in Amsterdam in order to co-ordinate further developments.[1127] As the result, the Amsterdam court opened a main proceeding and a few days later the Munich court opened a secondary proceeding.

4.187 To fill in the gap, in July 2007, European Communication and Cooperation Guidelines For Cross-border Insolvency (hereinafter the CoCo Guidelines), which were drafted by Prof. Wessels and Prof. Virgós, was published. 18 Guidelines have been invented to "facilitate cooperation and coordination between insolvency proceedings pending in two or more member states relating to several practical issues, where the text of the EC Regulation is left open or is vague".[1128] In particular, in accordance with Guidelines 16.4, courts are allowed to communicate with each other directly. In 2012, the European Commission proposed to add a new line to recital 20 of the Regulation, which is

"In their cooperation, liquidators and courts should take into account best practices for cooperation in cross-border insolvency cases as set out in principles and guidelines on communication and cooperation adopted by European and international associations active in the area of insolvency law."[1129]

[1123] Busch, Peter, Remmert, Andreas, Rüntz, Stefanieand Vallender, Heinz, Communication between Courts in Cross-Border Insolvencies: What is possible and what is not, in: 23 No.5 J.Bankr.L. & Prac. NL Art.3

[1124] The EC Regulation, article 31

[1125] Busch, Peter, Remmert, Andreas, Rüntz, Stefanieand Vallender, Heinz, Communication between Courts in Cross-Border Insolvencies: What is possible and what is not, in: 23 No.5 J.Bankr.L. & Prac. NL Art.3, p.540

[1126] Busch, Peter, Remmert, Andreas, Rüntz, Stefanie and Vallender, Heinz, Communication between Courts in Cross-Border Insolvencies: What is possible and what is not, in: 23 No.5 J.Bankr.L. & Prac. NL Art.3, p.540

[1127] Paulus, The Aftermath of "Eurofood" – BenQ Holding BV and the Deficiencies of the ECJ Decision, in: 20 Insolvency Intelligence, 2007, p. 85.

[1128] Wessels, Bob, International Insolvency Law (3rd ed.), Vol.X, Deventer: Kluwer, 2012, para.10855f; See also Wessels, Bob, Themes of the Future: Rescue Businesses and Cross-border Cooperation, Insolv. Int. 2014, 27(1), 4-9

[1129] EU Commission Explanatory Memorandum, Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings, Strasbourg, 12.12.2012, COM(2012) 744 final, p.17

5.1.2.2 New Articles under the EU Regulation (recast)

4.188 The EU Regulation (recast) incorporates rules of cooperation and communication between the actors involved in all the concurrent proceedings, including the courts and insolvency practitioners.[1130] The insolvency practitioners in the main proceedings and secondary proceedings shall at the earliest opportunity communicate to each other any relevant information about the other proceedings and discover the rescue potential of the debtor by preparing a restructuring plan if possible.[1131] Different from the Model Law, the main proceedings have the dominant role under the Regulation. Therefore, in the process of coordination, the insolvency practitioner in the main proceedings is given "an early opportunity" to submit proposals on the administration of the realization or use of the debtor's assets and affairs.[1132]

4.189 The courts in the main and territorial or secondary insolvency proceedings are required to cooperate and communicate with each other to the extent such cooperation is not incompatible with the rules applicable to each of the proceedings.[1133] It is suggested that the courts may appoint an independent person or body acting on its instructions if that this is not incompatible with the rules applicable to them,[1134] which corresponds to the form of cooperation stipulated under Article 27(a) of the Model Law.[1135] The courts can directly request information or assistance from each other unless that direct communication may jeopardize the procedural rights of the parties to the proceedings or the confidentiality of information.[1136] Besides, the courts may not charge costs to each other in the course of cooperation and communication.[1137]

4.190 With respect to cooperation and communication between the insolvency practitioners and the courts, it is required that the insolvency practitioner in the main proceedings shall cooperate with any courts, which open or receive a request to open the secondary proceedings.[1138] The insolvency practitioner in the territorial proceedings (including territorial insolvency proceedings and secondary proceedings) shall cooperate with the court, which open or receive a request to open the main proceedings.[1139] In addition, the insolvency practitioner in the territorial proceedings shall cooperate with the court, which open or receive a request to open the territorial proceedings.[1140]

[1130] The EU Regulation (recast), recital (48)
[1131] The EU Regulation (recast), article 41(2)(a)(b)
[1132] The EU Regulation (recast), article 41(2)(c)
[1133] The EU Regulation (recast), article 42(1)
[1134] The EU Regulation (recast), article 42(1)
[1135] The Model Law, article 27(a): Appointment of a person or body to act at the direction of the court
[1136] The EU Regulation (recast), article 42(2)
[1137] The EU Regulation (recast), article 44
[1138] The EU Regulation (recast), article 43(1)(a)
[1139] The EU Regulation (recast), article 43(1)(b)
[1140] The EU Regulation (recast), article 43(1)(c)

5.1.2.3 EU-wide Interconnection of Insolvency Registers

4.191 In EU, the accessibility of the information about insolvency proceedings to the public also varies considerably. According to Heidelberg-Luxembourg-Vienna Report, the most effective way of notification is through internet but not all of the Member States provide for online registers in which the opening of insolvency proceedings is published.[1141] The transparency problems result in parallel opening of main proceedings[1142] and raise difficulty of lodging of claims for creditors.[1143]

4.192 In order to avoid opening of parallel insolvency proceedings and facilitate due notification of creditors, the EU Regulation (recast) requires the Member States to establish one or several insolvency registers, which publish information of insolvency proceedings as soon as possible after they are opened.[1144] As the European Commission observed, information about insolvency proceedings is hardly collected at a central point on national level.[1145] Hence, the EU Regulation (recast) establishes a system in a decentralized way by interconnecting the individual insolvency registers on the basis of implementing act.[1146] The EU-wide interconnection of insolvency registers system is composed of central public electronic access point through the European e-Justice Portal, which provides links to information of the individual insolvency registers through a search service in all the official languages of the institutions of the Union.[1147] The EU Regulation (recast) provides mandated information,[1148] which has to be made publicly available in the insolvency registers and the optional information that the Member States can choose to make available through the European e-Justice Portal.[1149]

4.193 Costs incurred by the establishment, maintenance and future development concerning the system of interconnection of insolvency registers shall be

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[1141] The Member States that provide online registers (with websites) include Austria, Czech Republic, Estonia, France, Germany, Italy, Latvia, Luxembourg, Malta, Netherlands, Slovenia and Spain. See Hess, Oberhammer, Pfeiffer, European Insolvency Law-The Heidelberg-Luxembourg-Vienna Report on the Application of Regulation No.1346/2000/EC on Insolvency Proceedings (External Evaluation JUST/2011/JCIV/PR/0049/A4), C.H.Beck.Hart.Nomos, 2014, para.943

[1142] Case example: County Court Croydon 21/10/2008 1258/08, NZI 2009, 136. See EU Commission Explanatory Memorandum, Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings, Strasbourg, 12.12.2012, COM(2012) 744 final, p.25

[1143] See all National Reports on Q37 of the Heidelberg-Luxembourg-Vienna Report, in particular, Austria, Belgium, Czech Republic, Estonia, Ireland, Italy, Lithuania, Malta; See Hess, Oberhammer, Pfeiffer, European Insolvency Law-The Heidelberg-Luxembourg-Vienna Report on the Application of Regulation No.1346/2000/EC on Insolvency Proceedings (External Evaluation JUST/2011/JCIV/PR/0049/A4), C.H.Beck.Hart.Nomos, 2014, p.679-685

[1144] The EU Regulation (recast), article 24(1)

[1145] EU Commission Explanatory Memorandum, Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings, Strasbourg, 12.12.2012, COM(2012) 744 final, p.28

[1146] The EU Regulation (recast), article 25(1)

[1147] The EU Regulation (recast), article 25(1)

[1148] The EU Regulation (recast), article 24(2)

[1149] The EU Regulation (recast), article 25(1)

covered by the general budget of the Union.[1150] As for the establishment and improvement of national insolvency registers, the costs shall be borne by each Member State.[1151] Besides, the Member States have to make sure that access to the mandated information published on insolvency registers shall be free of charge.[1152]

5.2 Best Practices in Soft Law

4.194 In addition to the Model Law and the Regulation, there are two sets of soft law, which are specialized at providing generally accepted guidance with respect to cross-border insolvency cooperation and communication. Each of them is established based on consultation of opinions of related experts (including scholars, judges, insolvency practitioners). The first one is the American Law Institute (ALI) and International Insolvency Institute (III) Transnational insolvency: global principles for cooperation in international insolvency cases published in 2012 (hereinafter, the Global Principles). The second one is the EU Cross-Border Insolvency Court-to-Court Cooperation Principles (hereinafter, EU JudgeCo Principles) published in 2015.

5.2.1 The Global Principles

4.195 In 2012, Fletcher and Wessels, appointed by the American Law Institute (ALI)[1153] and the International Insolvency Institute (III)[1154], issued a report, which established 37 Global Principles for cooperation in international insolvency cases and 18 Guidelines for court-to-court communications in international insolvency cases, accompanied, in each case, by commentary. Those Global Principles were built up further on the basis of the ALI's Principles of Cooperation among the member-states of the North American Free Trade Association (the ALI-NAFTA Principles). In order to obtain a worldwide acceptance, the text of the Global Principles was created through consultation, discussion and debate among a number of experts from a wide and diverse array of international jurisdictions and reflected their consensus.[1155]

4.196 The Global Principles have influenced the judicial practice in matters of cross-border insolvency. For example, the Supreme Court of the United Kingdom

[1150] The EU Regulation (recast), article 26(1)
[1151] The EU Regulation (recast), article 26(2)
[1152] The EU Regulation (recast), article 27(1)
[1153] ALI is the leading academic institute in the United States "producing scholarly work to clarify, modernize", and improve the law. Its most renowned work includes Restatements of the Law. Its membership is composed of judges, legal practitioners and academics. For more information, please visit https://www.ali.org/about-ali/ (Last visited on 14 June 2016)
[1154] III is a non-profit organization aims at "improving international co-operation in the insolvency area and achieving greater co-ordination among nations in multinational business reorganizations and restructurings". For more information, please visit: http://iiiglobal.org (Last visited on 14 June 2016)
[1155] Wessels, A Global Approach to Cross-Border Insolvency Cases in a Globalizing World, in: The Dovenschmidt Quarterly, Issue 1, 2013, available at: http://www.elevenjournals.com/tijdschrift/doqu/2013/1/DQ_2013_002_001_003/fullscreen (Last visited on 14 June 2016)

has directly referred to the Principle 13 of the Global Principles in the judgment shortly after its publication in 2012.[1156] In 2013, the United States Court of Appeals for the Third Circuit has also made reference to the Principle 1 and Principle 24 of the Global Principles in re ABC Learning Centres Limited.[1157] In Germany, three judges of the insolvency division of the local courts wrote an article about the feasibility of communication between courts from civil law jurisdiction and common law jurisdiction in cross-border insolvencies, in which it is stated that the Global Principles "are not to be the benchmark but a basis for discussion"[1158].

5.2.2 EU JudgeCo Principles

4.197 In 2015, the EU Cross-Border Insolvency Court-to-Court Cooperation Principles (EU JudgeCo Principles)[1159] was published, which contain 26 principles and 18 guidelines to assist European courts in their cross-border cooperation and communication in cross-border insolvency cases. As stated in the Introduction of the EU JudgeCo Principles, the draft texts of these principles have been "tested on their suitability in practice by experts as well as during training and discussion sessions with over 100 judges, with positive results".[1160]

4.198 According to Wessels, who was the principal drafter of the EU JudgeCo Principles, it is expected that the EU JudgeCo Principles can be a timely tailor-made soft law instrument for the EU recast situation based on the following six criteria.[1161] First of all, taking into account the existing global best practice in the matters addressed therein, the EU JudgeCo Principles were built up further on the basis of the CoCo Guidelines and the Global Principles[1162] and thus are consistent with international norms. Secondly, the EU JudgeCo Principles aims at assisting in the effective and efficient operation of international insolvency proceedings, which will strengthen the judicial cooperation in the EU. Thirdly, the non-binding nature of the EU JudgeCo Principles can help to eliminate obstacles to the proper functioning of insolvency proceedings, which provides guidance to the existing related national laws. Fourthly, as suggested under the EU Regulation (recast), best practices for cooperation in cross-border insolvency

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[1156] *Rubin and another (Respondents) v Eurofinance SA and others (Appellants); New Cap Reinsurance Corporation (In Liquidation) and another (Respondents/Cross Appellants) v A E Grant and others as Members of Lloyd's Syndicate 991 for the 1997 Year of Account and another (Appellants/Cross Respondents)* [2012] UKSC 46, para.13

[1157] *Re ABC Learning Centres Limited*, No.12-2808 (3rd Cir. 2013)

[1158] Busch, Peter, Remmert, Andreas, Rüntz, Stefanieand Vallender, Heinz, Communication between Courts in Cross-Border Insolvencies: What is possible and what is not, in: 23 No.5 J.Bankr.L. & Prac. NL Art.3, p.541

[1159] The EU JudgeCo Principles was a project sponsored by the European Union and the International Insolvency Institute. The project was produced by a team of scholars, in particular coordinated by the Turnaround, Rescue and Insolvency research group of Leiden Law School, who worked with over 40 experts (scholars, judges, insolvency practitioners). For detailed information, please visit http://www.tri-leiden.eu/ (Last visited on 14 June 2016)

[1160] EU JudgeCo Principles, Introduction.

[1161] See also Wessels, EU Courts Can Rely on Soft Law Principles for Cooperation in International Insolvency Cases, in: 6 International Insolvency Law Review 2015/2, p. 145-160.

[1162] Wessels, Towards A Next Step in Cross-border Judicial Cooperation, in: Insolvency Intelligence, Vol.27, No.7, 2014, p. 101

cases on regional or international level adopted by European and international organizations active in the area of insolvency law should also be referred to.[1163] Although both the Global Principles and the EU JudgeCo Principles are qualified as the best practices, part of the Global Principles that might be incompatible with the mandatory rules stipulated under the EU Regulation (recast), such as Global Principles 7 (Recognition), 13 (International Jurisdiction), should be excluded. Meanwhile, the EU JudgeCo Principles have already intended to avoid those contradictory contents. Fifthly, the EU JudgeCo Principles also try to address the related issues arising from the ongoing case law. Last but not least, they are also a reflection of relevant developments within the EU legislature and the European Judicial community.[1164]

5.3 Instruments of Cooperation

5.3.1 General Introduction

4.199 The EC Regulation does not have specific provisions concerning means of cooperation but they are incorporated into the EU Regulation (recast). Some of them are literally are identical to those under the Model Law or carry the similar sense, including

(a) communication of information by any means considered appropriate by the court[1165]
(b) coordination of the administration and supervision of the debtor's assets and affairs[1166]
(c) coordination in the approval of protocols, where necessary[1167]/approval or implementation by courts of agreements concerning the coordination of proceedings[1168]
(d) appointment of a person or body to act at the direction of the court[1169]
(e) coordination of the conduct of hearings[1170] / coordination of concurrent proceedings regarding the same debtor[1171]

4.200 In addition, the EU Regulation (recast) also provides the possibility of appointment of a single insolvency practitioner for several insolvency proceedings concerning the same debtor or for different members of a group of companies. [1172] As aforementioned, appointment of a single insolvency representative is recommended only in the context of enterprise group under the Legislative Guide Part III by referring to some existing case law.[1173] Generally

[1163] The EU Regulation (recast), recital (48)
[1164] Wessels, Towards A Next Step in Cross-border Judicial Cooperation, in: Insolvency Intelligence, Vol.27, No.7, 2014, p. 101-103
[1165] The EU Regulation (recast), article 42(3)(b), the Model Law, article 27(b)
[1166] The EU Regulation (recast), article 42(3)(c), the Model Law, article 27(c)
[1167] The EU Regulation (recast), article 42(3)(e)
[1168] The Model Law, article 27(d)
[1169] The EU Regulation (recast), article 42(1), the Model Law, article 27(a)
[1170] The EU Regulation (recast), article 42(3)(d)
[1171] The Model Law, article 27(e)
[1172] The EU Regulation (recast), recital (47); article 42(3)(a)
[1173] Legislative Guide Part III, para. 46; Recommendation 251

speaking, it is quite difficult to reconcile the various requirements concerning qualification and licensing of the insolvency representatives under the national law, in particular, on international level. Hence, it is not surprising that the appointment of a single insolvency representative concerning a single debtor has not been suggested under Practice Guide on Cooperation. Instead, the Practice Guide on Cooperation compiles practice and experience with the use of cross-border insolvency agreements.

4.201 Among all those instruments available to achieve cooperation and communication, discussion will be expanded only on three of them in this section, which are considered to be helpful in China's context and the reasons will be explained in the following Part V. In addition to the EU Regulation (recast) and relevant guidelines prepared by UNCITRAL as well as other related soft law rules, in particular, the Global Principles and the EU JudgeCo Principles will also be taken into consideration.

5.3.2 Cross-border Insolvency Agreements (Protocols)

5.3.2.1 Development of Cross-border Insolvency Agreements under the Model Law

4.202 What are cross-border insolvency agreements (protocol)? In accordance with Chapter III of Practice Guide on Cooperation, it refers to "an oral or written agreement intended to facilitate the coordination of cross-border insolvency proceedings and cooperation between courts, between courts and insolvency representatives and between insolvency representatives, sometimes also involving other parties in interest."[1174] Before UNCITRAL adopted the specific term, a number of other titles have been used, including "protocol"(most commonly), "insolvency administration contract", "cooperation and compromise agreement" and "memorandum of understanding".[1175]

4.203 The diversity of titles exemplifies that cross-border insolvency agreements were inventions developed through individual attempts of the insolvency profession to resolve practical cross-border insolvency coordination issues in the absence of relevant national or international laws.[1176] The earliest reported case involving use of cross-border insolvency agreement dated back to 1908.[1177] A firm went bankrupt in England and India. The trustee in bankruptcy in England and the official assignee in India entered into an agreement for pooling and distributing the assets amongst English and Indian creditors. Considering it is "clearly a proper and common-sense business arrangement to make, and one manifestly for the benefit of all parties interested",[1178] the English court held that it had jurisdiction "to sanction such an agreement, notwithstanding that the

[1174] Practice Guide on Cooperation, Introduction-Glossary, 2(i)
[1175] Practice Guide on Cooperation, Introduction, para.9
[1176] Practice Guide on Cooperation, II, para.12
[1177] *Re P MacFadyen & Co, ex parte Vizianagaram Company Limited* [1908] 1 KB 675
[1178] Ibid

Bankruptcy Act, 1883, contained no express provisions authorizing such a scheme".[1179]

4.204 The standardization of cross-border insolvency agreements is mostly rooted in the common law jurisdictions, in particular, between the U.S. and Canada. The first guidelines for cross-border insolvency agreements were prepared by insolvency practitioners, the Committee J-Insolvency and Creditors' Rights of the International Bar Association, which issued a Cross-border Insolvency Concordat in 1995.[1180] According to Bellissimo and Johnston, the Cross-Border Concordat "helped to rebut concerns that it would be difficult and expensive to develop ad hoc protocols".[1181] In the *Everfresh* case, the courts of the United States and Canada entered into the first insolvency agreement based on the Cross-border Insolvency Concordat.[1182] The development of the cross-border insolvency agreements did not stop there. Instead, they have been continuously streamlined and improved in practice.

4.205 Practice Guide on Cooperation especially addresses the issues of use of cross-border insolvency agreements. The Annex I to Practice Guide on Cooperation, UNCITRAL has collected some 44 relevant cases, which related to utilization of cross-border insolvency agreements.[1183] In addition to 26 cases between the U.S. and Canada, the application of cross-border insolvency agreements has been extended to jurisdictions such as Switzerland,[1184] Bermuda,[1185] Bahamas,[1186] Germany,[1187] France,[1188] UK,[1189] British Virgin Islands,[1190] Cayman,[1191] Israel[1192] and Hong Kong SAR.[1193] In particular, in the Lehman Brothers case, there were over 75 separate proceedings with more than

[1179] Ibid

[1180] The Concordat is available at the website of the IBA. http://www.ibanet.org/LPD/Insolvency_Section/Insolvency_Section/Default.aspx (Last visited on 14 June 2016)

[1181] Bellissimo, Joseph J., Johnston, Susan Power, Cross-Border Insolvency Protocols: Developing an International Standard, Norton Annual Review of International Insolvency, 2010, Art.2, p.2

[1182] Ontario Court of Justice, Toronto, Case No. 32-077978 (20 December 1995), and the United States Bankruptcy Court for the Southern District of New York, Case No. 95 B 45405 (20 December 1995)

[1183] In *the United Pan-Europe Communications N.V.* case, which involved the U.S. and the Netherlands, there was no written agreement between the two sides. The insolvency representatives from the both sides worked closely with each other and enabled the parallel proceedings closed on the same day. In: Practice Guide on Cooperation, Annex I, No. 44 case.

[1184] Practice Guide on Cooperation, Annex I, No.3, No.41

[1185] Practice Guide on Cooperation, Annex I, No.4, No.30

[1186] Practice Guide on Cooperation, Annex I, No.6

[1187] Practice Guide on Cooperation, Annex I, No.8, No.14

[1188] Practice Guide on Cooperation, Annex I, No.8, No.38

[1189] Practice Guide on Cooperation, Annex I, No.10, No.13, No.14, No.20, No.24, No.30, No. 38, No.41

[1190] Practice Guide on Cooperation, Annex I, No.12, No.21

[1191] Practice Guide on Cooperation, Annex I, No.13

[1192] Practice Guide on Cooperation, Annex I, No.26

[1193] Practice Guide on Cooperation, Annex I, No.4, No.12, No.30

16 Official Representatives.[1194] Ten of those Official Representatives signed the cross-border insolvency protocol for Lehman Brothers, who representing Australia, the Netherlands, the Netherlands Antilles, Hong Kong, Germany, Luxembourg, Singapore, Switzerland, and the United States.[1195]

4.206 The possible content of the cross-border insolvency agreements has also been suggested in a more extensive way. Farley (judge in *Everfresh* case), Leonard and Birch used to stress that cross-border insolvency agreements should coordinate "procedural, rather than substantive, issues between jurisdictions". [1196] According to their suggestions, cross-border insolvency agreements typically deal with co-ordination of

"(a) court hearings in the two or more jurisdictions,
(b) procedures dealing with the financing or sale of assets,
(c) recoveries for the benefit or creditors generally and equality of treatment among the general body of unsecured creditors,
(d) claims filing processes, and,
(e) ultimately, plans in different jurisdictions."[1197]

4.207 Later it is further summarized in Practice Guide on Cooperation that the basic contents of the cross-border insolvency protocol, including:

"(a) Allocation of responsibility for various aspects of the conduct and administration of proceedings between the different courts involved and between insolvency representatives, including limitations on authority to act without the approval of the other courts or insolvency representatives;
(b) Availability and coordination of relief;
(c) Coordination of the recovery of assets for the benefit of creditors generally;
(d) Submission and treatment of claims;
(e) Use and disposal of assets;
(f) Methods of communication, including language, frequency and means;
(g) Provision of notice;
(h) Coordination and harmonization of reorganization plans;
(i) Issues related specifically to the agreement, including amendment and termination, interpretation, effectiveness and dispute resolution;
(j) Administration of proceedings, in particular with respect to stays of proceedings or agreement between the parties not to take certain legal actions;
(k) Choice of applicable law;
(l) Allocation of responsibilities between the parties to the agreement;
(m) Costs and fees;

[1194] Alvarez & Marsal Holdings LLC. Lehman Brothers International Protocol Proposal, 11 Feb. 2009, p.4, available at http://dm.epiq11.com/LBH/Document#maxPerPage=25&page=1 (Last visited on 14 June 2016)
[1195] Lehman Bros. Holdings Inc., Cross Border Insolvency Protocol for the Lehman Brothers Group of Companies, approved on 17 June, 2009, p.2
available at http://dm.epiq11.com/LBH/Document#maxPerPage=25&page=1 (Last visited on 14 June 2016)
[1196] Farley, J.M, Leonard, Bruce, Birch, John M, Cooperation and Coordination in Cross-Border Insolvency Cases (paper delivered on the INSOL conference in May 2006), p.9 available at
http://www.iiiglobal.org/component/jdownloads/viewcategory/362.html (Last visited on 14 June 2016)
[1197] Ibid

(n) Rights of appearance before the courts involved;
(o) Safeguards"[1198]

4.208 Do all of the cross-border insolvency agreements address all the issues in the aforementioned list? Actually not. Protocols vary in form and scope and are tailored to address the specific issues of a case and the needs of the parties involved. For example, in Lehman Brothers protocol, besides the regular provisions such as court-to-court communication, special procedure is formulated to promote the consistency of the calculation and adjudication of intercompany claims.[1199] A Procedures Committee is allowed to be established so as to reconcile the possible conflicts incurred by those intercompany claims.[1200]

5.3.2.2 Development of Protocols in the EU

4.209 In EU, it has been observed by Maltese that protocols do not play a role as active as they do in the common law countries. Although there are a few examples of protocols applied also in civil law jurisdictions, such as *Daisytek*,[1201] *SENDO*[1202] and *Swissair*,[1203] protocols is more frequently used and more developed in common law jurisdictions. The significant reason is that the EC Regulation does not specify the legal basis of cross-border insolvency agreements. To reach a cross-border insolvency agreement, it is usually required "the active participation of judges".[1204] Nevertheless, Article 31 of the EC Regulation merely establishes the duty of liquidators to cooperate and communicate information but it does not provide legal basis of cooperation and communication between courts. That's why the reluctance of the judges, most of whom are from the civil law jurisdictions, to conduct cooperation through a binding agreement is understandable.

4.210 In addition, the intra-E.U. cross-border insolvency agreements also have limited contents, which do not address any matters related to jurisdiction or recognition.[1205] As stated in the *SENDO* Protocol,

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[1198] Practice Guide on Cooperation, at 28
[1199] Proposed Cross-border Insolvency Protocol for the Lehman Brothers Group of Companies, para.9, 2009, available at http://www.ekvandoorne.com/files/CrossBorderProtocol.pdf (Last visited on 14 June 2016)
[1200] Proposed Cross-border Insolvency Protocol for the Lehman Brothers Group of Companies, para.9.3, 9.4, 2009, available at http://www.ekvandoorne.com/files/CrossBorderProtocol.pdf (Last visited on 30 June, 2014)
[1201] Practice Guide on Cooperation, Annex I, at 14
[1202] Pannen, Klaus (ed.), European Insolvency Regulation, De Gruyter Recht, 2007, p.660-666
[1203] Practice Guide on Cooperation, Annex I, at 41
[1204] Paulus, Christoph, Judicial Cooperation in Cross-Border Insolvencies-An outline of some relevant issues and literature, p.1, available at http://siteresources.worldbank.org/GILD/Resources/GJF2006JudicialCooperationinInsolvency_PaulusEN.pdf
[1205] Maltese, Michele, Court-to Court Protocols in Cross-border Bankruptcy Proceedings: Differing Approaches between Civil Law and Common Law Legal Systems, 2013, p. 39 http://iiiglobal.org/images/pdfs/maltese_michele%20submission.pdf (Last visited on 14 June 2016)

"this protocol … is not intended to create a binding precedent and should not be considered appropriate for all other secondary proceedings in France pursuant to the EC Regulations, however may be regarded indicative of achieving good practice. It is established for the purposes of implementing such operating means by the Joint Administrators and the French Liquidators agreeing to act in conformity with the following principles:

- mutual trust,
- Adherence to the duty to communicate information and to cooperate as defined by Article 31 of the (EC) regulation,
- Precedence of the main proceedings over the secondary proceeding."[1206]

4.211 The Regulation itself provides comprehensive procedural rules in matters of cross-border insolvency, especially concerning jurisdiction and recognition. It does not leave a lot of space for the courts and insolvency practitioners to exercise their discretions in that regard. To address that issue, Virgós and Wessels provide customized solutions, which fit into the characteristics of the EC Regulation. It incorporates the basic requirements with respect to the protocols, the liquidators, the debtor and the proceedings. In addition, it provides more detailed discretionary indications of what a protocol may contain in the form of checklist.[1207]

4.212 As result, although agreements or protocols do find the way into the EU Regulation (recast) and becomes the official legal instrument for cooperation and communication in EU, they have not been defined in the text of the EU Regulation (recast). Nevertheless, it has been pointed out the objective of protocols is to facilitate cross-border cooperation of multiple insolvency proceedings in different Member States concerning the same debtor or members of the same group of companies.[1208] The form and scope of protocols are not limited. However, the EU Regulation (recast) gives an example of simple generic agreements, which do not address specific issues but establish a framework of principles to govern multiple insolvency proceedings for the purpose of close cooperation between the parties concerned.[1209]

5.3.3 Joint Hearing

4.213 What is joint hearing? In accordance with Practice Guide on Cooperation, joint or coordinated hearing enables the courts to solve the complex problems of different insolvency proceedings directly and in a timely manner and bringing relevant parties in interest together at the same time for direct contact and the opportunity to share information and discuss and resolve outstanding issues or potential conflicts in other jurisdiction.[1210]

[1206] Pannen, Klaus (ed.), European Insolvency Regulation, De Gruyter Recht, 2007, p.661

[1207] Virgós and Wessels, European Communication and Cooperation Guidelines for Cross-border Insolvency, Developed under the aegis of the Academic Wing of INSOL Europe, July 2007, Appendix I

[1208] The EU Regulation (recast), recital (46)

[1209] The EU Regulation (recast), recital (46)

[1210] UNCITRAL Legislative Guide on Insolvency Law, Part Three: Treatment of enterprise groups in insolvency (2010), para. 38; Practice Guide on Cooperation, at 154

4.214 How should the joint hearing be conducted? Neither the Model Law nor the Regulation gives a clear answer. The EU Regulation (recast) merely provides the general legal basis for courts to conduct coordination of hearings.[1211] UNCITRAL has collected a list of cases, in which joint hearings have been contemplated or implemented.[1212] Interestingly, all those examples were U.S.-Canadian insolvency cases and the use of joint hearing was referred to in the insolvency agreements (protocols). On 12 May, 2014, in the latest case, which is the *Nortel Networks Corp.*, a joint hearing was simultaneously conducted also between the Delaware court in the USA and the Toronto court in Canada.[1213] Among them the earliest case occurred in 1995[1214] and later *Livent* case and *Loewen* case in 1999; which were prior to "the Court-to-Court Guidelines" that came into existence. It seems that joint hearing was developed based on common law practice, in particular, the experience between the United States and Canada.

4.215 In the meantime, the application of joint hearing have been mutually recommended by both the Global Principles and the EU JudgeCo Principles. In particular, the EU JudgeCo Principles have to a great extent reached consensus with the Global Principles on the contents of the relevant guidelines. According to both of them, a court may conduct a joint hearing with another Court that shall be conducted in the following manners:

"(a) Each Court should be able to simultaneously hear the proceedings in the other Court.
(b) Evidentiary or written materials filed or to be filed in one Court should, in accordance with the Directions of that Court, be transmitted to the other Court or made available electronically in a publicly accessible system in advance of the hearing. Transmittal of such material to the other Court or its public availability in an electronic system should not subject the party filing the material in one Court to the jurisdiction of the other Court.
(c) Submissions or applications by the representative of any party should be made only to the Court in which the representative making the submissions is appearing unless the representative is specifically given permission by the other Court to make submissions to it.
(d) Subject to Global Guideline 8(b)[1215]/EU JudgeCo Guideline 8(ii)[1216], the Court should

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[1211] The EU Regulation (recast), article 42(3), 57(3)
[1212] Practice Guide on Cooperation, Annex I: no.2 *AgriBioTech Canada Inc.*(2000); no.9 *Everfresh* (1995); no.11 *Financial Asset Management* (2001); no.15 *Laidlaw* (2001); no.17 (1999); no.18 *Loewen* (1999); no.25 *Mosaic* (2002); no.27 *360Networks* (2001); no.33 *Pope & Talbot* (2007); no.34 *Progressive Moulded* (2008); no.35 *PSINet* (2001); no.36 *Quebecor* (2008); no.40 *Solv-Ex* (1998); no.42 *Systech* (2003)
[1213] Wessels, Bob, Nortel Network Joint hearing as a test case for EU JudgeCo Principle 10?, 13 May, 2014, http://bobwessels.nl/2014/05/2014-05-doc8-nortel-network-joint-hearing-as-a-test-case-for-eu-judgeco-principle-10/ (Last visited on 14 June 2016)
[1214] Practice Guide on Cooperation, Annex I, no.9 *Everfresh* (1995);
[1215] Global Guidelines, Guideline 8(b): The communication between the Courts should be recorded and may be transcribed. A written transcript may be prepared from a recording of the communication which, with the approval of both Courts, should be treated as an official transcript of the communication.
[1216] EU JudgeCo Guidelines, Guideline 8(ii): The communication between the courts should be recorded and may be transcribed (a written transcript may be prepared from a recording of the communication which, with the approval of both courts, should be treated as an official transcript of the communication.

be entitled to communicate with the other Court in advance of a joint hearing, with or without counsel being present, to establish Guidelines for the orderly making of submissions and rendering of decisions by the Courts, and to coordinate and resolve any procedural, administrative, or preliminary matters relating to the joint hearing.
(e) Subject to Global Guideline 8(b)/EU JudgeCo Guideline 8(ii), the Court, subsequent to the joint hearing, should be entitled to communicate with the other Court, with or without counsel present, for the purpose of determining whether coordinated orders could be made by both Courts and to coordinate and resolve any procedural or non-substantive matters relating to the joint hearing."[1217]

4.216 Due to lack of specific rules, it is expected that the provisions concerning conduct of joint hearings under Global Guidelines and the EU JudgeCo Guidelines will be of great reference value.

4.217 In reality, joint hearing was developed based on common law practice, in particular, the experience between the United States and Canada. The latest example is the *Nortel Networks* case. The affiliates of Nortel Networks Corporation, who is the ultimate corporate parent, filed chapter 11 of the Bankruptcy Code in the U.S.A, filed an application with the Canadian Court in accordance with the Companies' Creditors Arrangement Act and also nineteen of Nortel's European affiliates was put into administration by the High Court of Justice in UK. The American, Canadian and English courts recognized each proceeding as the main proceeding in their own jurisdictions. An "Interim Funding and Settlement Agreement" (IFSA) has been reached among the UK, US and Canadian proceedings and was approved by the U.S. court. . Pursuant to section 12 of the IFSA, the parties agreed that the proceeds of any sale of their material assets (less taxes and costs) would be held in escrow until the parties either reached a consensual allocation of the proceeds, or

"in the case where the Selling Debtors fail to reach agreement, determination by the relevant dispute resolver(s) under the terms of the Protocol . . . applicable to the Sale Proceeds . . . which Protocol shall provide binding procedures for the allocation of Sales Proceeds. . . ."[1218]

4.218 Nevertheless, the parties concerned cannot enter into an agreement that could govern the allocation process. Instead, they attempted to reach agreement on the proper way of resolving allocation disputes. Unfortunately, as pointed out by Judge Gropper, there was no single cross-jurisdictional forum acceptable to all of the parties or able to assume control over the dispute despite extensive negotiations and formal mediations.[1219] Nortel's U.S. and Canadian debtors opted for judicial proceedings,[1220] whereas Nortel's UK joint administrators opted for arbitration,[1221] which was opposed by the U.S. and Canadian creditors.[1222] In the

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[1217] Global Principles, Section III Global Guidelines for Court-to-Court Communication (Global Guidelines), Guideline 10; EU JudgeCo Principles, 3. EU Cross-Border Insolvency Court-to-Court Communications Guidelines (EU JudgeCo Guidelines), Guideline 10
[1218] In *re Nortel Networks Corp*, 426 B.R. 84 (Bankr. D. Del. 2010)
[1219] Gropper, Allan L., The Arbitration of Cross-border Insolvencies, 86 Am. Bankr. L.J., 201, 2012, p.211
[1220] Motion, In *re Nortel Networks, Inc.* (Apr. 25, 2011), ECF No. 5307
[1221] Opposition & Cross-Motion to Compel Arbitration, In *re Nortel Networks, Inc.* (May 19, 2011), ECF No.5444

end, the U.S. and Canadian courts agreed to hold a cross-border coordinated joint hearing on allocation.[1223] Moreover, the conditions for conducting such a joint trial have been clarified. First of all, both the US court and the Canadian Court have jurisdiction in a joint hearing pursuant to the IFSA.[1224] Secondly, although it was fully acknowledged that a joint hearing "will confront practical and logistical difficulties" and the courts could arrive at inconsistent decisions on allocations,[1225] it is believed that the parties concerned, very ably represented, would assist the courts in minimizing any practical problems to "avoid the travesty of reaching contrary results which would lead to further and potentially greater uncertainty and delay" and in reaching the correct decision to seek timely solutions in the best interest of all parties concerned.[1226] Thirdly, both the US court and the Canadian court have worked through numerous difficulties on the Nortel case for years based on shared information, coordinated pre-trial discovery and schedule.[1227] That generated "enormous respect" between the courts from both sides, which further fueled confidence in the courts' ability to "continue to work together seamlessly".[1228] Fourthly, the practical difficulties, such as distance in space, were overcome through simultaneous hearings by using closed-circuit video, which both the US and Canadian courts can afford.[1229]

5.3.4 Independent Intermediaries

4.219 Who are intermediaries? According to Practice Guide on Cooperation, independent intermediaries can be regarded as medium, through which communication between the courts can be conducted indirectly.[1230] In *Maxwell Communications Corporation plc* case (*Maxwell* case), an examiner was appointed by the U.S. court in order to harmonize the proceedings between the U.S. and the UK and "permit a reorganization under U.S. law which would maximize the return to creditors".[1231] In re Joseph Nakash, the US bankruptcy court entered an order, appointing an examiner to develop a protocol for harmonizing and coordinating the United States Chapter 11 proceedings before the Courts of the

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[1222] Reply, In *re Nortel Networks, Inc.* (June 2, 2011), ECF No. 5571

[1223] In *re Nortel Networks, Inc.,* Case No. 09-10138(KG), Re Dkt No. 13208 (Bankr. D. Del. Apr. 3, 2013); *Nortel Networks Corp.* (Re), 09-CL-7950, 2013 O.N.S.C. 1757 (Can. Ont. Sup. Ct. J. Apr. 3, 2013).

[1224] IFSA, ¶ 16(b), the parties agree "to the non-exclusive jurisdiction of the U.S. and Canadian Courts (in a joint hearing conducted under the Cross-Border Protocol adopted by such Court, as it may be in effect from time to time), for purposes of all legal proceedings to the extent relating to the matters agreed" In *re Nortel Networks INC,* 737 F.3d 265 (2013), at 269

[1225] In *re Nortel Networks, Inc.,* No. 09-10138, 2013 WL 1385271 (Bankr. D. Del. Apr. 3, 2013), at 4; see also *Nortel Networks Corp.* (Re), 09-CL-7950, 2013 ONSC 1757 (Can. Ont. Sup. Ct. J. Apr. 3, 2013), at 35 - 37

[1226] *In re Nortel Networks, Inc.*, No. 09-10138, 2015 WL 2374351 (Bankr. D. Del. May 12, 2015), at 27; *Nortel Networks Corp.* (Re), 09-CL-7950, 2015 ONSC 2987 (Can. Ont. Sup. Ct. J. May 12, 2015), at 10.

[1227] In *re Nortel Networks*, *Inc*., No. 09-10138, 2013 WL 1385271 (Bankr. D. Del. Apr. 3, 2013); Robert W. Miller, Economic Integration: An American Solution to the Multinational Enterprise Group Conundrum, 11 RICH. J. GLOBAL L. & BUS. 185 (2012), at 217

[1228] In *re Nortel Networks*, *Inc.*, No. 09-10138, 2013 WL 1385271 (Bankr. D. Del. Apr. 3, 2013)

[1229] See Order Entering Allocation Protocol, In *re Nortel Networks, Inc*., No. 09-10138 (May 17, 2013), ECF No. 10565, at Ex. 1¶ 4(e)

[1230] Practice Guide on Cooperation, at III-152-153

[1231] In *Re Maxwell Communication Corp. Plc*, 170 B.R. 800 (Bankr. S.D.N.Y. 1994)

United States and State of Israel.[1232] In Matlack case, the Canadian court appointed an information officer to summarize the status of the U.S. proceeding and such other information in reports, which were periodically or upon request delivered to the court.[1233]

4.220 Wessels has also suggested a further expansion of Article 27(a) of the Model Law by introducing a so-called independent intermediary as an alternative or an addition to court-to-court communication.[1234] The suggestion later became the Global Principle 23, which created "a new professional function to overcome any hurdles in global communication".[1235] It is stated in the comment to the Global Principle 23 that

"Under certain circumstances, the court may wish to refrain from conducting direct communication with another foreign court… The court could consider appoint an independent intermediary, whose task is to ensure that an international insolvency case is operated in accordance with these Global Principles and with any specific provisions that are either set out in a protocol or specified in the order made by the court."[1236]

4.221 It has been addressed that the Global Principle 23 "fully fits within the structure of UNCITRAL Model Law"[1237] because appointment of an independent intermediary is consistent with the appropriate means stipulated under Article 27(a) of the Model Law, which is appointment of a person or body to act at the direction of the court. In addition, the UNCITRAL Legislative Guide, Part Three: Treatment of enterprise groups in insolvency (Legislative Guide Part III) has adopted a "court representative".[1238] The potential functions of the court representative, which are regarded as similar as those of an independent intermediary.[1239]

[1232] In *re Joseph Nakash*, United States Bankruptcy Court for the Southern District of New York, Case No. 94 B 44840 (23 May 1996)

[1233] In *Matlack, INC.*, Superior Court of Justice of Ontario, Case No. 01-CL-4109

[1234] Wessels, Bob, International Insolvency Law (3rd ed.), Vol.X, Deventer: Kluwer, 2012, para. 10334d

[1235] Wessels, A Global Approach to Cross-border Insolvency Cases in a Globalizing World, in: Eleven Journals, 2013, Issue 1, p.23

[1236] ALI/III, Transnational insolvency: global principles for cooperation in international insolvency cases: report to the ALI, Philadelphia. PA: Executive Office, The American Law Institute, 2012, the Comment to Global Principle 23 http://www.iiiglobal.org/component/jdownloads/finish/557/5932.htm, (The online version did not provide any page number. Last visited on 14 June 2016)

[1237] American Law Institute and International Insolvency Institute, Transnational insolvency: global principles for cooperation in international insolvency cases: report to the ALI, Philadelphia. PA : Executive Office, The American Law Institute, 2012, http://www.iiiglobal.org/component/jdownloads/finish/557/5932.htm, ft. 111 (Last visited on 14 June 2016)

[1238] Legislative Guide Part III, para.37

[1239] American Law Institute and International Insolvency Institute, Transnational insolvency: global principles for cooperation in international insolvency cases: report to the ALI, Philadelphia. PA : Executive Office, The American Law Institute, 2012, http://www.iiiglobal.org/component/jdownloads/finish/557/5932.htm, ft. 112 (Last visited on 14 June 2016)

4.222 As the latest outcome of the development in the field of international insolvency, it is noteworthy that the EU Regulation (recast) also permits appointment of an independent person or body to act on the instructions of the court, who is authorized to deal with the cooperation and communication concerning the same debtor or the different members of a group of companies.[1240] Moreover, the Global Principles and the EU JudgeCo Principles also provide special rules for independent intermediary.[1241]

Provisional Conclusion

4.223 As leading international insolvency regimes assisting states in operating transnational insolvency systems in an efficient, fair and cost-effective manner, the Regulation attempts to provide comprehensive private international law rules, including jurisdiction, applicable law, recognition and enforcement, on Union level, whereas the Model Law, as a soft law mechanism on global level, covers less ground and mainly focuses on simplified recognition, through which jurisdiction is considered indirectly, and cross-border cooperation and communication between courts and insolvency representatives, to which the EU Regulation (recast) attaches great value after revision. The Regulation and the Model Law have very similar objectives in common. The EU Regulation (recast) brings them closer, by extending the obligation of cooperation and communication between liquidators to insolvency practitioners and courts and expanding its scope by adding rescue measures into the existing European cross-border insolvency regime. In addition, the EC Regulation alone literally sets up the aim of prevention of forum shopping and the EU Regulation (recast) further attempts to rule out forum shopping in a fraudulent or abusive manner by introducing a look back period of three month for companies. Such an arrangement is tied to the characteristics of cross-border insolvency law and the requirement of the effective functioning of the internal market.

4.224 With respect to the scopes, the EC Regulation is applicable to both individuals as well as legal persons and explicitly excludes financial institutions. Although the Model Law intends to cover all kinds of debtors, regardless of their nature, it is still up to the enacting State whether or not to extend the application scope to natural persons or financial institutions. For the purpose of promoting the rescue culture, the EU Regulation (recast) broadens the definition of insolvency proceedings, which also covers pre-insolvency proceedings on an interim or provisional basis and hybrid proceedings. In addition, the annexes serve as indispensable parts of the Regulation and only proceedings mentioned in Annex A can benefit from the Regulation. The Model Law, in principle, can cover any proceedings, regardless of whether they are interim proceedings and collective judicial or administrative proceedings for the purpose of reorganization or liquidation. The Model Law is also accompanied by several Guides released by UNCITRAL for better understanding and implementation of the Model Law.

[1240] The EU Regulation (recast), article 42(1), 57(1)

[1241] Global Principles, Principle 23; EU JudgeCo Principles, Principle 17

4.225 As a Union legal instrument, the interpretation of the EC Regulation must be governed consistently by its superior Union law and the CJEU is granted the jurisdiction to give preliminary rulings concerning the interpretation of the EC Regulation, who safeguards the coherent interpretation of autonomous meanings inherent in the Regulation. Fully aware of its the contribution in that regard, the EU Regulation (recast) even directly refers to the case law of the CJEU in its recitals. The non-binding mechanisms, such as the recitals of the EC Regulation as well as the Virgós/Schmit Report have proved their value in promoting proper understanding of the EC Regulation. That probably explains why the amount of the recitals grows proportionally to those of the articles under the EU Regulation (recast). The flexibility of the Model Law allows modification of its texts. Although it has been stipulated under the article 8 that in order to interpret the Model Law, regard has to be given to the international origin and to the need to promote uniformity, the harmonized interpretation might not be very easy to be achieved in the Model Law context.

4.226 The Regulation and the Model Law employ the same terminologies, i.e. COMI and establishment, to indicate jurisdiction, both of which can find the origins from the relevant sources in the EU context. Center of main interests is designed in a way of rebuttable presumption, which reflects the compromise between the theory of real seat and the place of incorporation because a consensus was hard to be reached between the common law and the civil law at the beginning. How to rebut the presumption of registered office has raised quite a lot of problems in EU as well as on global level. In EU, with the continuous efforts made by the CJEU, the relevant factors to rebut the COMI presumption has been gradually made clear at the Union level, which has attached more importance to the place where the company has its central administration on the basis of a comprehensive assessment of all the relevant factors. Ascertainability by third parties, in particular the creditors, is also a crucial factor that needs to be taken into account. Those decisions handed down by the CJEU, in particular Interedil, have been literally codified into the EU Regulation (recast), which help to sets up all those conditions to rebut the presumption if possible. When the countries that have adopted the Model Law made interpretation of COMI, some of them chose to follow the European approach and some opted for different understanding, which resulted in incoherence among the enacting states. That is particular the case with respect to the timing COMI. Based on the case law, the EU Regulation (recast) provides that COMI assessment shall be initiated at the time of the request for the opening of insolvency proceedings and adds a restriction of a look-back period of 3 months on the presumption to make sure that the registered office has not been shifted for the purpose of fraudulent or abusive forum shopping. However, according to the case law of the U.S.A, the American jurisprudence not only holds different opinions from the Regulation and the Model Law, but also has split of views on the timing issues among the federal courts. The majority considers that the time to determine COMI shall be the date of the filing of the Chapter 15 petition, which allows assessment of COMI to start later after the opening of insolvency proceedings. That directly results in expansion of the scope of factors that can be taken into account to determine COMI so that liquidation activities and administrative functions are validated as

effective factors for the COMI analysis. Consequently, more factors can be manipulated for COMI relocation.

4.227 In light of establishment, which is also a concept of European origin, it cannot be understood as the mere presence of assets of the debtor under both the Regulation and the Model Law. The EU Regulation (recast) synchronizes the reference date to determine establishment with the reference date to assess COMI, which represents the subordinate nature of territorial proceedings under the Regulation. The concept of establishment serves as the basis for the opening of territorial proceedings, which was considered a deviation from the principle of universality and accordingly the main tone set on the conditions to commence the territorial proceedings was restriction under the Regulation.

4.228 In order to ensure the dominant role of the main proceedings and efficient administration of assets as well as promote the business rescue, the EU Regulation (recast) provides several possibilities for the insolvency practitioner in the main proceedings to intervene in secondary insolvency proceedings, which are pending at the same time. First of all, the insolvency practitioner in the main proceedings shall be given an early opportunity to propose a restructuring plan, a composition or a comparable measure as permissible under the law of the Member State where the secondary proceedings have been opened to close the proceedings without liquidation. Secondly, the insolvency practitioner in the main proceedings can also give a unilateral undertaking to the local creditors in the Member State, where there is an establishment, in order to avoid the opening of the secondary proceedings. Given its virtual nature, however, that kind of synthetic proceedings makes the landscape of rules of applicable law more complicated because they enable *lex fori concursus*, *lex fori concursus secondarii* and relevant EU law to run parallel to each other. Thirdly, the EU Regulation (recast) provides possibility of a temporary stay on the opening of secondary proceedings for a period not longer than three months when a temporary moratorium of individual enforcement proceedings has been granted in the main proceedings. The debtor and his creditors are allowed to conduct negotiations during that period of time and suitable measures shall be taken to protect the interests of local creditors. Fourthly, it is required under the EU Regulation (recast) that the court shall immediately give notice to the insolvency practitioner or the debtor in possession in the main proceedings and give him an opportunity to be heard on the pending request to open secondary proceedings.

4.229 Opening of concurrent proceedings under the Model Law receives far less restrictions than as under the EU Regulation (recast). First of all, concurrent insolvency proceedings can be opened on the basis of establishment or even mere presence of assets. Secondly, a foreign main proceeding will be granted automatic recognition and reliefs in the enacting State where a concurrent proceeding has already been opened in the receiving court. In case that the foreign proceeding is a foreign main proceeding, the stay and suspension should be modified or terminated if inconsistent with the proceeding in this enacting State. In a word, the foreign main proceeding pursuant to the Model Law does not have the same superior status as the main insolvency proceedings under the Regulation.

4.230 The EU insolvency regime is an international jurisdiction dominant system. The effect of international recognition is closely related to the jurisdiction. Once the insolvency proceedings are opened as the main proceedings, the automatic and universal effects throughout the EU will be incurred, which is based on the principle of mutual trust between the EU Member States. The recognition system under the Regulation is based on a singular criterion, which is directly linked to jurisdiction. A judgment commencing a main insolvency proceeding rendered by a court of a Member State shall be automatically recognized in all other Member States as long as the court that opened the proceeding has jurisdiction. That arrangement is peculiar to EU because automatic recognition is guaranteed by the principle of mutual trust. On the ground the principle of mutual trust, the effects flowing from automatic recognition are universal to the extent the exception applies, which means without further formalities, the effects of the main proceeding are extended to all other Member States. Besides, the scope of the effects of cross-border insolvency proceedings is also connected with choice of law rules. In order to approach the universal effect, the Regulation adopted *lex fori concursus* as the fundamental rule of its uniform choice of law system, which requires that the law of the State of the opening of proceedings shall determine the conditions for the opening, conduct and closure of insolvency proceedings. That reinforces the dominant influences of the main proceedings. Upon recognition, the effects are mainly realized by the insolvency practitioners, who exercise the powers vested in them under the Regulation. If an insolvency practitioner is appointed by the opening of the main proceedings, the nature, content and extent of his power is determined subject to the *lex fori concursus* automatically exercisable in other Member States, though with some exceptions.

4.231 The Model Law is a recognition dominant system. One of the key objectives of the Model Law is to establish simplified procedures for recognition of qualifying foreign proceedings. In addition, the Model Law also uses the jurisdictional basis, i.e. COMI and establishment, for the court to distinguish recognition of the foreign proceedings as the main or non-main proceedings. To be recognized as main or non-main proceeding differ quite substantially in the legal consequences because the effects and reliefs flowing from recognition may depend upon the category into which a foreign proceeding falls. Due to various insolvency systems from State to State influenced by respective social, political, financial and other considerations, UNCITRAL found it difficult to provide uniform choice of law rules on global level. To fill in the gap and give necessary support to the recognized proceedings, the Model Law introduced a "minimum" list of effects or measures that would be triggered by recognition, while at the same time leaving room for the recognizing court to provide additional effects or measures. Those effects or measures are addressed as reliefs in the context of the Model Law. The Model Law mainly provides two types of reliefs, provisional reliefs before the recognition and reliefs upon the recognition. Once recognized as a foreign main proceeding, automatic relief will be granted although it might be subject to certain exceptions, limitations, modifications or termination in accordance with the law of the enacting State. With respect to discretionary reliefs, including provisional relief under Article 19 and discretional relief under

Article 21 upon recognition of both main and non-main proceedings, the court may, at the request of the foreign representative, subject the relief granted to any conditions it considers appropriate.

4.232 In the EU, the public policy, which is the only ground for opposing recognition, is interpreted by the CJEU in a very restrict manner and is expected to be applied in exceptional cases. In accordance with the Model Law, public policy has a wider scope than that of the Regulation, a notable example is that public policy is not only an exception for recognition but also can be extended to entitlement to relief in the American jurisprudence. The contents of the public policy are two-folded, i.e. procedural and substantive. Procedural contents are more foreseeable, mainly related to due process, whereas substantive contents are more variable. In the EU, more restrictive requirements are set up for the Member States to refuse to recognize insolvency proceedings based on substantive contents and according to statistic information, it also seldom succeeds in practice. The public policy exception is more frequently incurred in the context of the Model Law for the sake of protection the interests of local creditors, although it is expected that the public policy exception will be rarely used and shall be understood more restrictively than domestic public policy.

4.233 Due to the complexity of enterprise groups, there were no specific provisions either under the EC Regulation or the Model Law but plenty of theoretical suggestions. The main concern about dealing with group insolvencies relates to whether it is possible to concentrate multiple group members within a single jurisdiction and how to achieve that goal. There are basically two solutions: one is to find the COMI of the entire group; the other is to accept the merits of corporate separateness in the group context and solve the problem through cooperation and coordination. Neither the EU nor the UNICTRAL prevents a court to open insolvency proceedings for members belonging to the same group in a single jurisdiction if the court considers that the center of main interests of those group members is located in a single Member State. However, more explanation concerning determination of COMI of group companies is needed to support that approach. In addition, it can also depend on the group structure, business model, degree and level of integration and reliance between the particular group members because the more decentralized the group is, the more dispersed the proceedings are, the more likely coordination and cooperation, instead of COMI-based solution, is to be of considerable assistance.

4.234 The approach the EU Regulation (recast) and the Legislative Guide Part III have chosen is to attach importance to cooperation of insolvency proceedings concerning different entities of the same group by utilizing cooperation and communication measures. The EU Regulation (recast) provides a new chapter concerning insolvency proceedings of group of companies, which is composed of two sections: Section 1 cooperation and communication; Section 2 coordination. Cooperation and communication provisions in the context of group companies under the EU Regulation (recast) mainly involve cooperation and communication between insolvency practitioners and the courts, which have been greatly influenced by the Legislative Guide Part III and share a lot in common with the latter.

4.235 The single insolvency practitioner approach has been introduced into the EU Regulation (recast), which further substantiates that approach by establishing the system of group coordination proceedings. Provisions concerning the group coordination proceedings can be classified as twofold: rules on the procedure and rules on the group coordinator. Accordingly, there are also two main kinds of relationship, which play a crucial role in the group coordination proceedings. One is the relationship between the participant members of a group of companies in the group coordination proceedings and those members of non-participants. The other the relationship between the group coordinator and the insolvency practitioners appointed in relation to members of the group. In the context of group coordination, the Working Group V (insolvency law) proposed a enterprise group insolvency solution, which aims at facilitating coordinated reorganization as a going concern or liquidation of two or more members of an enterprise group that would, or would be likely to, either maintain or add value to the enterprise group as a whole or to those group members. It is also recommended by the Working Group V as well as under the Legislative Guide Part III that a single or the same insolvency representative can be appointed so as to facilitate coordination of multiple insolvency proceedings of the same group as a whole.

4.236 The EC Regulation merely provides an article concerning duty of cooperation and communication between the liquidators. To fill in the gap, the CoCo Guidelines provide some soft law standards concerning cross-border cooperation and communication between courts. The EU Regulation (recast), by referring to international best practice in matters of cooperation and communication, in particular, the relevant guidelines prepared by UNCITRAL (eg. Practice Guide on Cooperation), has stressed cooperation between courts, courts and insolvency practitioners in the insolvency proceedings involving the same debtor and group companies, in particular introducing the use of protocols. In addition, in order to avoid opening of parallel insolvency proceedings and facilitate due notification of creditors, the EU Regulation (recast) requires the Member States to establish one or several insolvency registers, which publish information of insolvency proceedings. A decentralized EU-wide interconnection of insolvency registers system will be established, which is composed of central public electronic access point through the European e-Justice Portal and is linked to information of the individual insolvency registers through a search service in all the official languages of the institutions of the Union. The forms of cooperation incorporated into the EU Regulation (recast) are either literally identical to those under the Model Law or carry the similar sense. Only three of them will be discussed in detail, which are considered to be helpful in China's context and the reasons will be explained in the following Part V. In addition to the EU Regulation (recast) and relevant guidelines prepared by UNCITRAL, best practices for cooperation in cross-border insolvency cases, such as the Global Principles and the EU JudgeCo Principles shall also be taken into account.

4.237 Cross-border insolvency agreements (protocols) are the most common means that facilitates cross-border cooperation and coordination of multiple insolvency proceedings in different States. Cross-border insolvency agreements

originated from practice in order to make up for the absence of relevant coordination rules. The common law jurisdictions have made influential contribution to the standardization of cross-border insolvency agreements. With the development of the soft law as well as judicial practice, the application of cross-border insolvency agreements has been gradually extended. The contents of cross-border insolvency agreements have also shifted from the pure procedural nature to procedural-substantial combined pattern, which may vary in form and scope and are tailored to address the specific issues of a case and the needs of the parties involved. In the EU, cross-border insolvency agreements do not play a role as active as they do in the common law countries. Most of the EU member states governed by the EC Regulation are civil law countries. It will be easier for civil law jurisdiction to utilize protocols if there is an appropriate statutory basis. The existing cross-border insolvency agreements, which were entered into by the EU member states, mostly addressed minor procedural issues because the Regulation has already provided comprehensive procedural rules in matters of cross-border insolvency, especially concerning jurisdiction and recognition. Therefore, different weight should be given to the discretionary coordination contents. As result, although agreements or protocols do find the way into the EU Regulation (recast) and becomes the official legal instrument for cooperation and communication in EU, it has not been defined and exemplified through an example of simple generic agreements, which do not address specific issues but establish a framework of principles to govern multiple insolvency proceedings.

4.238 The merits of joint hearing is to promote the efficiency of current proceedings, by enabling the courts to solve the complex problems of different insolvency proceedings directly and in a timely manner and bringing relevant parties in interest together at the same time. Joint hearing is a means of direct cooperation, which is developed from common law practice. The EU Regulation (recast) provides statutory basis for coordination of hearings without specific rules. It is thus expected that the provisions concerning conduct of joint hearings under the Global Principles and the EU JudgeCo Principles will be of great reference value in the future. Under certain circumstances, the court may wish to refrain from conducting direct communication with another foreign court. In such a case, intermediaries, which is furnished by the Global Principle 23, can be appointed by the courts as medium, through which communication between the courts can be conducted indirectly, which is consistent with the appropriate means stipulated under the Model Law and also permitted in accordance with the EU Regulation (recast).

Part V Solutions Tailored into a Chinese Context: A Balanced Way[1242]

Introduction

5.01 Based on the analysis in the former parts, Part V attempts to find a balanced way between the Model Law and the Regulation and tailor them into China's context. It provides 10 Recommendations to China's Inter-regional Cross-border Insolvency Arrangement (hereinafter referred to as CICIA), including Guiding Principle, Overriding Objectives, Form and Scope, Recognition and Reliefs, Public Policy, Cooperation and Communication (single debtor and enterprise groups), Cross-border Insolvency Agreements, Functional Dispute Settlement Mechanism, Inter-regional Case Register and Independent Intermediary (a separate arrangement for cross-strait insolvency cooperation).

Recommendation 1 -- Guiding Principle

Acknowledging lack of cooperation in matters of cross-border insolvency despite of the increasingly closer economic relationship, the guiding principle that embodies the entire arrangement is designed to promote fair and efficient administration of China's inter-regional cross-border insolvency proceedings in a coordinated manner.

Comments to Recommendation 1

As a to-be-established inter-regional legal cooperation regime, CICIA cannot stand firm without any guiding legal principles that serve as the foundation. Among all those classic jurisdiction-oriented principles, Recommendation 1 explains the reasons for choosing a coordinated approach based on cooperation and communication.

1.1 Universalism v. Territorialism

5.02 The underlying principle of Recommendation 1 is related to an enduring struggle in the world of international insolvency law between the ideal and the reality over a hundred years, i.e. universalism and territorialism.[1243] In an ideal picture painted by the universalists in its purest form, there would have a single insolvency regime (principle of unity) that collects, administers and then distributes all the debtor's assets wherever these assets may be situated throughout the world (principle of universality).[1244] It reflects the principle that

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[1242] Part of the contents in the Part V has been published in: Gong, Xinyi, A Middle Way – Tailoring the Model Law and the Regulation into China's Context, in: Norton Journal of Bankruptcy Law and Practice, October 2014, Vol.23, Issue 5, Article 9, p.691-738 (Westlaw citation: 23 No. 5 JBKRLP-NL Art. 9) However, due to the revision of the EU Regulation (recast) as well as protest and demonstration against the Mainland broke out in Taiwan and Hong Kong SAR in 2014, the current Part V is a recast of its published predecessor.

[1243] Lowell, John, Conflict of Laws as Applied to Assignments for Creditors, 1 HARV. L. REV. 259, 264 (1888), qtd: LoPucki, Lynn M., Global and out of Control?, 79 Am. Bankr. L.J. 79 (2005)

[1244] Westbrook, Jay Lawrence, *A Global Solution to International Default*, 98 MICH.L.REV. (2000), at 2292-2293; Trautman, Donald T., et al., *Four Models for International Bankruptcy*, 41

a person (a debtor) owns the undivided entirety of property.[1245] From the economic perspective, it is also easy to explain since debt collection inherently involves transaction costs.[1246] Bankruptcy systems are designed to reduce these collection costs through collective action.[1247] In addition, when browsing through the legal literature, one cannot escape the impression that jurists are "slightly (at least) biased against divergence. Convergence, harmonization and even stronger phenomena like unification are often perceived as positive developments in and of themselves".[1248]

5.03 Universalism has been and still is well acknowledged as the fundamental principle of cross-border insolvency law.[1249] Unfortunately, the reality is that we do not live in a world with a single insolvency regime. Each jurisdiction runs its own insolvency system under its sovereignty and the differences are often dramatic. Those specialized rules that govern the proper liquidation or reorganization of insolvent entities are usually closely interrelated to some local policies, for instance tax and pension scheme. That's why, in practice, universalism has had to give way to pragmatic realities.[1250]

1.2 Development in Practice

5.04 Before any influential global or regional solutions came into effect, the tentative measure was taken by the sovereign states in accordance with the domestic legislations. For example, in the U.S., once a bankruptcy proceeding is opened, an automatic stay prevents creditors from instituting or continuing any action to obtain assets from the bankruptcy estate or to collect a debt owed by the debtor.[1251] If a creditor violates the stay, whether in the US or abroad, that creditor is liable to penalties in the US bankruptcy courts, which may include denial of the creditor's claim.[1252] As for the foreign insolvency proceedings in pursuit of assistance in U.S., before 2005 it was Section 304 (repealed) of the US Bankruptcy Code that provided the possibility. That section for the first time

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AM.J.COMP.LAW (1993), 575-576. Case C-328/12, Ralph Schmid v. Lilly Hertel, [2013] Opinion of Advocate General Sharpston, ft.6

[1245] Wessels, International Insolvency Law (3rd ed.), Vol.X, Deventer: Kluwer, 2012, para.10018

[1246] Bufford, Samuel L., United States International Insolvency Law 2008 – 2009, New York: Oxford University Press, 2009, pp. 4.

[1247] Jackson, Thomas H., The Logic and Limits of Bankruptcy Law, Cambridge, Harvard University Press, 1986, pp.5

[1248] Larouche, Pierre, Cserne, Péter(ed.), National Legal Systems and Globalization, New Role, Continuing Relevance, T.M.C. Asser Press, Spinger, 2013, 12.

[1249] In the *Re HIH case* (*McGrath & Ors v Riddell & Ors* (Conjoined Appeals) [2008] UKHL 21), para. 30, Lord Hofmann described universalism as "the golden thread running through English cross-border insolvency law since the eighteenth century"; see also *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26; [2007] 1 AC 508, 517 at para. 17. It is noteworthy that the principle of modified universalism is still regarded as a recognized principle of the common law, even though *Cambridge Gas* has been overruled by the Privy Council in *Singularis*,. See *Singularis Holdings Limited v PricewaterhouseCoopers* [2014] UKPC 36, at 23

[1250] McCormack, Gerard, Universalism in Insolvency Proceedings and the Common Law, in: Oxford Journal of Legal Studies, Vol. 32, No. 2(2012), 347

[1251] US Bankruptcy Code, s362.

[1252] US Bankruptcy Code, s105

codified United States notions of comity and cooperation with foreign courts in bankruptcy matters. The model is referred to as "modified universalism".[1253] Modified universalism shares the view that there should be a single main case for an international business in its home country, mostly subject to the laws of the home country. Nevertheless, the modified universalism in the context of extra-territorial is effective solely in a single direction. Upon the inbound request, the ancillary proceeding was opened in the requested state merely for assistance purpose. As for the outbound proceeding, the effect relied on the vast extent of jurisdiction stated beforehand under the domestic legislation, which would probably meet challenge and uncertainty since it may have difficulty being enforced if the foreign state refuses to recognize it where this effect is inconsistent with the domestic law of the relevant foreign country.[1254]

5.05 In pursuit of approaching universalism in a round-way form (principle of unity and principle of universality), a system of parallel jurisdictions has been invented within EU, each of which can open an independent insolvency proceeding. What is the relationship between them to realize the goal of "a single forum" (principle of unity)? Some specialized terminology has been developed to establish specialized rules of choice of forum for cross-border insolvency cases. It attempts to allocate cross-border insolvencies to a single proceeding, which is called the "main" proceeding and shall be granted automatic recognition in other Member States without the need for an exequatur or of prior publication.[1255] There is also some compromise because secondary proceedings can be opened without reference to the main proceedings, which was regarded as deviation from the principle of unity. Accordingly, the universal effect of the main proceedings has also to be restricted for the sake of local interests, which departs from the principle of universality. With the reform of the Regulation, there are two main solutions to that kind of deviation: one is to avoid the opening of the secondary proceedings;[1256] the other is to reinforce the duties of cooperation and communication among the actors involved.[1257]

5.06 Compared to the Regulation, the Model Law is a less ambitious regime, which does not aims at concentrating cross-border insolvency within one jurisdiction. The key objective of the Model Law is to facilitate recognition of insolvency proceedings via simplified procedures and emphasizes on access, recognition, relief, cooperation and coordination. The similarity is the Model Law, like the Regulation, also allows the local concurrent proceedings opened parallel to the main proceedings. Nevertheless, the Model Law avoids establishing a rigid hierarchy between the main proceedings and the non-main proceedings because that would unnecessarily hinder the ability of the court to

[1253] American Law Institute, Transnational Insolvency Project, International Statement of United States Bankruptcy Law, published by Executive Office, American Law Institute, 2003, 73-74
[1254] McCormack, Gerard, Universalism in Insolvency Proceedings and the Common Law, in: Oxford Journal of Legal Studies, Vol. 32, No. 2(2012), p.329
[1255] The Virgós/Schmit Report (1996), at 19 (c); the EC Regulation, recital (22); EU Regulation (recast), recital (65)
[1256] The EU Regulation(recast), recital (41), (42), (45)
[1257] The EU Regulation(recast), recital (48)

cooperate.[1258] The consequence is that the Model Law does not provide any rules to intervene or prevent the opening of concurrent proceedings, which eventually result in more than one single proceeding. Considering the differences between the Regulation and the Model Law, if the Regulation approaches the principle of universalism in a way acknowledged by many universalists or even territorialists,[1259] can the Model Law still be labeled as the same universalism as described under the Regulation? According to Wessels, who highlighted some major ingredients of the Model Law that reflect both universality and territoriality,[1260] the answer is no.[1261] It is further indicated by Ms. Jenny Clift[1262] that the Model Law has chosen a "middle roading" between aspiration of universalism and concession to essential influence of pragmatism.[1263]

1.3 Universalism in a Coordinated Manner

5.07 The traditional discussion between the pros and cons of universalism and territoriality usually leads to a "struggle over jurisdiction".[1264] In particular, the possibility of opening of non-main (territorial/secondary) proceedings is deemed as "essentially a territorial system with universalist pretensions".[1265] However, non-main proceedings (territorial/secondary) cannot be totally given up. First of all, as aforementioned, the birth of non-main proceedings (territorial/secondary) is a result of compromise between local interests and the principles of unity and universality from the beginning. Secondly, as remarked by Pottow, allowing only one single proceeding running worldwide could lead to "fight over who gets to be the COMI in any given bankruptcy", whereas non-main proceedings (territorial/secondary) can make the foreseeable competition far less intensive.[1266] Thirdly, the non-main proceedings (territorial/secondary) are still relevant proceedings in the context of group insolvency. Under the

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[1258] Guide and Interpretation, para.231

[1259] For example, "strenthening universality" Buxbaum, Hannah, Rethinking International Insolvency: The Neglected Choice-of-Law Rules and Theory, in: 36 Stanford Journal of International Law 2000, 23; "contractualism" Rasmussen, Robert K., A New Approach to Transnational Insolvencies, in: 19 Michigan Journal of International Law 1999, 1; "virtual territoriality" Janger, Edward J., Virtual Territoriality, 48 Colum. J. Transn'l Law 401, 2010; "cooperative territorialism": LoPucki, Lynn M., The Case of Cooperative Territoriality in International Bankruptcy, in: 98 Michigan Law Review 2000, 2216; Westbrook, Jay Lawrence, Chapter 15 at Last, 79 AM. BANKR. L.J.713, 2005, p.716; Janger, Edward J., Universal Proceduralism, 32 BROOK. J. INT'L L. 819, 2007, p.824; Clark, Leif M., & Goldstein, Karen, Sacred Cows: How to Care for Secured Creditors' Rights in Cross-Border Bankruptcies, 46 TEX. INT'L L.J. 513, 2011, p.524; Wessels, Bob, International Insolvency Law (3rd ed.), Vol.X, Deventer: Kluwer, 2012, para.10939

[1260] Wessels, International Insolvency Law (3rd ed.),Vol.X, Deventer: Kluwer, 2012, para. 10377-10379

[1261] Wessels, International Insolvency Law (3rd ed.), Vol.X, Deventer: Kluwer, 2012, para. 10199

[1262] Ms Clift is Senior Legal Officer and Secretary, UNCITRAL Working Group V (Insolvency Law), ITLD/OLA (UNCITRAL Secretariat), Office of Legal Affairs, United Nations.

[1263] Clift, Jenny, Choice of Law and the UNCITRAL Harmonization Process, Brooklyn Journal of Corporate, Finance & Commercial Law, Vol.9, Issue1, 2014, p.33

[1264] Wessels, Bob, International Insolvency Law (3rd ed.), Vol.X, Deventer: Kluwer, 2012, para.10030

[1265] Tung, Fredrick, "Is International Bankruptcy Possible" (2001) 23 Michigan J Intl L 31, 77.

[1266] Pottow, John A.E., A New Role for Secondary Proceedings in International Bankruptcies, 46 Tex. Int'l L.J., 2011, p.582

Regulation, a secondary proceeding can be commenced in respect of a subsidiary at its place of operation if the COMI of a subsidiary is located at the registered office of the parent company.[1267] In addition, in the proposal of the Working Group V (insolvency law) of UNCITRAL, which deals with the cross-border insolvency of multinational enterprise groups, the proceedings for group members on the basis of criteria such as the location of an establishment or the presence of assets, which is akin to non-main proceedings under the Model Law, is recommended as the coordinating center of the group insolvency solution if the COMIs of those group members are not located in the same jurisdiction.[1268]

5.08 If the parallel non-main proceedings (territorial/secondary) cannot be removed from both international cross-border insolvency regimes, what is the solution to the deviation from universalism? Despite the differences, there is a common measure shared by both the Regulation and the Model Law, which is cooperation and communication. Under the EC Regulation, it provides the mandatory cooperation and communication between the liquidators of main proceedings and secondary proceedings.[1269] The current EU Regulation (recast) extends the duties of cooperation and communication to all the actors involved, which greatly refers to the relevant provisions under the Model Law concerning cooperation and communication between the courts and representatives of the parallel proceedings.[1270] Besides, the landscape of cross-border insolvency has been changed by the enterprise groups. It has been accepted by both EU and UNCITRAL that coordination of concurrent insolvency proceedings involving single debtors and multiple debtors based on cooperation and communication is a more pragmatic approach,[1271] which is capable of easing the tension caused by competition among jurisdictions. Under the circumstances that it is getting more and more difficult to identify a "home" for multiple debtors, a neutral and efficient mechanism is needed on the basis of respect for independence and authority of each competent court.

5.09 In addition to EU and UNCITRAL, more supportive references are available now in regards to cooperation and communication. One of the most prevailing suggestions is *Global Principles for Cooperation in International Insolvency Cases*

[1267] Re Daisyteck-ISA Ltd [2003] BCC 562; see also Moss, Gabriel, The Triumph of "fraternité": ISA Daisytek SAS (Court of Appeal Versailles, 4 September 2003), available at: http://iiiglobal.org/component/jdownloads/finish/39/5749.html (Last visited on 14 June 2016); [2006] High Court of Justice Birmingham 2006 EWHC 1296 (CH D); see also Pannen, Klaus (ed.), European Insolvency Regulation, Berlin: De Gruyter Recht, 2007, ft.274; See also EU Commission Explanatory Memorandum, Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings, Strasbourg, 12.12.2012, COM(2012) 744 final, p.36

[1268] Working Group V (insolvency law), UNCITRAL, Facilitating the Cross-border Insolvency of Multinational Enterprise Groups, A /CN.9/WG.V/WP.128, 2015, para.18

[1269] The EC Regulation, article 31

[1270] The EU Regulation (recast), recital (48); the Model Law, Chapter IV

[1271] The EU Regulation (recast), Chapter V, Section I; Draft Legislative Provisions on the Cross-border Insolvency of Enterprise Groups Working Group V (insolvency law), Article 9 - Article 18 (Please note there are 18 articles in total in that draft.), in: UNCITRAL, Facilitating the Cross-border Insolvency of Multinational Enterprise Groups, A /CN.9/WG.V/WP.128, 2015

(Global Principles)[1272] contributed by Fletcher and Wessels, who were appointed by the American Law Institute (ALI) and the International Insolvency Institute (III) to prepare a Report, in which the Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases ("Court-to-Court Guidelines") is also included. These Guidelines in their original form were included in Appendix B of the ALI-NAFTA Principles and represent procedural suggestions for increasing communications between courts and between insolvency administrators in cross-border insolvency cases. These ALI-NAFTA Guidelines have already been used in many cross-border cases, recently in such cases as *Lehman Brothers* involving some 70 insolvency proceedings in 17 countries all over the world.[1273] Even the key supporter of territorialism, LoPucki, also advocates in his theory of "cooperative territorialism" that every state can administrate the bankruptcy asset located within its jurisdiction and meanwhile courts and representatives should cooperate and communicate.[1274] In an era that the business goes global, it is cooperation that matters. "The barren choice of either universality or territoriality of bankruptcy has almost lost its meaning."[1275]

5.10 Moreover, pursuant to the Basic Law, which provides China's legal foundation of inter-regional legal cooperation, it is the judicial organs of the Mainland and the SARs that shall maintain juridical relations with each other through consultations. [1276] Accordingly, cooperation and communication between the courts is in consistency with the fundamental legal basis. Therefore, I submit to adopt the coordinated approach to resolve the conflicts between universalism and co-existence of parallel proceedings under CICIA, which attaches importance to cooperation and communication among the proceedings involving both single debtors and multiple debtors. In particular, the courts are suggested to cooperate and communicate with each other to resolve the cross-border insolvency cooperation-related disputes together at the regional level. I will come back to that point later in Recommendation 8.

Recommendation 2 – Overriding Objective

Aware of restrictions set by the constitutional arrangements and lack of functioning fundamental principles, the overriding objective of the arrangement is to facilitate recognition of inter-regional insolvency proceedings.

Comments to Recommendation 2

[1272] The Report is based on a global research and survey and aims at a worldwide acceptance of the ALI-NAFTA Principles.

[1273] American Law Institute and International Insolvency Institute, Transnational insolvency: global principles for cooperation in international insolvency cases: report to the ALI, Philadelphia. PA: Executive Office, The American Law Institute, 2012, (no page number is provided in the online version) http://www.iiiglobal.org/component/jdownloads/finish/557/5932.htm (Last visited on 14 June 2016)

[1274] LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL L. REV. (1999), 750

[1275] See Balz, M,"The European Union Convention on Insolvency Proceedings" (1996) 70 Am Bankr LJ 485, 531.

[1276] Basic Law of HKSAR, article 95; Basic Law of Macao SAR, article 93

Recommendation 2 attempts to determine the proper mainline of CICIA, i.e. jurisdiction oriented or recognition oriented. A balanced solution is sought on the basis of comparison of the underlying legal foundations and principles of different relevant regimes.

2.1 Jurisdiction or Recognition as the Mainline

5.11 To address the issues raised by cooperation in cross-border insolvency cases, the Regulation and the Model Law have different focuses. The former is able to establish a compulsory jurisdiction system for cross-border cooperation in insolvency cases within EU, whereas the later has adopted a streamlined formulation, which does not contain choice of forum rules but provisions concerning recognition of foreign insolvency proceedings.

5.12 From the perspective of private international law, choice of forum, choice of law and recognition and enforcement constitute the three central themes of private international law.[1277] Among the three central themes, to provide for uniform rules on jurisdiction is deemed as one of the most difficult tasks because that might incur sovereignty concern. For example, from 1996-2001, the Hague Conference conducted intense negotiations on a Convention concerning recognition and enforcement of judgments in civil and commercial matters, excluding insolvency matters, which ultimately failed.[1278] The most unresolved area was the possible ground of jurisdiction at the international level.[1279] Later, the project was scaled down to focus on international cases involving choice of court agreements, which led to the conclusion of the Hague Convention of 30 June 2005 on Choice of Court Agreements ("Choice of Court Convention"). The Choice of Court Convention is thus based on party autonomy, which will enter into force on 1 October 2015 following the approval by the European Union on 11 June 2015.[1280] As for China, rules of jurisdiction also used to be one of the biggest problems for the Mainland and the Hong Kong SAR to reach consensus on reciprocal enforcement of judgments in civil and commercial matters.[1281] In order to break the deadlock, the exercise of jurisdiction based on a choice of forum agreement served as a useful guide and model in the arrangement between the Mainland and the Hong Kong SAR, who in the end entered into

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[1277] Woelki, Katharina Boele, Unifying and Harmonizing Substantive Law and the Role of Conflict of Laws, Leiden/Boston: Martinus Nijhoff Publishers, 2010, p.18-19

[1278] Permanent Bureau of HCCH, Continuation of the Judgments Projects, Preliminary Document No.14 of February 2010 for the attention of the Council of April 2010 on General Affairs and Policy of the Conference, Prel. Doc. No.14, Feb. 2010, para.5

[1279] Permanent Bureau of HCCH, Some Reflections on the Present State of Negotiations on the Judgments Project in the Context of the Future Work Programme of the Conference, Preliminary Document No 16 of February 2002 for the attention of Commission I (General Affairs and Policy of the Conference) of the XIXth Diplomatic Session, Prel. Doc. No.16, Apr. 2002, para.3

[1280] Please visit: http://www.hcch.net/index_en.php?act=events.details&year=2015&varevent=412 (Last visited on 14 June 2016)

[1281] Jiang Baoguo, A Comparative Study on the Recognition and Enforcement of Civil and Commercial Judgments Arrangements between the Mainland, Hong Kong and Macao – with special reference to the Practice of Hong Kong (in Chinese), in: Legal Forum, No .5(Vol .22, Ser .No .113), Sep., 2007, p.71

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 Pursuant to Choice of Court Agreements between Parties Concerned.[1282]

5.13 Nonetheless, both the Brussels I Regulation (recast) and Choice of Court Convention exclude insolvency cases from their scopes of application. That implies rules of jurisdiction in the context of cross-border insolvency cannot be properly governed by party autonomy. In the field of cross-border insolvency, it is the principle of unity (concentrating cross-border insolvencies within a single proceeding) that dominates the rule of choice of forum, which is, as stated by Westbrook, "perhaps no other principle of choice of forum has been so generally accepted for so long".[1283] In the EU, the principle of unity with regards to the main insolvency proceeding has been preserved as much as possible. For example, the EU Regulation (recast) allows the opening of synthetic proceedings so as to contract out the commencement of the secondary proceedings.[1284] Contrary to EU's insistence on the principle of unity, the Model Law imposes no limitations on the jurisdiction of the courts in the enacting State to commence or continue concurrent insolvency proceedings, which can be initiated either on the basis of establishment or mere presence of assets.[1285]

5.14 To understand the reasons behind the differences between the Regulation and the Model Law, it is necessary to identify why a compulsory jurisdiction system is possible in the EU. Above all, the legal foundation underlying the Regulation is based on the principle of mutual trust,[1286] flowing from the principle of sincere cooperation under the EU Treaties, which is the fundamental support for a compulsory jurisdiction system. In addition, establishment of a compulsory jurisdiction system alone will become meaningless if the dominant effects of the main proceedings cannot be recognized in other jurisdiction. It is also the principle of mutual trust that generates automatic effects of recognition throughout EU,[1287] which are governed by a set of uniform choice of law rules.

[1282] Please note that the relevant provisions in the Choice of Court Convention relating to "choice of forum" will not be implemented to relationship between the Mainland and the three regions, judgments even if China, including the SARs, had ratified the Convention. This is because the Choice of Court Convention, as an international agreement, shall not be applicable within the same country. See also Legislative Council Paper No CB(2)722/01-02(04), 20 December 2001, para.18; see also para.5.46 for detailed explanation; Chen Yonghui, Shen Shuangwu, The Supreme People's Court and the Hong Kong SAR Signed 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 Pursuant to Choice of Court Agreements between Parties Concerned, in: People's Court Daily, 15 July 2006, p.1

[1283] Westbrook, Jay Lawrence, Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum, in: 65 Am. Bankr. L.J. 457, p. 460

[1284] The EU Regulation (recast), recital (42), article 36; Wessels, Bob, Contracting out of Secondary Insolvency Proceedings: The Main Liquidator's Undertaking in the Meaning of Article 18 in the Proposal to Amend the EU Insolvency Regulation, in: Brooklyn Journal of Corporate, Finance & Commercial Law, vol.9, issue 1, 2014, p.87

[1285] The Model Law, article 28; Guide and Interpretation, para.224-226

[1286] C-341/04 *Eurofood IFSC*, [2006], para.40; Case C-444/07, *MG Probud Gdynia sp. z o.o.* [2010] ECR I-00417, para. 28

[1287] The EC Regulation, recital (22); the EU Regulation (recast), recital (65)

The Model Law also accords the main proceedings with sort of automatic effects.[1288] Without equivalent legal foundations, the automatic effects granted under the Model Law are relatively limited. First of all, the Model Law does not provide uniform rules of applicable law but introduced a "minimum" list of automatic reliefs while at the same time leaving room for the recognizing court to provide additional effects or measures. Secondly, those automatic effects are triggered by recognition, the extent of which is limited between the state where the proceeding is opened and the state where the petition for recognition is sought.

5.15 In summary, considering the fundamental differences between the Regulation and the Model Law, to choose a mainline between a jurisdiction oriented approach or a recognition oriented approach relies on whether or not the equivalent legal basis is available.

2.2 Sincere Cooperation and Mutual Trust

2.2.1 Function of Sincere Cooperation and Mutual Trust under the Regulation

5.16 To properly understand the function of the principles of sincere cooperation and mutual trust, how those two principles operate under the Regulation should be made clear at first. It is stated according to the article 4(3) of TEU, “pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.” The principle of sincere cooperation (sometimes also addressed as the principle of loyalty) is regarded to have produced “some of the strongest ‘ties that bind’ the Member States within the European Union”,[1289] among which one of the derivatives is the principle of mutual trust. According to Guzman, international law works based on “three Rs of compliance”, i.e. reciprocity, retaliation, and repudiation.[1290] However, he also noted that there is a “single greatest example of international cooperation, which is the European Union that substituted reciprocity and retaliation by a complete system of remedies and a centralized jurisdiction to enforce them.”[1291] In the context of cross-border insolvency cooperation, reciprocity was replaced by mutual trust. It is specified in Article 81(1) of TFEU that

“the Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.”

5.17 On the basis of Article 81(1) and the underlying principle of sincere cooperation, the Regulation provides “automatic and universal recognition

[1288] The Model Law, article 20(1)

[1289] Klamert, Marcus, The Principle of Loyalty in EU Law, Oxford Studies in European Law, Graig, Paul & De Búrca, Gráinne (Series editors), Oxford University Press, 2014, p.1

[1290] Guzman, A.T., How International Law Works: A Rational Choice Theory, Oxford and New York: Oxford University Press, 2007, p.40.

[1291] Guzman, A.T., How International Law Works: A Rational Choice Theory, Oxford and New York: Oxford University Press, 2007, p.14

(throughout the EU) of insolvency proceedings opened in accordance with the jurisdictional scheme of Article 3",[1292] which stipulates the rules of the allocation of international jurisdiction with respect to insolvency proceedings.[1293]

5.18 In the *Eurofood* case and the *MG Probud* case, the following remarks are repeatedly used by the CJEU, which were originally quoted from the Court's decision regarding the Brussels Convention (now the Brussels I Regulation).

"It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to respect, and as a corollary the waiver by those States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favor of a simplified mechanism for the recognition and enforcement of decisions handed down in the context of insolvency proceedings [see by analogy, in relation to the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial matters."[1294]

5.19 The principle of mutual trust also constitutes the main basis of Brussels I regulation. Van Calster concluded, "the theme of mutual trust runs through European private international law, extending from Brussels I into the Insolvency Regulation".[1295] In practice, it is evident that the CJEU has repeatedly referred to the principle of mutual trust to safeguard the uniform understanding of the EU legislation and coordinate the conflicting or competitive opinions as held by the courts of the Member States. The principle of mutual trust entails that a court may not refuse to recognize the foreign judgment on the ground that "it would be more appropriate for the case to be dealt with in proceedings opened in another Member State",[1296] i.e. *forum non conveniens*.[1297]

5.20 Besides, in the case of *Bank Handlowy*,[1298] the French Court opened insolvency proceedings of a Polish company, the COMI of which was situated in France. The *sauvegarde* proceedings were opened in France, which had the protective nature. In the event that the judgment of the French Court was held to be in breach of public policy in accordance with Article 26 of the Regulation, an alternative application was made by *Bank Handlowy* for the opening of winding up proceedings in Poland. Thereafter, the French Court approved a rescue plan for Polish company, pursuant to which debts would be paid off in installments

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[1292] Moss, Fletcher, Isaacs (ed.), The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide (2nd ed.), Oxford University Press, 2009, para.5.73

[1293] Moss, Group Insolvency – Choice of Forum and Law: the European Experience under the Influence of English Pragmatism (2007) 32 Brooklyn Journal of International Law 1005, 1007

[1294] C-341/04 *Eurofood IFSC*, [2006], para.40; Case C-444/07, *MG Probud Gdynia sp. z o.o.* [2010] ECR I-00417, para. 28; Case C-116/02, *Erich Gasser GmbH v MISAT Srl.* [2003] ECR I-14693, para. 72; Case C-159/02, *Gregory Paul Turner v Felix Fareed Ismail Grovit and Others* [2004] ECR I-03565, para. 24

[1295] Van Calster, Geert, European Private International Law, Oxford and Portland, Oregon: Hart Publishing, 2013, p.25

[1296] See Virgós, Miguel and Garcimartín, Francisco, The European Insolvency Regulation: Law and Practice, Kluwer Law International, 2004, nr. 67

[1297] Wessels, International Insolvency Law (3rd ed.), Vol.X, Deventer: Kluwer, 2012, para.10551

[1298] Case C-116/11, *Bank Handlowy w Warszawie SA v. Christianapol sp. z o.o.* [2012] (*Bank Handlowy*)

over a 10-year period. The debtor contended that Bank Handlowy's application for the opening of secondary proceedings in Poland should be dismissed on the basis that such proceedings would be contrary to the objectives of the French insolvency proceedings and argued that the secondary proceedings should be discontinued since the main proceedings had closed once the French Court approved the rescue plan.[1299]

5.21 Although the *sauvegarde* is incorporated into Annex A to the EC Regulation, concerns have been raised as to whether they comply with the definition of insolvency proceedings. The CJEU considered that the court having jurisdiction to open secondary proceedings could not examine the main insolvency of a debtor opened in another Member State, which has a protective purpose, holding

> "It should be noted, however, that when a court before which an application for secondary proceedings has been made draws conclusions from the finding of insolvency in the main proceedings, it must have regard to the objectives of the main proceedings and take account of the scheme of the Regulation as well as the principles on which it is based."[1300]

5.22 Moreover, in the case of *Bank Handlowy*, the court allowed the opening of the secondary proceedings, which conformed to Article 27 of the EC Regulation. As aforementioned, the sole liquidation nature of the secondary proceedings has received a lot of criticism in the process of amendment to the EC Regulation[1301]since they might derogate from the protective purpose of the main proceedings. Therefore, the CJEU, according to the principle of sincere cooperation laid down in Article 4(3) TEU, stressed that the court of the secondary proceedings had to take into account the objectives and the scheme of the EC Regulation and encouraged "the mandatory coordination of the main and secondary proceedings guaranteeing the priority of the main proceedings."[1302] By relying on the principles of sincere cooperation and mutual trust, the CJEU attempted to make up for deficiencies left by the EC Regulation.

2.2.2 Sincere Cooperation and Mutual Trust under Construction in China

2.2.2.1 Interpretation of the Basic Law

5.23 It is equally essential to check out whether or not there is sincere cooperation and mutual trust among the three jurisdictions in China. The first issue that has to be addressed is the interpretation of the Basic Law. Governed by the constitutional framework between the Mainland and the two SARs, interpretation of the Basic Law directly demonstrates the relationship between the central authority and the two regions.

[1299] Case C-116/11, *Bank Handlowy w Warszawie SA v. Christianapol sp. z o.o.* [2012], para.17-24
[1300] Case C-116/11, *Bank Handlowy w Warszawie SA v. Christianapol sp. z o.o.* [2012], para.73
[1301] EU Commission Explanatory Memorandum, Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings, Strasbourg, 12.12.2012, COM(2012) 744 final, p.5
[1302] Case C-116/11, *Bank Handlowy w Warszawie SA v. Christianapol sp. z o.o.* [2012], para.62

5.24 In accordance with the Basic Law, the interpretation of the Basic Law shall be requested through the Court of Final Appeal of the Region to the Standing Committee of the National People's Congress (NPC, the Central Legislator) under certain circumstances.[1303]After China's resumption of sovereignty over Macao, it has never occurred that the Court of Final Appeal seeks interpretation of the Basic Law from the Standing Committee of the NPC. According to Zheng Wei, Advisor of the Legislative Council of the Macao SAR, so far there were "not any conflicts and debates arising due to the interpretation of the Basic Law by the Standing Committee of the NPC in SAR as the cases in the Hong Kong SAR".[1304]

5.25 In 2012, the Hong Kong government issued a report to celebrate its 15th Anniversary of Reunification, in which it is stated that there are several occasions, which incurred the interpretation of the Basic Law and each of them might have challenged the smooth implementation of the Basic Law. These occasions include the right of mainland-born children to reside in HKSAR, the selection of the Chief Executive and the length of office of the Chief Executive[1305]and whether or not the P.R.C.'s policy on absolute state immunity also applies to Hong Kong in the DR Congo case.[1306] I will mainly focus on the DR Congo case by comparing it with the right of abode[1307] of the mainland children cases. In respect of selection of Chief Executive and the length of office of the Chief Executive, it falls out of the ambit of the research topic of this book and thus will not be discussed.

5.26 The right of abode cases involved a series of cases involving the rights of residence of the mainland-born children to stay in Hong Kong. One of the most important decisions is *NG Ka Ling and Another v. The Director of Immigration*,[1308] which was handed down by the Court of Final Appeal of the HKSAR in 1999. In matters of interpretation of the Basic Law, the Court of Final Appeal of the HKSAR made the following statement in its decision

"Article 158 has been quoted in full earlier in this judgment. Article 158(1) provides that the power of interpretation of the Basic Law shall be vested in the Standing Committee

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[1303] The Basic Law of HKSAR, article 158; the Basic Law of Macao SAR, article 143
[1304] Zheng Wei, A Preliminary Discussion on the Mechanism of Interpreting the Basic Law of the Macao SAR, Academic Journal of "One Country, Two Systems", vol. I, 2009 p.159; So far, the Standing Committee of NPC only issued two interpretation with respect to the Basic Law. One was released on 16 January 1999 before Macao's reunification. It was concerned about Article 24(2) of the Basic Law, which provides the definition of permanent residents of the Macao SAR. On 29 February 2012, another interpretation was issued upon the report submitted by the Chief Executive of the Macao Special Administrative Region, which is Decision of the Standing Committee of the National People's Congress on the Methods for Forming the Legislative Council in 2013 and Selecting the Chief Executive in 2014 of the Macao Special Administrative Region.
[1305] Basic Law-the Source of Hong Kong's Progress and Development, in:
Tam, Maria Wai-chu (editor-in-chief), Basic Law-the Source of Hong Kong's Progress and Development, in: 15 Anniversary Reunification, 2012, p.86-87, http://www.basiclaw.gov.hk/en/publications/book/15anniversary_reunification_ch2_3.pdf (Last visited on 14 June 2016)
[1306] *Democratic Republic of the Congo and Others v. FG Hemisphere Associates LLC* [2011] HKCFA 43; (2011) 14 HKCFAR 95; [2011] 4 HKC 151; FACV7/2010 (8 June 2011)
[1307] The Basic Law of HKSAR, article 24
[1308] *NG Ka Ling and Another v. The Director of Immigration* [1999] HKCFA 72

of the National People's Congress. Article 158(2) provides that the Standing Committee "shall authorize" the courts of the Region "to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region". It is clear, as is accepted by both counsels, that this contains the constitutional authorization. The words "on their own", in our view, emphasize the high degree of autonomy of the Region and the independence of its courts.

But the jurisdiction of the courts of the Region is not limited to interpreting such provisions. For Article 158(3) provides that the courts of the Region "may also interpret other provisions" of the Basic Law in adjudicating cases."[1309]

5.27 Further, the Court of Final Appeal considered that it did not have a duty to make a reference to the Standing Committee of the National People's Congress unless both the classification condition and the necessity condition were met.[1310] From the point of view of the Court of Final Appeal,

"it is for the Court of Final Appeal and for it alone to decide, in adjudicating a case, whether both conditions are satisfied. It is for the Court, not the National People's Congress, to decide whether the classification condition is satisfied, that is, whether the provision is an excluded provision. This is accepted by both counsel for the applicants and counsel for the Director."[1311]

5.28 After having examined the both conditions, the Court of Final Appeal did not refer the issue to the Standing Committee of the National People's Congress but made interpretation on its own. On 20 May 1999, the Chief Executive of the HKSAR in accordance with Articles 43 and 48(2) of the Basic Law submitted a report to the State Council "seeking the assistance of the Central People's Government in resolving the problems encountered in the implementation of the relevant provisions of the Basic Law". It was stated in the report "the Court's interpretation of Articles 22(4) and 24(2)(3) differed from the HKSAR Government's understanding of the relevant provisions."[1312]

5.29 On 26 June 1999, the Standing Committee of the National People's Congress issued the interpretation. In the preamble, it is stated that

"The issue raised in the Motion related to the interpretation of the relevant provisions of the Basic Law by the Court of Final Appeal of the HKSAR dated 29 January 1999. Those provisions concerned affairs, which are the responsibility of the Central People's Government and concerned the relationship between the Central Authorities and the HKSAR. Before making its judgment, the Court of Final Appeal of the HKSAR had not sought an interpretation of the NPCSC in compliance with the requirement of Article

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[1309] *NG Ka Ling and Another v. The Director of Immigration* [1999] HKCFA 72, para. 81, 82

[1310] *NG Ka Ling and Another v. The Director of Immigration* [1999] HKCFA 72, para. 88,89

[1311] *NG Ka Ling and Another v. The Director of Immigration* [1999] HKCFA 72, para. 90

[1312] Chief Executive of the HKSAR, Report on seeking the assistance of the Central People's Government in resolving the problems encountered in the implementation of the relevant provisions of the Basic Law, 20 May, 1999, p.1 http://www.basiclaw.gov.hk/en/materials/doc/1999_05_20_e.pdf (Last visited on 14 June 2016)

158(3) of the Basic Law. Moreover the interpretation of the Court of Final Appeal is not consistent with the legislative intent."[1313]

5.30 The reaction of the Court of Final Appeal of the HKSAR can be found in the case of *Lau Kong Yung and Others v. The Directors of Immigration*,[1314] which was also one of the right of abode series cases. The Court of Final Appeal of the HKSAR summarized its views on the interpretation issued by the Standing Committee of the National People's Congress as following:

"(1) The Standing Committee has the power to make the Interpretation under Article 158(1).
(2) It is a valid and binding Interpretation of Article 22(4) and Article 24(2)(3) which the courts in the HKSAR are under a duty to follow.
(3) The effect of the Interpretation is:
(a) ...
(b) ...
(4) The Interpretation has effect from 1 July 1997."[1315]

5.31 It is also noteworthy that in accordance with Article 158(3), judgments previously rendered shall not be affected by the interpretation, which might cause inconsistency in those rights of abode cases, since the interpretation does not bind on the former ones.

5.32 In 2011, in Democratic Republic of the Congo and Others v. FG Hemisphere Associates LLC (DR Congo case),[1316] the case involved an application of an American company for enforcement of arbitral awards against DR Congo in Hong Kong. The case was appealed to the Court of Final Appeal and the core question is whether the Hong Kong court shall follow the Mainland's rule of policy on state immunity, which is different from HK's doctrine that recognizes a commercial exception to absolute immunity, after China's resumption of the exercise of sovereignty on 1st July 1997. The Court of Final Appeal found it necessary to adopt the doctrine of the Mainland rule on state immunity. The opinions of the Court of Final Appeal on that specific issue are summarized as follows:

(1) The doctrine of state immunity, both in international law and at common law, is a matter of relations between states, which constitutes "an important component in the conduct of a nation's foreign affairs in relation to other States".[1317]

[1313] Interpretation by the Standing Committee of the National People's Congress of articles 22(4) and article 24(2)(3) of the Basic Law of the HKSAR of the P.R.C., Adopted at the Tenth Session of the Standing Committee of the National People's Congress on 26 June, 1999, p.1 http://www.basiclaw.gov.hk/en/basiclawtext/images/basiclawtext_doc17.pdf (Last visited on 14 June 2016)

[1314] *Lau Kong Yung and Others v. The Directors of Immigration* [1999] HKCFA

[1315] *Lau Kong Yung and Others v. The Directors of Immigration* [1999] HKCFA 4; [1999] 3 HKLRD 778; (1999) 2 HKCFAR 300; [1999] 4 HKC 731 ; FACV10/1999 (3 December 1999), para.74

[1316] *Democratic Republic of the Congo and Others v. FG Hemisphere Associates LLC* [2011] HKCFA 41; (2011) 14 HKCFAR 95; [2011] 4 HKC 151; FACV5/2010 (8 June 2011)

[1317] *Democratic Republic of the Congo and Others v. FG Hemisphere Associates LLC* [2011] HKCFA 41; (2011) 14 HKCFAR 95; [2011] 4 HKC 151; FACV5/2010 (8 June 2011), para.229, 265.

(2) The responsibility for laying down the policy to be adopted on state immunity is allocated on a government organ or exceptionally on a province on the basis of the respective constitutional arrangements of each country.[1318] As to Hong Kong, it has no responsibility for foreign affairs in accordance with the Article 13(1) of the Basic Law. Hong Kong "lacks the very attributes of sovereignty", which might enable it to establish its own policy or practice of state immunity.[1319]

(3) In accordance with the common law, the doctrine adopted by the courts of UK and the U.S.A was that the courts and the executive should "speak with one voice".[1320] Considering the constitutional arrangements governing the position in the HKSAR, "it is self-evident that any attempt by such a region or municipality to adopt a divergent state immunity policy would embarrass and prejudice the State in its conduct of foreign affairs." [1321]Hence, the Court of Final Appeal accepted the "one voice principle" and followed the executive's lead in this case.

5.33 Moreover, for the first time the Court of Final Appeal decided to take the initiative to make a reference to the Standing Committee for the interpretation of the Basic Law before the final decision was handed down.[1322]

5.34 Nevertheless, the decision of the Court of Final Appeal was not adopted without debate. There were five judges, who participated in adjudication of this case, and two of the justices dissented from the majority. I focus on the dissenting opinions of Justice Bokhary PJ because Justice Mortimer NPJ agreed with Mr Justice Bokhary PJ's judgment "in its conclusions and its reasoning".[1323] Justice Bokhary PJ considered that the aim of the Basic Law was to ensure "continuity between the pre-handover and present judicial systems".[1324] His justice further referred to Justice Chan's statement in the earlier judgment *HKSAR v. Ma Wai Kwan*, which was also rendered altogether by himself and Justice Mortimer NPJ,

"In my view, the intention of the Basic Law is clear. There is to be no change in our laws and legal system (except those which contravene the Basic Law). These are the very fabric of our society. Continuity is the key to stability. Any disruption will be disastrous".[1325]

[1318] *Democratic Republic of the Congo and Others v. FG Hemisphere Associates LLC* [2011] HKCFA 41; (2011) 14 HKCFAR 95; [2011] 4 HKC 151; FACV5/2010 (8 June 2011), para.233, 267, 266
[1319] *Democratic Republic of the Congo and Others v. FG Hemisphere Associates LLC* [2011] HKCFA 41; (2011) 14 HKCFAR 95; [2011] 4 HKC 151; FACV5/2010 (8 June 2011), para.268
[1320] *Democratic Republic of the Congo and Others v. FG Hemisphere Associates LLC* [2011] HKCFA 41; (2011) 14 HKCFAR 95; [2011] 4 HKC 151; FACV5/2010 (8 June 2011), para.234
[1321] *Democratic Republic of the Congo and Others v. FG Hemisphere Associates LLC* [2011] HKCFA 41; (2011) 14 HKCFAR 95; [2011] 4 HKC 151; FACV5/2010 (8 June 2011), para.269
[1322] *Democratic Republic of the Congo and Others v. FG Hemisphere Associates LLC* [2011] HKCFA 41; (2011) 14 HKCFAR 95; [2011] 4 HKC 151; FACV5/2010 (8 June 2011), para.416
[1323] *Democratic Republic of the Congo and Others v. FG Hemisphere Associates LLC* [2011] HKCFA 41; (2011) 14 HKCFAR 95; [2011] 4 HKC 151; FACV5/2010 (8 June 2011), para.417
[1324] *Democratic Republic of the Congo and Others v. FG Hemisphere Associates LLC* [2011] HKCFA 41; (2011) 14 HKCFAR 95; [2011] 4 HKC 151; FACV5/2010 (8 June 2011), para.76
[1325] *HKSAR v. Ma Wai Kwan* [1997] HKLRD 761 (29 July 1997), para.774D-E

5.35 Justice Bokhary PJ considered that by virtue of Article 13(3) of the Basic Law, Hong Kong was allowed to deal with its external affairs. He went on to point out

"Whether the immunity available in the courts of Hong Kong is absolute or restrictive is a question of Hong Kong common law for Hong Kong's independent judiciary to adjudicate upon, independently of course."[1326]

5.36 Indeed the SARs are empowered with independent judicial competence. It is also correct that the Basic Law intends to maintain continuity of the legal system and the law in each region. Nevertheless, that kind of continuity cannot be granted without any restrictions. The restrictions are two-fold. The first restriction is regarding the rank of the legislation. A regional legal system is established under the Basic Law, in which parallel legal systems are effective in the respective jurisdiction. The legislation convergences are either listed in the Annex to the Basic Law or interpretation of the Central Authority in respect of the responsibility of the Central People's Government and concerning the relationship between the Central Authorities. It is obvious that those legislations or rules have supremacy over the other regional laws and are binding throughout China. The second restriction is placed on the discretion of the courts of the Region. The judicial intersection occurs when the courts of the SARs are required to make a reference to the Central Authority in order to interpret the relevant provisions of the Basic Law. It is under the discretion of the courts of the Region to determine whether the specific provisions in the individual case falls into the ambit of interpretation. The problem is to which extent the courts of the Region can apply their discretion. It has been well acknowledged that Hong Kong operates under the common system, which can result in deviation from the legal system of the Mainland, such as understanding of state immunity. The majority of justices in the *DR Congo* case have precisely indicated that Hong Kong SAR is also bound by the constitutional arrangements with the Mainland China since 1997. While the Mainland Authority is obliged not to intervening in continuity of the legal system and the law in the HKSAR, the courts of the HKSAR shall also adhere to the principles set under the Basic Law and use their discretion accordingly in a self-restraint way. I think the restrictions under the Basic Law are mutual.

5.37 From the rights of abode cases to the DR Congo case, it is observed that the Court of Final Appeal began to cooperate with the Standing Committee of the NPC to carry out tasks of interpretation, which flow from the Basic Law. Nevertheless, the dissenting opinions disclosed that cooperation was not conducted in "one voice". I would like to go a bit further to address something about evolvement of the new regional legal system in China. It is a scheme that has to resolve the constitutional conflicts between the Central Authority and the Regions as well as promote cross-border judicial cooperation in matters of civil and commercial disputes. Thus, one of the main problems concerning the regional legal system is how to coordinate "the coexistence autonomous legal

[1326] *Democratic Republic of the Congo and Others v. FG Hemisphere Associates LLC* [2011] HKCFA 41; (2011) 14 HKCFAR 95; [2011] 4 HKC 151; FACV5/2010 (8 June 2011), para.114

orders in the same time–space context",[1327] i.e. the legal pluralism between the Mainland and the SARs in order to ensure the compliance with the Basic Law. In China's context, it is more difficult to be solved because there is no regional supreme court to adjudicate the disputes caused by the legal pluralism.[1328] It is expected that the fight will continue because "victory is determined by the shifting loyalties of officials in each particular instance"[1329] on their own discretion.

2.2.2.2 Trust towards the Mainland Courts

5.38 As remarked by Mathews, Ma and Lui that

> "Many people in the world take for granted their national identity, and thus cannot easily examine it critically; they may disagree with their country's policies but their subliminal feeling of rooted attachment to their country – the unexamined sense that they "naturally" belong to their country…"[1330]

5.39 Nevertheless, that's not the case between the Mainland and the SARs. People in the SARs did not acquire their Chinese nationality in a natural way but through political and constitutional arrangements. Against that background, it is unlikely that the "new citizens" can get used to their new identity immediately and have confidence in Chinese legal system right away, which they used to cast doubt on. When the Mainland and Hong Kong entered into the arrangement of recognition of civil and commercial judgments in 2006, Zhang and Smart mentioned that there had been "deep worries of Hong Kong businessmen" about the rulings rendered by the Mainland courts through questionable means, even through corruption.[1331] They also indicated that it was not that easy to prove that kind of foul play, "even when it is obvious".[1332] Besides, lack of recognition of the judgments rendered in the other regions also poses problems. For instance, in the aforementioned *ML v. YJ* case (section 2.22-2.23),[1333] it is evident in the reasoning of the Court of Final Appeal of HKSAR that non-recognition is a big concern of Hong Kong courts towards the Mainland courts, even in case of a

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[1327] According to the classification of legal pluralism by Twining, William, Normative and Legal Pluralism: A Global Perspective" 20 Duke Journal of Comparative and International Law 47, 2010, p.488, 489

[1328] Chan, Cora, Reconceptualising the Relationship between the Mainland Chinese Legal System and the Hong Kong Legal System, in: Asian Journal of Comparative Law, vol.6, issue 1, 2011, p.3

[1329] Tai, Benny Y.T., "Chapter 1 of HK's New Constitution", in: Chan Ming K and So Alvin Y (eds.), Crisis and Transformation in China's Hong Kong, HK: HK University Press, 2002, 189-219, esp. at 211

[1330] Mathews, Gordon, Ma Eric Kit-wai, Lui, Tai-lok, Hong Kong, China: Learning to Belong to a Nation, Routledge Contemporary China Series, 2008, p.3

[1331] Zhang Xianchu, Smart, Philip, Development of Regional Conflict of Laws: On the Arrangement of Mutual Recognition and Enforcement of Judgments in Civil and Commercial Matters between Mainland China and Hong Kong SAR, 36 Hong Kong L. J. 553, 2006, p.567

[1332] Zhang Xianchu, Smart, Philip, Development of Regional Conflict of Laws: On the Arrangement of Mutual Recognition and Enforcement of Judgments in Civil and Commercial Matters between Mainland China and Hong Kong SAR, 36 Hong Kong L. J. 553, 2006, p.567

[1333] *ML v. YJ* [2010] HKCFA 85; (2010) 13 HKCFAR 794; [2011] 1 HKC 447; FACV20/2009 (13 December 2010)

doubt, which can be deemed as one of the legitimate reasons to open parallel civil proceedings in Hong Kong.

5.40 Nonetheless, China's judicial reform is difficult but ongoing. For instance, Li has conducted empirical research on court corruptions in China and according to her, the latter half of the 1990s witnessed the increase of court corruptions and in 1998 the number of court personnel investigated and punished for corruption reached the peak, which was 2,512 cases in total but Li also pointed out that the situation is undergoing changes and improvement. In the first half of the first decade of the 21st century the number of corruption cases declined.[1334] In 2016, it is stated under the annual work report of the Supreme Court that 575 judges was investigated and punished for corruption and poor performance of their duties and the authority made commitment to adhere to zero tolerance and continue to fight against judicial corruption.[1335] In addition, China has taken some measures to improve the quality in handling foreign-related cases and safeguard better judicial independence.[1336] In 2002, Provisions of the Supreme People's Court on Some Issues Concerning the Jurisdiction of Civil and Commercial Cases Involving Foreign Elements[1337] came into effect, which centralized jurisdiction over foreign-related civil and commercial cases to a few designated intermediate people's courts and basic courts. In accordance with that judicial interpretation, the jurisdiction of the people's courts over civil and commercial cases involving parties from Hong Kong, Macao or Taiwan shall refer to this judicial interpretation.[1338] Later incorporated into the specialized bilateral arrangements between the Mainland and the SARs, the jurisdiction over the recognition and enforcement of a civil or commercial decision rendered by Hong Kong and Macao courts is designated only to the intermediate people's courts in the Mainland.[1339] Therefore, these bilateral arrangements apply higher threshold to the Mainland courts, which are allowed to exercise jurisdiction over inter-regional recognition and enforcement petitions. In my view, it reflects the cautious attitude adopted by the Mainland towards the inter-regional legal cooperation. It is widely accepted that the courts in basic level are the most affected ones by local protectionism mainly for their reliance on the local financial support from the local governments.[1340] The intermediate people's courts, which are at the higher level, can perform correctional function that are designed to remedy some of the wrongs upon appeal perpetrated at the lower

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[1334] Li Ling, "Corruption in China's Courts", in Randall Peerenboom (ed.), Judicial Independence in China: Lessons for Global Rule of Law Promotion, New York: Cambridge University Press, 2010, p. 201-202

[1335] The 2016 annual work report of the Supreme Court (in Chinese) is available at http://www.npc.gov.cn/npc/dbdhhy/12_4/2016-03/21/content_1985710.htm

[1336] Li Yuwen, The Judicial System and Reform in Post-Mao China: Stumbling Towards Justice, Routledge, 2014, p.19-20

[1337] [2002] Judicial Interpretation No.5

[1338] [2002] Judicial Interpretation No.5, article 5. It is noteworthy that Hong Kong, Macao and Taiwan related cases are usually regarded as foreign related cases in practice. See Gong Xinyi, When Hong Kong Becomes SAR, Is the Mainland Ready? Problems of Judgments Recognition in Cross-Border Insolvency Matters, in: 20 International Insolvency Review, 2011, p.57-58

[1339] [2006] Judicial Interpretation No.2, art.4; [2008] Judicial Interpretation No.9, article 4

[1340] Peerenboom, Randall, Judicial Independence in China: Common Myths and Unfounded Assumptions, in: Randall Peerenboom (ed.), Judicial Independence in China: Lessons for Global Rule of Law Promotion, New York: Cambridge University Press, 2010, p.81-82

levels. With that kind of function, according to the findings of one of the latest empirical study, Chinese courts at the higher level gain fruitful experience on reducing likely influence caused by judicial local protectionism.[1341] Accordingly, concentrating jurisdiction over inter-regional recognition and enforcement in civil and commercial matters to the intermediate people's courts can better ease the concern on the capability and impartiality of the Mainland courts in trying such cases.

2.2.3 Recognition as the Mainline

5.41 As abovementioned, the principles of sincere cooperation and mutual trust are pretty much at the primary stage in China's regional legal system. The compulsory jurisdiction and automatic recognition under the Regulation is built upon these two fundamental principles. Since these two fundamental principles are still under construction in China, it is premature to make direct allocation of jurisdiction under CICIA. In addition, it may not be wise to frequently trigger conflicts of jurisdiction in a country, where it is undergoing resumption of sovereignty and integration. Instead, the recognition approach on a more flexible basis adopted by the Model Law should thus be regarded as the proper mainline. Meanwhile, considering the decisive roles played by those jurisdiction-related concepts, such as COMI and establishment, in pursuit of recognition, a functional dispute settlement mechanism is to be set up under CICIA (see Recommendation 8) to ease the possible tension between the rules recognition and the rules of jurisdiction.

Recommendation 3: Form and Scope

(1) Considering China's complex internal structure and desiring more predictability and more legal certainty at the regional level, an inter-regional cross-border insolvency arrangement (CICIA) is to be established.

(2) CICIA is binding on the Mainland and the two SARs altogether. In accordance with CICIA, cross-strait insolvency cooperation between the Mainland and Taiwan is subject to a separate arrangement.

(3) CICIA applies only to proceedings where the center of the debtor's main interests (COMI) is located within the Mainland and the two SARs.

(4) CICIA shall apply to public collective proceedings, including interim proceedings, in accordance with laws relating to insolvency in which proceedings the assets and affairs of the debtor are under the control or supervision by a court for the purpose of rescue, reorganization or liquidation.

(5) CICIA shall not apply to insolvencies concerning natural persons and financial institutions, which are governed by special insolvency regimes in the three regions.

[1341] Long Xiaoning, Wang Jun, Judicial Local Protectionism in China: An empirical study of IP case, in: 42 International Review of Law and Economics, 2015, p.59

Comments to Recommendation 3

5.42 Recommendation 3 examines the proper form of CICIA against China's special political composition and gives the reasons of the extent and the limits of such an arrangement.

3.1 Form

3.1.1 China in a "Group" Context

5.43 In the course of cross-border insolvency cooperation, convention used to be regarded as the proper form of achieving the goal. Prior to the EU Insolvency Regulation, efforts had been made to introduce conventions into Europe, which were the European Convention on Certain International Aspects of Bankruptcy (i.e. the Istanbul Convention) [1342] and the Convention on Insolvency Proceedings[1343]. The former one was only ratified by one State, which was Cyprus. The latter one did not come into effect due to the retreat of UK.[1344] Nowadays, it still remains a prominent option. Upon the proposal of the Union, Internationale des Avocats and support of the International Bar Association (IBA), the Working Group V of UNCITRAL has taken into consideration the possibility of developing an international convention in matters of cross-border insolvency.[1345] Now the related project is continuing and has been put in the current mandate of Working Group V.[1346] Nevertheless, UNCITRAL also raised the concern with respect to "the feasibility of reaching agreement, particularly in view of the difficulties encountered in the past in the area of international insolvency law",[1347] such as the aforementioned EU experience.

5.44 Suppose that the international convention on cross-border insolvency was adopted by UNCITRAL, to which the Mainland, the SARs and Taiwan all became parties, cooperation on cross-border insolvency among those regions could be solved. Nevertheless, after the People's Republic of China resumed its sovereignty over Hong Kong and Macao respectively in 1997 and 1999, China becomes a country composed of peculiar political compounds, which include the Mainland China, Hong Kong SAR and Macao SAR. From then on, Hong Kong and

[1342] E.T.S. 136, May 5, 1990, opened for signature in Istanbul on 5 June 1990. See Fletcher, Ian F, Insolvency in Private International Law. National and International Approaches, Oxford Private International Law Series, Oxford University Press 2nd ed. 2005, at 6.01

[1343] Official Journal No L00000, opened for signature in Brussels on 23 November 1995. See Moss, Gabriel, Fletcher, Ian F, Isaacs, Stuart (ed.), The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide (2nd ed.), Oxford University Press, 2009, pp. 12.

[1344] Fletcher, Ian F, Insolvency in Private International Law. National and International Approaches, Oxford Private International Law Series, Oxford University Press 2nd ed. 2005, 6.01; Moss, Gabriel, Fletcher, Ian F, Isaacs, Stuart (ed.), The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide (2nd ed.), Oxford University Press, 2009, pp. 2.

[1345] Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17), para. 259; A/CN.9/686 - Report of Working Group V (Insolvency Law) on the work of its thirty-seventh session (Vienna, 9-13 November 2009), para.127-130

[1346] A /CN.9/WG.V/WP.117, United Nations Commission on International Trade Law Working Group V (Insolvency Law) Forty-fourth session Vienna, 16-20 December 2013, at 7-16

[1347] A /CN.9/WG.V/WP.117, United Nations Commission on International Trade Law Working Group V (Insolvency Law) Forty-fourth session Vienna, 16-20 December 2013, at 8

Macao can no longer be treated as “foreign” jurisdictions. As for Taiwan, although there is still political uncertainty, the cross-strait relationship is undergoing changes due to closer economic cooperation.[1348] Consequently, as a “group” composed of four regions, the landscape of China gets complicated when entering into the international conventions. For instance, it involves “four Chinas” in the WTO Agreement, i.e. the People’s Republic of China, “Hong Kong, China”, “Macao, China” as well as “Chinese Taipei”[1349], which all enjoy full membership of WTO.[1350]

5.45 As for conventions concerning legal cooperation, in accordance with the Basic Law, the relationship of China and its SARs to the convention is briefly introduced as follows. (1) If the conventions are implemented in the two SARs prior to the reunion, they may continue to be implemented in the two SARs even if the Mainland is not a party.[1351] There is a typical example involving cooperation with Hague Conference on Private International Law in the field of the private international law (See Annex V). (2) There are conventions implemented in the Mainland and also applied to Hong Kong and Macao based on declarations filed by the United Kingdom or Portugal prior to the reunification. Whether or not the application of those kinds of conventions can be extended to the SARs should be decided by the Central People's Government, in accordance with the circumstances and needs of the Region, and after seeking the views of the government of the Region.[1352] The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter the New York Convention) is such an example. Upon resumption of sovereignty over Hong Kong on 1 July 1997, the Government of China extended the territorial application of the New York Convention to Hong Kong, Special Administrative Region of China, subject to the statement originally made by China upon

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[1348] In 2010, the signing of the Cross-strait Economic Cooperation Framework Agreement (ECFA) embarked on a new era of the economic interaction between the two sides. This agreement is a preferential trade agreement between the governments of the Mainland China and Taiwan that aims to reduce tariffs and commercial barriers between the two sides. As for the cross-strait relationship, the visible development is that See Ramzy, Austin, *China and Taiwan Hold First Direct Talks Since ’49*, in: New York Times, 11 Feb. 2014.

[1349] On 1 January 2002, Taiwan acceded to WTO under the title of “Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu”, abbreviated as “Chinese Taipei”. As stated in the literatures of Taiwanese scholars, the fact that Taiwan did not use the “Republic of China” as its official title to join the WTO shows its reluctant compromise with political reality. In addition, due to P.R.C’s insistency, Taiwan joined the WTO 1 day after P.R.C.’s accession. See HSIEH, Pasha L., Facing China: Taiwan’s Status as a Separate Customs Territory in the World Trade Organization, Journal of the World Trade 39 (2005) 6, pp. 1195; See also Wu, Chien-Huei, A New Landscape in the WTO: Economic Integration Among China, Taiwan, Hong Kong and Macao, in: European Yearbook of International Economic Law, Vol. 3(2012), pp.241-242.

[1350] Prior to P.R.C. and Taiwan become the members of the WTO, Hong Kong had become a contracting party to GATT from 23 April 1986 and Macao on 11 January 1991 under the arrangements of UK and Portugal. After P.R.C. resumed the exercise of sovereignty over Hong Kong and Macao as from 1997 and 1999, the two SARs will, on their own, continue to be WTO Members, using the name of “Hong Kong, China” and “Macao, China”. See the WTO documents, http://www.wto.org/english/thewto_e/acc_e/chinabknot_feb01.doc (Last visited on 14 June 2016) As for the legal basis, please refer to article 152 of the Basic Law of HKSAR and article 137 of the Basic Law of Macao SAR.

[1351] The Basic Law of HKSAR, article 153; the Basic Law of Macao SAR, article 138

[1352] The Basic Law of HKSAR, article 153; the Basic Law of Macao SAR, article 138

accession to the Convention. On 19 July 2005, China declared that the New York Convention shall apply to the Macao Special Administrative Region of China, subject to the statement originally made by China upon accession to the New York Convention.[1353] (3) In addition, there are also convention that prior to the reunification have applied to the Mainland China but not to Hong Kong and Macao. For example, United Nations Convention on Contracts for the International Sale of Goods (CISG). As stated on the website of the CISG, so far there is no related depositary notification for the CISG having been filed with the Secretary-General of the United Nations by the People's Republic of China.[1354] Therefore, it is still uncertain whether or not the effect of the CISG is extended to the two SARs.[1355] With respect to Taiwan, its legal identity is always a problem. Conventions are usually only open for accession of sovereign states. That's why Taiwan is neither a signatory to New York Convention[1356] nor a member of CISG[1357]. Under some circumstances, as stated in the CISG, if a contracting state has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in the convention, it may declare that the convention is to extend to all its territorial units or only to one or more of them.[1358] However, it depends on China's consent to granting such an extension and Taiwan's willingness of being China's territorial unit.

[1353] Cited from declarations or other notifications pursuant to article I (3) and article X (1) of the UNCITRAL website, please visit:
http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html
(Last visited 14 June 2016)

[1354] See http://www.cisg.law.pace.edu/cisg/countries/cntries-China.html (Last visited on 14 June 2016)

[1355] There is a risk that the opinions of the courts of other jurisdictions, including the Mainland courts, may vary on the effect of CISG on Hong Kong and for Macao. Fan Yang, Barriers to the Application of the United Nations Convention on Contracts for the International Sale of Goods (1980) in the People's Republic of China, pp. 280-281; 310 https://qmro.qmul.ac.uk/jspui/bitstream/123456789/2483/1/YANGBarriersTo2011.pdf (Last visited on 14 June 2016)
Schroeter, Ulrich G., The Status of Hong Kong and Macao under the United Nations Convention on Contracts for the International Sales of Goods, in: 16 Pace International Law Review, 2004, pp. 311, ft 14, http://www.schroeter.li/pdf/Schroeter_16_Pace_Intl_L_Rev_2004_307.pdf (Last visited on 14 June 2016)

[1356] Article VIII-1, the New York Convention: This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations. Taiwan is not a party to the New York Convention because Taiwan is no longer a Member of UN since 1971 when The People's Republic of China restored its position in United Nations, whose representatives are "the only lawful representatives of China" and expelled the unlawful representatives of Taiwan. See United Nations General Assembly Resolution 2758, Restoration of the Lawful Rights of the People's Republic of China in the United Nations, visit http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/327/74/IMG/NR032774.pdf?OpenElement (last visited on 14 June 2016) (Last visited on 14 June 2016)

[1357] CISG, article 91(1)

[1358] CISG, article 93 (1)

5.46 Evidently, legal cooperation in the form of an international convention is not that easy to be accepted by China in a "group" context. Even under the circumstances that the international conventions can be implemented in both the Mainland and the two SARs, it is still necessary to make specific regional arrangements since those conventions are only applicable to the "States", which is deemed as inappropriate to deal with the relevant domestic issues and the content should be subject to relevant adjustment. A typical example is the New York Convention. Although both the Mainland and the two SARs are contracting "States" to the New York Convention, mutual arrangements are signed in dealing with the enforcement of arbitral awards among the three regions.[1359] It is noteworthy that only one of the most important provisions, the article V of the New York Convention, is almost copied and pasted in each of the three arrangements.[1360] However, the rest of the contents are different.

3.1.2 Problems of Adopting A Soft Law Instrument

5.47 As a soft law instrument, although the word "State" occurs in the Model Law regularly, as explained in the Guide to Enactment, the word "State" refers to the entity that enacts the Law.[1361] It seems that the neutral explanation of the word "State" under the Model Law is flexible enough to be incorporated into a local legal system. Unlike accession to a convention, once an entity would like to enact the Model Law, it can simply introduce the Model Law into the local legal system without sending related depositary notification to the UN or some other countries. If the four regions adopted the Model Law respectively, certain degree of harmonization could be achieved. However, for a region that is undergoing integration, would that kind of arrangement be satisfied enough? Probably not.

5.48 The Model Law is not designed for regional cooperation but aims at promoting the efficiency of dealing with the cases of the cross-border insolvency on a global level. Considering the diversity of national legislations, the drafters placed text in italics between square brackets to "instruct" the national legislators to complete the text in their own way.[1362] Although the spirit of a Model Law and the intention of its drafters is that States should make as few changes as possible in incorporating the Model Law into their legal systems to ensure a degree of certainty and predictability, a satisfactory degree of certainty achieved in relation to harmonization is likely to be lower than that resulting

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[1359] *Hong Kong SAR and the Mainland China: Arrangement Concerning Mutual Enforcement of Arbitral Awards (1999); Macao SAR and the Mainland China: Arrangement Concerning Mutual Recognition and Enforcement of Arbitral Awards between the Mainland and the Macao Special Administrative Region (2007); Hong Kong SAR and Macao SAR: Arrangement Concerning Reciprocal Recognition and Enforcement of Arbitral Awards Between the Hong Kong Special Administrative Region and the Macao Special Administrative Region (2013)*

[1360] Hong Kong SAR and the Mainland Arrangement, article 7; Macao SAR and the Mainland Arrangement, article 7; Hong Kong SAR and Macao SAR Arrangement, article 7; See also Fan Kun, p. 86

[1361] The Guide to Enactment, para. 56

[1362] Berends, André, The UNCITRAL Model Law on Cross-border Insolvency: A Comprehensive Overview, in: 6 Tul. J. Int'l & Comp. L., pp. 320, 323.

from a binding regime[1363] since the character of the Model Law, as a soft law instrument, is a recommendation in essence. Moreover, owing to the legislative autonomy of each region in China, it will be up to local authority to decide to which extent they would like to adopt the Model Law and one jurisdiction cannot interfere even if there is deviation from the Model Law in the process of its enactment in others within one country.

3.1.3 A Regional Cooperation Instrument

5.49 In Europe, a successful regional cross-border insolvency cooperation regime has been established on the basis of some prerequisites that need to be satisfied in advance.

3.1.3.1 Legislation Competence at the Regional Level

5.50 Bariatti remarked that "public international law is at the basis of both the European Law and of many developments of private international law that is comprised of uniform rules established through treaties and international conventions."[1364] The legislation competence concerning inter-regional judicial cooperation in civil matters at the Union level gradually derogates from the development of EU treaties.

5.51 In 1957, it was stipulated in the Treaty establishing the European Economic Community (EEC, repealed)

"Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals.

…
— the simplification of the formalities governing the reciprocal recognition and execution of judicial decisions and of arbitral awards."[1365]

5.52 Later in 1992, it was provided in the Treaty of Maastricht on European Union that

"Article K Cooperation in the fields of justice and home affairs shall be governed by the following provisions.

Article K.1 For the purposes of achieving the objectives of the Union, in particular the free movement of persons, and without prejudice to the powers of the European Community, Member States shall regard the following areas as matters of common interest:
…
6. judicial cooperation in civil matters;
…"

1363 The Guide and Interpretation, para. 20; See also Wessels, Bob, International Insolvency Law (3rd ed.), Vol.X, Deventer: Kluwer, 2012, para. 10195
1364 Bariatti, Stefania, Cases and Materials on EU Private International Law, Oxford and Portland, Oregon, Hart Publishing, 2011, p.42
1365 EEC (repealed), article 220

5.53 Further in 1997, pursuant to the Treaty of Amsterdam, the EC acquired legislative competence in cross-border judicial cooperation with respect to civil and commercial cases.

"Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 and insofar as necessary for the proper functioning of the internal market, shall include:

(a) improving and simplifying:
- the system for cross-border service of judicial and extrajudicial documents;
- cooperation in the taking of evidence;
- the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases;
(b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction;
(c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States."[1366]

5.54 In 2012, in accordance with the Treaty on the Functioning of the EU (TFEU), it has been stressed that

"4. The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decision in civil matters"[1367]

5.55 Moreover, the legislation competence of EU in private international law has been standardized and extended. It is stipulated under TFEU that

"1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring:
(a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases;
(b) the cross-border service of judicial and extrajudicial documents;
(c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;
(d) cooperation in the taking of evidence;
(e) effective access to justice;
(f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States;
(g) the development of alternative methods of dispute settlement;
(h) support for the training of the judiciary and judicial staff."[1368]

[1366] The Treaty of Amsterdam, article 65
[1367] TFEU, article 67

5.56 From a mere possibility to consolidated competence, the evolvement of the Treaties texts has illustrated the growth of "judicial cooperation in civil matters having cross-border implications" at the European Union level. The whole process took over 50 years and is to be continued.

5.57 Meanwhile, in accordance with the Basic Law, which entered into force over 15 years,

"The 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."[1369]

5.58 The text of the Basic Law reminds me of the aforementioned text of EEC signed in 1957, which only provided a possible reference for China's inter-regional legal cooperation.

3.1.3.2 Legal Instrument at the Regional Level

5.59 In EU, legal cooperation in matters of cross-border insolvency has been achieved in the form of regulation, although there are also other instruments available. Wessels summarized the development of insolvency law on the European level in three periods.[1370] In the early period prior to 2002, when the Regulation came into effect, there were only individual national attempts of some Member States by referring to the Directives respectively,[1371] which provided some insolvency rules on the EC level. The implementation of the Regulation opened the era of the cross-border period, which enabled the interaction between the Regulation and national insolvency law of the Member States as well as interconnection in matters of cross-border insolvency between the Member States since they are required to grant automatic recognition to the main proceedings opened in other Member States and cooperate and communicate in accordance with the EC Regulation. Recently the third period, proposed by the European Parliament to harmonize the national insolvency law on EU level, has started.[1372]

[1368] TFEU, article 81

[1369] The Basic Law of HKSAR, article 95; the Basic Law of Macao SAR, article 93

[1370] Wessels, On the Future of European Insolvency Law – INSOL Europe Academic Forum's 5th Edwin Coe Lecture, in: Parry, Rebecca, European Insolvency Law: Current Issues and Prospects for Reform, INSOL Europe, 2014, p.135-141

[1371] Such as Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, Article 7; Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor-compensation schemes, recital (8); Directive 2000/35 of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions, article 6(3)(a); Directive 2002/74/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 80/987/EEC on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer; Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), article 63

[1372] Motion for a European Parliament Resolution - with recommendations to the Commission on insolvency proceedings in the context of EU company law (2011/2006(INI)), in which it is stated that "C. whereas even if the creation of a body of substantive insolvency law at EU level is not

5.60 Under the Basic Law, both SARs have been granted a high degree of autonomous legislative powers[1373] and the three independent jurisdictions are operating parallel to each other with very limited interference from the central authority in one country. In China, the legal instruments available at the regional level include Annex III to the Basic Law and bilateral arrangements. The laws listed in the Annex III are those applicable in the Mainland and shall be applied in the SARs through local promulgation or legislation procedures. Currently the legislations listed in Annex III to the Basic Law of HKSAR and in Annex III to the Basic Law of Macao SAR (See Annex VI) have very limited scope, which only covers the matters outside the limits of the autonomy of the SARs, mainly including defense and foreign affairs.[1374]

5.61 Legal cooperation in the field of civil and commercial cases does not fall within the ambit of mandatory uniform legislation system (Annex III to the Basic Law) in China. Although the Basic Law leaves a window open, which allows the Mainland and the SARs to maintain juridical relations with the judicial organs of each other and may render assistance to each other through consultations,[1375] the Basic Law does not specify the proper forms of inter-regional legal cooperation or provide equivalent instruments as under the EU legal system. That gives rise to the consequence that it is conducted in the form of bilateral arrangements in practice. Those bilateral arrangements take measures on service of judicial documents, exchange of evidence as well as recognition and enforcement of judgments and arbitral awards (See Annex I).

3.1.4 A Comprehensive Inter-regional Arrangement

5.62 China's complex internal structure, as reflected from its relations with international conventions, makes it necessary to make arrangements for legal cooperation at China's regional level. It is also noteworthy that the word "arrangement" is applied in almost all the agreements, economic or legal, entered into between the Mainland and SARs. As pointed out by Wang, the choice of word is deliberate.

"From the negotiating history of the CEPA, it appears the use of the term 'arrangement' was the result of an understanding between Mainland China and HKSAR negotiators that most FTAs [Free Trade Agreements] in the world are preferential agreements among states, while the negotiated trade agreement between Mainland China and the

possible, there are certain areas of insolvency law where harmonization is worthwhile and achievable".
http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2011-0355+0+DOC+XML+V0//EN (Last visited on 14 June 2016) See also Wessels & Fletcher, Harmonisation of Insolvency Law in Europe, Preadviezen Nederlandse Vereniging voor Burgerlijk Recht, Deventer: Kluwer, 2012

[1373] Basic Law of HKSAR, article 17; Basic Law of Macao SAR, article 17

[1374] Basic Law of HKSAR, article 18; Basic Law of Macao SAR, article 18

[1375] Basic Law HKSAR, article 95; Basic Law Macao SAR, article 93

HKSAR was under one country, China. Therefore, based on the principle of the 'one country, two systems,' the agreement [of CEPA] was entitled arrangement."[1376]

5.63 Accordingly, CICIA is also entitled "Arrangement". CICIA will not adopt the soft law approach. The reasons are two-fold. First of all, more considerate arrangements can be made exclusively on a region-wide scenario because there are common constitutional arrangements, which provide legal basis for regional judicial cooperation. Secondly, more predictability and more legal certainty is reasonable expectation within one country through uniform rules at the regional level for the purpose of maximization of the debtor's assets and protection of the interests of all creditors.

5.64 The Regulation is an indispensible part of the whole EU legal system. To achieve a comprehensive regional arrangement as the Regulation, there are certain obstacles, such as restricted regional legislation competence and limited regional legislation instruments, that China will have to overcome. Although the Basic Law provides some legal instruments, there is no equivalent mandatory instrument like regulation under the EU law, which is directly applicable throughout the whole region. In China, the relevant measures with respect to legal cooperation can be taken upon consensus and it is also noteworthy that it takes time for the consensus to be reached. The arrangement concerning recognition and enforcement of arbitral awards is such an example. In 1999, the Mainland and HKSAR entered into the Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and Hong Kong SAR. Meanwhile, Hong Kong considered that arrangements for mutual enforcement of arbitral awards between Hong Kong and Macao "should be finalized as soon as possible.[1377] However, in December 2002, the government provided an information note on the subject, stating that

"the absence of such an arrangement should not prejudice the enforcement in Macao of awards made in Hong Kong and the Administration considered it unnecessary to have a separate arrangement for reciprocal enforcement of arbitral awards."[1378]

5.65 In 2007, the Mainland and the Macao SAR concluded the Arrangement Concerning Mutual Recognition and Enforcement of Arbitral Awards. In 2010, the government revisited the need and advantages of entering into an arrangement with Macao on reciprocal enforcement of arbitral awards and considered such an arrangement would be

"(a) adding certainty to the enforceability of Macao arbitral awards in Hong Kong and vice versa;
(b) establishing a simple mechanism in both jurisdictions on reciprocal enforcement of arbitral awards;

[1376] Wang Wei, CEPA: A Lawful Free Trade Agreement Under "One Country, Two Customs Territories?", 10 Law & Bus. Rev. Am. 647, 2004, p.654
[1377] Minutes of meeting on 9 November 1999 of the Bills Committee on the Arbitration (Amendment) Bill, 1999 (LC Paper No. CB(2)2016/99-00)
[1378] LegCo Panel on Administration of Justice and Legal Services, LC Paper No. CB(2)1129/10-11(01), at 23

(c) fostering legal co-operation between Hong Kong and Macao in civil and commercial matters; and
(d) enhancing Hong Kong's role as a regional arbitration center for commercial disputes."[1379]

5.66 Consequently in 2013 the Hong Kong SAR and the Macao SAR signed the Arrangement Concerning Reciprocal Recognition and Enforcement of Arbitral Awards. Finally, the recognition regime of arbitral awards among the three regions has been interconnected. It is notable that those arrangements are still drafted in a parallel bilateral way.

5.67 As for CICIA, I submit to take a step further to make a comprehensive inter-regional cooperation arrangement, which should be binding on the Mainland and the two SARs altogether. Compared to ordinary civil and commercial proceedings, one of the main features of cross-border insolvency proceedings is that they are usually operating parallel in the different jurisdictions at the same time. Hence, it will be more efficient for the courts in the different jurisdictions within one country to refer to the uniform rules as formulated in such an arrangement, which will also provide more legal certainty in the process of cooperation and ensure equal protection of the creditors in different regions.

3.2 Scope

3.2.1 Taiwan in a Separate Arrangement

5.68 The legal cooperation between the Mainland and the two SARs is based on the constitutional arrangement, i.e. the Basic Law,[1380] whereas such a legal basis does not exist between the Mainland and Taiwan. It was not until 2009 that the two sides signed the first mutual agreement in matters of legal cooperation (2009 Agreement between Both Sides of the Taiwan Strait on Jointly Fighting against Crimes and Mutual Judicial Assistance, hereinafter, the 2009 Agreement). As explicitly stated in that agreement, the civil judgments and arbitral awards can be recognized based on the principle of reciprocity,[1381] whereas the Mainland and the two SARs are suggested to take a step further by adopting the principle of comity. Moreover, in practice, as aforementioned (Part II, Section 3.2.2.2), Taiwan applies parallel rules in dealing with recognition of civil judgments rendered in different regions. In accordance with article 74 of the Mainland Act, the irrevocable civil rulings or judgments rendered in the Mainland Area shall not be considered the same validity as_irrevocable civil rulings or judgments rendered in Taiwan. Whereas the irrevocable civil ruling or

[1379] Ibid, at 24

[1380] Basic Law HKSAR, 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.
Basic Law Macao SAR, article 93: The Macao 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.

[1381] 2009 Agreement between Both Sides of the Taiwan Strait on Jointly Fighting against Crimes and Mutual Judicial Assistance, article 10

judgment rendered in Hong Kong and Macao, pursuant to article 42-I of Hong Kong and Macao Act, shall be automatically recognized. [1382]

5.69 Although the 2009 Agreement came into effect,[1383] it did not really solve the problem. The reasons are two-fold. Firstly, this agreement serves merely as a very general guideline for the cross-strait legal cooperation since its content is general and broad, composed of 24 articles, which covered both criminal and civil cases. In addition, it does not specify the scope of application, i.e. whether or not the insolvency proceeding can be included into the ambit of civil judgments. Secondly, in order to implement the 2009 Agreement, the Supreme People's Court has issued the relevant judicial interpretation with respect to recognition of Taiwan civil judgments.[1384] As for Taiwan, please recall the protest against ECFA (please refer to para.2.08 of Part II) which casted doubt on the nature of those cross-strait agreements and what should be the relevant due process in passing them. If they are regarded as treaties, it is stated under the No.329 of the Judicial Yuan Interpretation that

"Within the Constitution, "treaty" means an international agreement concluded between the R.O.C. and other nations or international organizations whose title may apply to a treaty, convention or an agreement. Its content involves important issues of the Nation or rights and duties of the people and its legality is sustained. Such agreements, which employ the title of "treaty," "convention" or "agreement" and have ratification clauses, should be sent to the Legislative Yuan for deliberation. Other international agreements, except those authorized by laws or pre-determined by the Legislative Yuan, should also be sent to the Legislative Yuan for deliberation."[1385]

5.70 Meanwhile, it is stipulated under the Act Governing Relations between People of the Taiwan Area and Mainland Area, the agreement document involving the exercise of governmental powers or any matter of political issues, and executed between the Taiwan Area and the Mainland Area shall be submitted to the Executive Yuan for approval and to the Legislative Yuan for record, with a confidential procedure if necessary, where its content does not require any amendment to laws or any new legislation. [1386] All those aforementioned cross-strait agreements, including the 2009 Agreement, were passed or intended to be passed in accordance with the Act Governing Relations

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[1382] Wu Wei-Hua, Does a Fixed Civil Judgment Rendered in Mainland China and Recognized by a Taiwanese Court have any Impact on Taiwan's Legal System? — Analysis of Taiwan Supreme Court Judgments (96) Tai Shang Tzu No.2531 (2007) and (97) Tai Shang Tzu No.2376 (2008), in: National Taiwan University Law Review 6:1, 2011, 35

[1383] In accordance with the article 24 of the Agreement, the Agreement should come into effect within 60 days after the agreement was signed on 24 April 2009.

[1384] [2009] Judicial Interpretation No.4, Supplementary Provisions on of the Supreme People's Court on the People's Courts' Recognition of Civil Judgments of the Relevant Courts of the Taiwan Region

[1385] For more information of the No.329 of the Judicial Yuan Interpretation, including the reasoning of the interpretation, please visit: http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=329 (Last visited on 14 June 2016)

[1386] The Act Governing Relations between People of the Taiwan Area and Mainland Area, article 4-2-III, article 5-II

between People of the Taiwan Area and Mainland Area, which means, merely through administrative procedure instead of upon the consent of the parliament.

5.71 Aware of the problem of procedural legality and also in response to the local turmoil, on 3 April, 2014, the Taiwan government issued the draft of the Regulations on Treatment and Supervision of the Agreements Reached between the Taiwan Area and the Mainland Area and submitted it to the parliament for review.[1387] On 6 April, 2014, the President of the parliament made the statement that the Cross-strait Trade in Service Agreement would not be discussed in the parliament unless the Regulations on Treatment and Supervision of the Agreements Reached between the Taiwan Area and the Mainland Area was passed,[1388] which remains a draft till the completion of the dissertation. Once passed, the possible influence on the validity of all the cross-strait agreements, including the 2009 Agreement as well as the ECFA will still need to be observed. Moreover, once passed, the Regulations on Treatment and Supervision of the Agreements Reached between the Taiwan Area and the Mainland Area will serve as the new legal basis for the future cross-strait cooperation.

5.72 Although Taiwan is also engaged in economic cooperation with the Mainland, there is still lack of mutually accepted legal basis, such as the Basic Law, to ensure the involvement of Taiwan into an integrated regional legal cooperation arrangement at this moment. In addition, considering the political reality and the public opinion on the cross-strait relationship, cross-strait insolvency cooperation has to be treated in a different manner.

3.2.2 Scope of Application

3.2.2.1 Intra-regional Effects Only

5.73 CICIA established on the basis of common constitutional foundation shall apply only to the intra-regional insolvency proceedings. The center of the debtor's main interests should be located in the Mainland, Hong Kong SAR or Macao SAR. If COMI of the debtor is located in one of the three regions but the debtor operates its establishment outside, CICIA remains applicable for the purposes of recognition of the main proceedings within the three regions.

3.2.2.2 Definition of Insolvency Proceedings

5.74 First of all, the proceedings governed by CICIA should be collective in nature. Any individual action will be precluded because that will result in inefficient realization of the debtor's assets and damage on the creditor's interests as a whole. Hence, the participation in distribution system, which

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[1387] For more information with respect to the Regulations on Treatment and Supervision of the Agreements Reached between the Taiwan Area and the Mainland Area, please visit the website of the Taiwan government:
http://www.ey.gov.tw/News_Content2.aspx?n=F8BAEBE9491FC830&sms=99606AC2FCD53A3A&s=92EB39EC07DB4524 (Last visited on 14 June 2016)

[1388] Wang, Jin-Pyng, Statement of the President of the Parliament on 26 April 2014, http://www.cna.com.tw/news/firstnews/201404060077-1.aspx (Last visited on 14 June 2016)

encourages the creditors to individually grab the assets under no obligation to share with other creditors and thus decline to file an insolvency petition, should be excluded from the scope of application of CICIA. It is also required under both the EU Regulation (recast) and the Model Law that the insolvency proceedings should be collective proceedings.[1389] The difference is the insolvency proceedings are exhaustively listed in Annex A to the EU Regulation (recast).[1390] Given the fact that the regions that will enter into CICIA are certain, it is suggested that such an Annex can also be set up to provide greater legal certainty.

5.75 Secondly, all kinds of collective proceedings, regardless of for the purpose of reorganization or liquidation or interim proceedings should be covered by CICIA. It has been witnessed that the focus of the Regulation has shifted from liquidation and divestment of the debtor's assets[1391] to "the rescue of economically viable but distressed businesses and which give a second chance to entrepreneurs".[1392] That is also the trend at work in China. In the Mainland, several judicial interpretations have been issued by the Supreme People's Court in matters of reorganization of enterprises, including Notice of the Supreme People's Court on the Summary of Minutes of the Symposium on the Trial of Cases concerning Reorganization of Listed Companies,[1393]Instructive Opinions of the Supreme People's Court on Judicial Safeguards Provided by the People's Court for Enterprises Mergers and Acquisitions and Reorganization,[1394]Opinions of the Supreme People's Court on Equal Protection of Non-state Owned Economy and Promotion of Sound Development of Non-state Owned Economy.[1395] All of them consider reorganization as an effective mechanism and encourage the enterprises in crisis to make full use of reorganization to restore their business vitality.[1396] In Hong Kong, a new statutory company rescue regime has been proposed to improve Hong Kong's current corporate insolvency law regime in 2014.[1397] In Taiwan, the Draft Debt Clearance Act, which has been approved by Judicial Yuan in 2015, added a new chapter of reorganization to the new insolvency law.[1398]

5.76 Thirdly, the collective proceedings should be based on a law relating to insolvency. With respect to this criterion, the EU Regulation (recast) has set up more restrict requirement than the Model Law, which requires that proceedings are not qualified as pursuant to laws relating to insolvency unless they are

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[1389] The EC Regulation, recital (10), article 1(1); the EU Regulation (recast), article 2(1); the Model Law, article 2(a), Guide and Interpretation, para.69-70
[1390] The EU Regulation (recast), recital (9), article 2(4)
[1391] Virgós/Schmit Report (1996), para.49(b)
[1392] The EU Regulation (recast), recital (10)
[1393] [2012] Judicial Interpretation No.261
[1394] [2014] Judicial Interpretation No.7
[1395] [2014] Judicial Interpretation No.27
[1396] [2012] Judicial Interpretation No.261, article 1(2); [2014] Judicial Interpretation No.7, article 5(16); [2014] Judicial Interpretation No.27, article 2(6)
[1397] Legislative Council Panel on Financial Affairs, Consultation Conclusions on Corporate Insolvency Law Improvement Exercise and Detailed proposals on a new Statutory Corporate Rescue Procedure, CB(1)1536/13-14(01), 7 July 2014, p.3-10 & Annex B
[1398] The 2015 Draft, article 220 – 286

designed exclusively for insolvency situations.[1399] Hence, UK schemes of arrangement based on the Companies Act 2006, s885 are beyond the scope of the recast Regulation. In practice, schemes of arrangement have been utilized to restructure their business in UK by incorporating choice of law and choice of jurisdiction clauses into the underlying agreement,[1400] whereas those companies in fact have no clear links to the UK. As common law jurisdiction that was deeply influenced by the UK legal system, Hong Kong has also adopted the schemes of arrangement. That kind of restructure strategy also becomes workable in Hong Kong due to the recent decision handed down by the High Court of HKSAR.[1401] Moreover, without a statutory company rescue regime, corporate rescue currently can only be brought about through the procedure of a scheme of arrangement pursuant to the Companies Ordinance.[1402] Nowadays, more and more foreign companies doing business in China choose a dual company governance structure,[1403] which is composed of the onshore operation and the offshore operation. Hong Kong is always chosen as an intermediate place of incorporation in order to connect onshore operations with the offshore operations for more preferential tax rate,[1404] which can always be deemed as a sufficient connection with Hong Kong. Although schemes of arrangement indeed address insolvency issues, as told by the case law, its flexibility will make the jurisdiction concerning cross-border insolvency exercised by the Hong Kong Court way too extensive, which in essence contravenes the rule of assessment of COMI. Therefore, once the statutory company rescue regime is built up in Hong Kong, it is suggested to adopt the European approach, which requires that proceedings should be narrowed down to a law designed exclusively for insolvency situations.

5.77 Fourthly, the collective proceedings should be subject to control or supervision by a court. To properly understand the meaning of "control or supervision by a court", the Guide and Interpretation should be referred to because the EU Regulation (recast) does not provide any specified rules. First of all, a proceeding in which the debtor retains some measure of control over its assets, albeit under court supervision, such as a debtor-in-possession would fulfill the condition.[1405] In addition, indirect control or supervision exercised by an actor, such as an insolvency representative, who is subject to control or supervision by the court, can qualify as well.[1406] As for the proper time of control or supervision, it recognizes that expedited reorganization proceedings, which need control or supervision by a court at a late stage of the insolvency process, should also be counted in.[1407]

[1399] The EU Regulation (recast), recital (16)

[1400] *Re Apcoa Parking (UK) Ltd and others* [2014] EWHC 997 (Ch), at 39

[1401] *Re LDK Solar Co. Ltd.* [2014] HKCFI 2234

[1402] Cap 622, s. 668-670, 673, 674, 677

[1403] Lee, Emily, Comparing Hong Kong and Chinese Insolvency Laws and Their Cross-border Complexities, in: The Journal of Comparative Law, Vol. 9(2) 2015, p. 259-260

[1404] Daljit, Kaur and Susarla, Kamesh, Anti-Tax Avoidance Developments in Selected Asian Jurisdictions, Asia-Pacific Tax Bulletin, Volume 17, No 4, 2011, p.261

[1405] Guide and Interpretation, para.74

[1406] Guide and Interpretation, para.74

[1407] Guide and Interpretation, paras.75-76; See also Legislative Guide, Part two, Ch. IV, paras. 76-94 and Recommendations 160-168

5.78 Last but not least, fully aware of the importance of disclosure of information to the creditors and to preserve the collective nature of the proceeding, CICIA does not allow any confidential proceedings to be recognized and attempts to establish an inter-regional case register to facilitate exchange of information. In accordance with CICIA, insolvency proceedings should be public.

3.2.3 Exclusion

3.2.3.1 Personal Insolvency

5.79 It is suggested to exclude personal insolvency from CICIA. Although a natural person can be declared bankrupt in Hong Kong[1408], Macao[1409] and Taiwan[1410], there is no personal insolvency system in the Mainland. The reason was ascribed to lack of adequate personal property registered system and sound social credit environment.[1411] Instead, as aforementioned, it is participation in distribution system that takes its place, which cannot be regarded as insolvency proceedings under the proposed regional cross-border insolvency arrangement. As a system related to more fundamental questions about personal exemptions and discharge, it might be quite difficult to persuade the Mainland to accept a cross-border insolvency cooperation system including the personal insolvency, which is a system that has not been established there. Moreover, it is also better to start the cooperation with something in common, i.e. corporate insolvency.

3.2.3.2 Financial Institutions

5.80 In China, financial institutions, depending on the types of activities they perform, are governed by different specialized rules. In the Mainland, in the event that an a financial institution, such as commercial bank, securities company, insurance company, is insolvent, it is the administrative regulations, instead of the EBL, that come into play.[1412] In Hong Kong SAR, if a financial institute suffers a serious deterioration in its financial condition, the responsible regulatory authorities, in particular the Monetary Authority, Securities and Futures Commission and Insurance Authority, will initiate a set of supervisory intervention powers to carry out resolutions in accordance with the respective

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[1408] Cap 6 Bankruptcy Ordinance

[1409] CPCM, article 1185-1198

[1410] Taiwan Consumer Debt Clearance Act

[1411] Liu Jing, Credit Deficiency and Legislation Preference: Explanation of Difficulties to Establish China's Personal Insolvency System (in Chinese), in: Social Scientist, Issue 2, 2011, p.100

[1412] EBL, article 134; commercial bank: Regulations on the Cancellation of Financial Institutions 2001, Banking Supervision Law of the People's Republic of China (2006 Amendment), Regulation of Deposit Insurance System 2015; securities company: Opinions on the Purchase of Individual Creditor's Rights and Securities Trading Settlement Capital of Clients 2004, Notice of the People's Bank of China, the Ministry of Finance, China Banking Regulatory Commission and China Securities Regulatory Commission on Promulgating the Measures for Implementing the Purchase of Individual Credits and the Securities Trading Settlement Capital of Clients 2005, Notice of the People's Bank of China, Ministry of Finance, and China Securities Regulatory Commission on Relevant Issues concerning the Purchase of Individual Credit's Rights of Securities Companies and the Securities Trading Settlement Capital of Clients 2005; insurance company: Measures for the Administration of Insurance Protection Fund (2008)

ordinances.[1413] In Macao SAR, the Monetary and Foreign Exchange Authority of Macao (AMCM) is responsible for supervision of monetary and financial operations, in particular monitoring the performance of banking and insurance industries and taking relevant rescue measures, in accordance with the specialized rules.[1414] The ways of resolution of the Taiwanese financial institutions are scattered in relevant laws and regulations, such as Insurance Act, Insurance Deposit Act, Banking Act, Financial Institutions Merger Act, Financial Holding Company Act and etc.

5.81 Financial institutions have not been included into the corporate insolvency systems because they relate to vital interests of a large number of individuals that need to be prudentially supervised and protected, which usually requires particularly prompt action. In the context of cross-border insolvency, both the Regulation and the Model Law also exclude financial institutions from their scopes of application.[1415] Therefore, it is suggested that financial institutions are also exempted from the scope of application under CICIA.

Recommendation 4: Recognition and Reliefs

(1) An insolvency proceeding commenced in one region, that with respect to the debtor concerned, has the relevant international jurisdiction should be recognized as main or non-main insolvency proceeding and given appropriate effect under the circumstances in every other region.

(2) The courts of one region within the territory of which the center of the debtor's main interests is situated shall have jurisdiction to open main insolvency proceedings.

[1413] Cap 155 Banking Ordinance; Cap 571 Securities and Futures Ordinance; Cap 41 Insurance Companies Ordinance. It is noteworthy that the Financial Services and the Treasury Bureau of the Government ("FSTB"), in conjunction with the Hong Kong Monetary Authority ("HKMA"), the Securities and Futures Commission ("SFC") and the Insurance Authority ("IA") (together "the authorities") attempted to implement a legislative reform that is needed to strengthen the options available to the authorities for dealing with a crisis situation in which a systemically important financial institutions fails, which is expected to be introduced into a Bill to the Legislative Council by end-2015. See Financial Services and the Treasury Bureau, the Hong Kong Monetary Authority, the Securities and Futures Commission and the Insurance Authority, An Effective Resolution Regime for Financial Institutions in Hong Kong: Consultation Paper, 7 January 2014, available at: http://www.fstb.gov.hk/fsb/ppr/consult/resolution_e.pdf (Last visited on 14 June 2016), see also Financial Services and the Treasury Bureau, the Hong Kong Monetary Authority, the Securities and Futures Commission and the Insurance Authority, An Effective Resolution Regime for Financial Institutions in Hong Kong (second consultation paper): Conclusions from First Consultation and Further Policy Development, 21 January 2015, p.2; available at:
http://www.gov.hk/en/residents/government/publication/consultation/docs/2015/RR.pdf
(Last visited on 14 June 2016)

[1414] Macao Financial System Act, Decree Law no.32/93/M (of July 5th, 1993); Macao Deposit Protection Regime, Law no. 9/2012, 9 July 2012; Solvency Ratio (i.e. Capital Adequacy Ratio), Notice no. 011/2015-AMCM; Macao Insurance Ordinance, Decree-Law no. 27/97/M of 30 June; Legal framework for Private Pension Funds, Decree-Law no. 6/99/M of 8 February; Amendments to the Legal Framework of Private Pension Funds, Law no. 10/2001

[1415] The EU Regulation (recast), article 1(2); the Model Law, article 1(2), Guide and Interpretation paras.55-57

(3) The place of the registered office shall be presumed to be the COMI in the absence of proof to the contrary.

It should be possible to rebut this presumption where the debtor's central administration is located in a region other than that of its registered office, and where a comprehensive assessment of all the relevant factors establishes, in a manner that is ascertainable by third parties, that the debtor's actual center of management and supervision and of the management of its interests is located in that other region.

The relevant date at which COMI shall be determined is the date of commencement of the main insolvency proceedings.

(4) The courts of another region shall have jurisdiction to open a non-main insolvency proceedings against the debtor if it possesses an establishment within the territory of that other region.

(5) Establishment means any place of operations where a debtor carries out a non-transitory economic activity with human means and assets.

The relevant date at which an establishment of the debtor shall be determined is the date of commencement of the non-main insolvency proceedings.

(6) Upon recognition of an insolvency proceeding as a main proceeding:

(a) Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed; but the stay does not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor;

(b) Execution against the debtor's assets is stayed; and

(c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.

The scope, modification or termination of those aforementioned reliefs is subject to the law of the region where recognition and reliefs are sought. Those aforementioned reliefs do not affect the right to request the opening of an insolvency proceeding in the region where recognition and reliefs are sought.

(7) The following interim reliefs may be granted upon request of the insolvency practitioners in the main or non-main proceedings, from the time of filing an application for recognition until the application is decided upon:

(a) Staying execution against the debtor's assets;

(b) Entrusting the administration or realization of all or part of the debtor's assets located in the region to the insolvency practitioner in the main or non-main proceedings, in order to protect and preserve the value of assets

The interim reliefs can be refused to be granted if they would interfere with the administration of a main insolvency proceeding and unless extended, they terminate when the application for recognition is decided upon.

(8) Upon recognition of an insolvency proceeding, whether main or non-main, the court may, at the request of the insolvency practitioners in the main or non-main proceedings, grant any appropriate relief that may be available under the laws of this region where recognition and reliefs are sought.

Comments to Recommendation 4

5.82 In accordance with the recognition-based approach set up under the overriding objective (Recommendation 2), Recommendation 4 provides the rules of recognition and reliefs mainly by referring to the relevant rules under the Model Law. Jurisdiction only serves as the basis for recognition as main or non-main proceedings, upon recognition of which different reliefs shall be granted accordingly. In the comments, the fundamental principle of recognition and the reasons of choice of reliefs under CICIA will be demonstrated.

5.83 After having taken into consideration the recent development under the EU Regulation (recast), the crucial concepts, such as COMI and establishment, have been introduced into Recommendation 4. However, a look-back period as stipulated under the EU Regulation (recast) has not been introduced to assess the abusive forum shopping. The reasons are two-fold. First of all, a look-back period is set up for the purpose of prevention of abusive forum shopping under a jurisdiction dominant regime, which is not an objective under the Model Law or CICIA. Secondly, to which extent a look-back period can prevent abusive forum shopping and how long a look-back period can be effective and proper still needs to be tested. The look-back period actually has a direct effect on company reincorporation rather than a quick relocation of assets or business. Therefore, if a company was to shift its COMI instead of its registered office within a period of three months prior to a request for insolvency proceedings, it would fall outside the scope of Article 3(1) EIR Recast. That, according to Rudbordeh, would puncture the functionality of the look-back period.[1416]

5.84 Thus, it is sufficient to define COMI as a pre-insolvency concept to facilitate its assessment. Besides, considering that there may be gap period between the date of the application for commencement of insolvency proceedings and the date of commencement of insolvency proceedings, it is appropriate to refer to the date of commencement for the purposes of COMI determination because CICIA, as a recognition-oriented regime, is concerned only with existing

[1416] Rudbordeh, Amir Adl, An analysis and hypothesis on forum shopping in insolvency law: From the European Insolvency Regulation to its Recast, p.51, available at: https://www.iiiglobal.org/node/1932

insolvency proceedings. Especially under certain insolvency systems, the effects of commencement are backdated to the date of the application for commencement.[1417] (For detailed discussion, see Section 2.1.3 in Part IV) Moreover, it has been clearly indicated in the Guiding Principle that CICIA lays emphasis on cooperation and coordination between the main and the non-main proceedings and thus the effect of the opening of main proceedings is not as extensive as under that the EU Regulation (recast). Accordingly, CICIA does not synchronize the date to determine whether there is establishment by reference to the date of request for the opening of main proceedings, which is a decisive factor in the commencement of secondary proceedings under the EU Regulation (recast).

4.1 Comity as Foundation for Recognition

5.85 Recognition results in the effects of foreign law rendered by a foreign court entering into the sovereignty of the receiving state. Therefore, recognition in essence invokes an evaluation process of whether or not to defer to the laws of a foreign state in any given situation.[1418] UNCITRAL acknowledges there are two legal basis for international cooperation in the area of cross-border insolvency: reciprocity and comity.[1419] Although one of the key objectives of the Model Law is to establish simplified procedures for recognition of qualifying foreign insolvency proceedings,[1420] the evaluation process cannot be waived either on the basis of reciprocity or comity. Reciprocity was specially suggested as a requirement for recognition on more than one occasion in the negotiations that resulted in the Model Law and it was rejected by overwhelming consensus each time.[1421] Nevertheless, among the 43 jurisdictions enacting the Model Law, there are five of them, which have eventually adopted the reciprocal treatment de jure or de facto, including the British Virgin Islands (the BVI),[1422] Mauritius,[1423] Mexico,[1424] Romania[1425] and South Africa[1426].

[1417] Cap 32 Companies (Winding Up and Miscellaneous Provisions) Ordinance, s 184(2); Civil Procedure Code of Macao SAR, article 1044

[1418] Schuz, Rhona, The Doctrine of Comity in the Age of Globalization: between International Child Abduction and Cross-border Insolvency, in: BROOK. J. INT'L L. Vol.40, no.1, 2015, p.33

[1419] Guide and Interpretation, para.214, 215

[1420] Guide and Interpretation, para.29

[1421] Clift, Jenny, The UNCITRAL Model Law on Cross-border Insolvency – A Legislative Framework to Facilitate Coordination and Cooperation in Cross-border Insolvency, 12 Tul. J. Int'l & Comp. L., 2004, 325.

[1422] In accordance with the Section 437 of the Insolvency Act of the BVI, a designated foreign country is defined as a country or territory designated by the governor for the purpose of Part XVIII by notice published in the Gazette. See also Kite, Phillip, British Virgin Islands, & Kelly, Rachel, Van Zuylen, Claire, South Africa, in: Look Chan Ho (ed.), A Commentary on the UNCITRAL Model Law (3rd ed.), Global Law and Business, 2012, p. 58; 402-403

[1423] Pursuant to Insolvency Act 2009 of Mauritius, article 4, recognition of foreign insolvency proceedings will only be granted if there is sufficient reciprocity in dealing with insolvencies with jurisdictions that have trading or financial connections with Mauritius. See also Moller, Malcolm, Mauritius, in: Look Chan Ho (ed.), A Commentary on the UNCITRAL Model Law (3rd ed.), Global Law and Business, 2012, p. 289, 294-298

[1424] In accordance with Article 280 of the Commercial Insolvency Law of Mexico, "Unless there is no international reciprocity, the provisions of this title apply in cases when the treaties to which Mexico is a party do not provide otherwise." See also Perezalonso, Pablo, in: Look Chan Ho (ed.), A Commentary on the UNCITRAL Model Law (3rd ed.), Global Law and Business, 2012, p. 315

5.86 The doctrine of comity prevails in common law jurisdictions.[1427] What is comity? Comity has been described as "the vague and amorphous body of rules and principles which are not legally binding but which are regularly applied in dealings between states and their authorities … whose essence lies in mutual respect and accommodation between states and their interests".[1428] Comity is also a "complex and elusive" concept,[1429] which courts have attempted to define for more than a century but have never formed a workable definition.[1430] A landmark decision was handed down by Judge Gray of the US Supreme Court in *Hilton v Guyot*, who explained comity as follows:

"Comity, in the legal sense, is neither a matter of absolute obligation on the one hand, nor of mere courtesy and good will upon the other. But it is 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."[1431]

5.87 In practice, a court will not hesitate to refuse comity if "… according comity is contrary or prejudicial to the interests of the nation called upon to extend its effects."[1432] For all those descriptions, comity would not be qualified as a reliable basis for recognition of cross-border insolvency proceedings. According to Paul, however, it is the imprecision and vagueness that has allowed the doctrine of international comity to "mutate over time in ways that respond to different geopolitical circumstances."[1433]

5.88 On the basis of mutual trust, the Regulation provides a simplified mechanism, which allows automatic recognition of opening of insolvency proceedings between Member States in the EU. It also entails that the decision of the first court to open proceedings should be recognized in the other Member States without those Member States having the power to scrutinize that court's

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[1425] In accordance with article 18(1)(e) of Romanian Law on Regulating Private International Law Relations in the Field of Insolvency, "reciprocity concerning the effects of foreign judgments Romania and the State of the court that pronounced the judgment". See also Law No. 637 of 7 December 2002 on Regulating Private International Law Relations in the Field of Insolvency, English text Contributed by Jenny Clift, UNCITRAL, Vienna, published on http://www.iiiglobal.org/component/jdownloads/viewdownload/406/1480.html (Last visited on 14 June 2016)

[1426] Cross-border Insolvency Act (42/2000) of South Africa, Section 2(2) (b) provides that the Minister may only designate a State as contemplated in paragraph (a) if he or she is satisfied that the recognition accorded by the law of such a State to proceedings under the laws of the Republic relating to insolvency justifies the application of this Act to foreign proceedings in such State.

[1427] Guide and Interpretation, para.7

[1428] Cane, Peter, and Conaghan, Joanne, The New Oxford Companion to Law (online version), Oxford University Press, 2008, www.oxfordreference.com (Last visited on 14 June 2016)

[1429] *Laker Airways Ltd v Sabena, Belgian World Airlines* 731 F2d 909 (DC Cir 1984), 937, qtd: Yamauchi, Keith D., Should Reciprocity Be a Part of the UNCITRAL Model Cross-Border Insolvency Law?, in: 16 International Insolvency Review, Winter 2007, Issue 3, pp. 150

[1430] Janis, Mark W., International Law (6th ed.), 2012, p.373

[1431] *Hilton v Guyot* 159 US 113 (1895), 163-164

[1432] In the Matter of *Thornhill Global Deposit Fund Ltd*, 245 B.R. 1, at 16 (Bankr. D. Mass. 2000).

[1433] Paul, Joel R, The Transformation of International Comity, in: 71 Law and Contemporary Problems, 2008, p.20

decision.[1434] In short, the principle of mutual trust waives the right of the Member States to evaluate whether or not to grant recognition by referring to their internal rules. According to Wessels, both mutual trust and comity have their "shared historic roots in the 17th century Dutch doctrine of 'comitas gentium'".[1435]As indicated by Omar, the principle of mutual trust "has acceptance in the United Kingdom, where it is referred to as the comity principle, although lately the courts have also begun to refer to a doctrine of obligation".[1436] It seems that mutual trust within the EU is a strengthened version of comity, which turns the latter from a discrete element into an obligation of respect.

5.89 The recognition mechanism under CICIA is built up among the regions where the regional legal order and mutual trust is still under construction and meanwhile some jurisdiction strictly adheres to the principle of reciprocity, such as the Mainland in handling cross-border insolvency cases.[1437] Considering that the principle of reciprocity, which the Model Law tried to get rid of, could result in a stalemate or retaliatory action concerning recognition and thus goes against the purposes of closer cooperation within a country where the integration is undergoing, a balanced solution between mutual trust (strengthened comity) and reciprocity thus needs to be sought on the basis of the flexible nature of comity.

5.90 The recognition mechanism under CICIA sets out jurisdiction as the sole criterion for recognition, as required under the Model Law. According to the doctrine of comity, the judgment concerning the opening of the insolvency proceeding should be recognized based on the respect of one jurisdiction for another.[1438] Given the fact that comity is a weaker foundation than mutual trust (strengthened comity), a functional dispute settlement mechanism (Recommendation 8) will be introduced into CICIA, which helps to reconcile the

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[1434] The EU Regulation (recast), recital (65)

[1435] Wessels, The Comity Principle, in: Amice, Rutgers-bundel (Opstellen, op 26 April 2005 aangeboden aan prof. mr. G.R.Rutgers ter gelegenheid van zijn afscheid van de Rijksuniversiteit Groningen), Kluwer, 2005, p.359.

[1436] Omar, Paul, European Insolvency Law, United Kingdom: Ashgate Publishing, Aldershot, 2004, p.105.

[1437] EBL, article 5(2): Where any legally effective judgment or ruling made by a foreign court involves any debtor's assets within the territory of the People's Republic of China and if the debtor applies with or requests the people's court to confirm or enforce it, the people's court shall, according to the relevant international treaties that China has concluded or acceded to or according to the principles of reciprocity, conduct an examination thereon and, when believing that it does not violate the basic principles of the laws of the People's Republic of China, does not damage the sovereignty, safety or social public interests of the state, does not damage the legitimate rights and interests of the debtors within the territory of the People's Republic of China, grant confirmation and permission for enforcement.

In the Hua An Funds case, by investigating the precedents of the UK court, the judge held there was no judgment that the UK courts recognized and enforced the insolvency rulings rendered by Chinese courts and there were no relevant bilateral treaties between UK and China. Hence the effect of the UK insolvency proceeding failed to be recognized. See Zhang Fengxiang, The Needs for Improvement of Relevant Laws Arising from the Financial Derivative Products Cooperative Disputes between Hua An Funds and Lehman Brothers International Europe (in Chinese), in: Frontier of Financial Law, 2011, p.33-45

[1438] Paul, Joel R, The Transformation of International Comity, in: 71 Law and Contemporary Problems, 2008, p.23

conflicts invoked by jurisdiction and safeguard coherent interpretation on crucial provisions, such as COMI. In addition, the functional dispute settlement mechanism is designed in the way that the disputes should be settled down through judicial negotiation and discussion between the Mainland and the SARs on an equal footing, which will contribute to build up mutual respect that is at the core of this idea of comity.[1439]

4.2 Reliefs

4.2.1 Intentional Lack of Uniform Choice of Law Rules

5.91 CICIA does not provide uniform choice of law rules. From the technical perspective, as addressed by UNCITRAL, it is difficult to find a reconciled solution to uniform choice of law rules due to lack of harmony among diverse local insolvency laws.[1440] Besides, insolvency systems in different jurisdictions in China are still undergoing development, such as Hong Kong SAR and Taiwan. Accordingly, relevant rules including priority rules, security interests, avoidance of transactions, are still under reform, which makes harmony even more difficult at this moment.

5.92 In addition, there is a tendency of convergence between harmonization of substantive law and uniform choice of law rules. As remarked by Bridge, "it is a fallacy to believe that uniform substantive law and choice of law are mutually exclusive processes". In accordance with the Basic Law, the SARs are granted with legislative power[1441] and national laws are not directly applicable to the SARs unless those laws stay outside the limits of the autonomy of the SARs and are listed in the Annex to the Basic Law.[1442] Therefore, the interaction of legislation between the Mainland and SARs needs to proceed with due caution. That's why there is no uniform conflict of law rules under the current bilateral legal cooperation arrangement between the Mainland and SARs, in particular in matters of recognition and enforcement of civil and commercial judgments. Without equivalent solid legal foundation for harmony or approximation of laws as in the EU,[1443] consensus upon uniform choice of law rules between the Mainland and SARs is necessary, which depends on one region's view on the other regions' law as well as on a number of relevant social, political, financial, and other considerations. Given the fact that the mutual trust between the Mainland and SARs is still under construction, it will probably take a while before such a consensus can be reached.

4.2.2 List of Minimum Reliefs

[1439] Paul, Joel R, The Transformation of International Comity, in: 71 Law and Contemporary Problems, 2008, p.23

[1440] Jenny Clift, International Insolvency Law: The UNCITRAL Experience with Harmonization and Modernization Techniques, 11 Y.B. PRIVATE INT'L L. 405, 2009, p.424

[1441] Basic Law of HKSAR, article 17; Basic Law of Macao SAR, article 17

[1442] Basic Law of HKSAR, article 18; Basic Law of Macao SAR, article 18

[1443] TFEU, article 114

5.93 Without safeguard of uniform choice of law rules, the effects of insolvency proceedings are guaranteed by a list of minimum reliefs pursuant CICIA. The reliefs under the Model Law have been used to a great degree for reference, which are composed of automatic reliefs and discretionary reliefs.

5.94 Automatic reliefs are mandatory and solely granted upon recognition of the main proceedings alone. Notwithstanding the "automatic" or "mandatory" nature, the automatic reliefs upon recognition of the main proceedings might be subject to certain exception, limitation, modification or termination in accordance with the law of the region where recognition is sought. Discretionary reliefs include provisional reliefs and any appropriate reliefs available upon recognition under the laws of the region where recognition is sought.

5.95 When deciding whether or not to grant discretionary reliefs, an issue arises regarding whether the laws can also refer to private international law in that region. As addressed by Fletcher in the context of the Regulation, the law shall "only refer to the substantive domestic law of the Member State concerned".[1444] Otherwise, it will allow recourse to *renvoi*, which would be inconsistent with "the very objective of harmonization of choice of law rules" under the Regulation.[1445] Therefore, it is suggested that private international law shall be excluded from the references of the local laws, on the basis of which the discretionary reliefs can be granted so as to prevent the application of *renvoi* and reduce complexity and uncertainty in the course of implementation of CICIA.

Recommendation 5: Public Policy

Any region may refuse to recognize insolvency proceedings opened in another region or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that region's public policy, in particular its fundamental principles or the constitutional rights and liberties of its citizens.

Comments to Recommendation 5

5.96 Recommendation 5 provides the only negative condition of recognition, which is public policy. The proper degree of discretion on application of public policy will be discussed from both international and domestic perspectives.

5.97 As a bar to recognition and enforcement of cross-border insolvency proceedings, public policy has been incorporated into both the Regulation and the Model Law. The difference is public policy is interpreted by the CJEU in a very restrictive manner and is expected to be applied in exceptional cases in the

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[1444] Moss, Gabriel, Fletcher, Ian F, Isaacs, Stuart (ed.), The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide (2nd ed.), Oxford University Press, 2009, at 4.04

[1445] Moss, Gabriel, Fletcher, Ian F, Isaacs, Stuart (ed.), The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide (2nd ed.), Oxford University Press, 2009, at 4.04

EU.[1446] Whereas the scope of public policy under the Model Law is considered broader and public policy has been more frequently triggered to refuse to grant reliefs in particular on the basis of its substantive contents in its enacting states. (Please refer to Part IV, section 3.3)

5.98 In EU the Member States are allowed an area of discretion within the limits imposed by the Treaty. Nevertheless, the CJEU has in fact played the role of supervisor in guiding the Member States to invoke their public policy exception. It has been observed by Kessedjian that the CJEU

"no longer hesitates, if it ever did, to look over the shoulder of the member states and to decide whether a rule that a member state considers to be mandatory and covered by the public policy exception does indeed qualify to be characterized as such."[1447]

5.99 In the case of *Régina v Pierre Bouchereau*, the CJEU held

"recourse by a national authority to the concept of public policy presupposes, in any event, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society."[1448]

5.100 With respect to recognition of civil and commercial cases, the CJEU has repeatedly stressed that

"Recourse to the clause on public policy in Article 27, point 1, of the Convention can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. In order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognized as being fundamental within that legal order.[1449]"

5.101 It is also indicated in the *Eurofood* case that

"Considering itself competent to review the limits within which the courts of a Contracting State may have recourse to that concept for the purpose of refusing recognition to a judgment emanating from a court in another Contracting State, the Court of Justice had held, in the context of the Brussels Convention, that recourse to that clause can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. The infringement would have to constitute a manifest breach of

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[1446] *Eurofood,* para.67; Hess/Pfeiffer, Interpretation of the Public Policy Exception (IP/C/JURI/IC/2010-076), pp. 30 et seqq. & pp.167-168

[1447] Kessedjian, Cathrine, Public Order in European Law, Erasmus Law Review, Vol. 01, Issue 01, 2007, pp. 30

[1448] Case C-30/77, *Régina v Pierre Bouchereau* [1977] ECR I-01999, at 35

[1449] Case C-7/98, *Dieter Krombach v André Bamberski* [2000] ECR I-01935, at 37; Case C-38/98, *Régie nationale des usines Renault SA v Maxicar SpA and Orazio Formento* [2000] ECR I-02973, at 30

a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognized as being fundamental within that legal order."[1450]

5.102 Although the concept of public policy may vary from one State to another, the continuous efforts of the CJEU have gradually cultivated a consensus that the Member States are very self-restraint in invoking public policy exception to a very limited extent.[1451]

5.103 As pointed out by UNICTRAL, there is a dichotomy between the notion of public policy under the domestic law and the notion of public policy as it applies to recognition of effects of foreign laws. It is emphasized that public policy in the context of international cooperation should be understood more restrictively than domestic public policy.[1452] Therefore, broader understanding and application of the public policy to protect local interests is also inconsistent with the genuine intent of the Model Law. According to Dawson, however, the Model Law lack in harmonious efforts on incoherent interpretation,[1453] which facilitate the deviation.

5.104 Public policy is an ambiguous and elusive concept. Especially in the Mainland, different terms concerning public policy have been applied, such as fundamental principles of law, state sovereignty and security, socio-public interests, which can probably bring about more problems with respect to proper interpretation. To unify application of public policy, the Supreme People's Court has taken some measures. For example, Notice on Several Issues Concerning the People's Court's Handling Relevant Affairs to the Foreign or Foreign-Related Arbitration was issued in 1995.[1454] It provides that if a lower court decides to refuse to recognize a foreign arbitral award, it should report the case to a corresponding High People's Court for review before the decision is handed down. If the High People's Court accords with the lower court and also decline to recognize the foreign arbitral award, it should report its decision to the Supreme People's Court. Before the Supreme People's Court gives its reply, the refusal decision cannot be handed down.[1455] The "Report Mechanism", according to He's case study, has guided the application of public policy to recognition of foreign arbitral awards has been conducted in a self-restraint manner.[1456] Two merits can be concluded from that mechanism. First of all, it helps to distinguish external from internal public policies expressed in domestic laws. Secondly, it gradually makes clear what constitute violation of public policies in the context of foreign arbitral award.

[1450] *Eurofood*, at 63
[1451] Hess/Pfeiffer, Interpretation of the Public Policy Exception (IP/C/JURI/IC/2010-076), pp. 30 et seqq. & pp.167-168.
[1452] Guide and Interpretation, para.103
[1453] Dawson, Andrew B., The Problems of Local Methods in Cross-border Insolvencies, 2015, p.4, available at: http://iiiglobal.org/iii-prize-in-insolvency.html (Last visited on 14 June 2016)
[1454] [1995] Judicial Interpretation No.18
[1455] [1995] Judicial Interpretation No.18, article 2
[1456] He, Qisheng, Public Policy in Enforcement of Foreign Arbitral Awards in the Supreme People's Court of China, in: 43 Hong Kong L. J.1037, 2013, p.1041

5.105 Under CICIA, it is suggested to apply more restrictive interpretation of public policy on a regional level in cross-border insolvency cooperation. Meanwhile, a functional dispute settlement mechanism is to be established (See Recommendation 8) to safeguard harmonious understanding of the provisions, including public policy.

Recommendation 6 – Cooperation and Communication (single debtor and enterprise groups)

(1) An insolvency practitioner shall, in the exercise of its functions and subject to the supervision of the court, cooperate and communicate to the maximum extent possible with the courts or insolvency practitioners in other regions.

(2) Where insolvency proceedings relate to two or more members of a group of companies, an insolvency practitioner appointed in proceedings concerning a member of the group shall cooperate and communicate with the courts and any insolvency practitioner appointed in proceedings concerning another member of the same group to the maximum extent possible.

Comments to Recommendation 6

5.106 Recommendation 6 addresses the issue of cooperation and communication. Considering the legal basis and forms of the current legal cooperation between the Mainland and the SARs, it will be explained why the direct court-to-court cooperation and communication is not workable in China's context and proposes a balanced solution.

6.1 Legal Basis

5.107 Considering the significant supervisory role of courts in the insolvency proceedings,[1457] cooperation and communication between the courts is regarded as "an essential element"[1458] of coordination of cross-border insolvency proceedings. The problem is whether there is sufficient legal basis to support this kind of cooperation and communication in China. The Basic Law provides the fundamental legal basis for judicial cooperation between the Mainland and the SARs,[1459] which contributes to closer cooperation between the courts within one country. In practice, there is court-to-court cooperation between the Mainland and the SARs, which is stipulated under the bilateral legal cooperation arrangements in civil and commercial matters, including service of judicial documents, taking of evidence and recognition and enforcement of civil and commercial judgments.

6.2. Court-to-court Cooperation and Communication in Practice

6.2.1 Service of judicial documents

[1457] UNCITRAL Practice Guide on Cooperation, III, para.148
[1458] UNCITRAL Practice Guide on Cooperation, II, para.4
[1459] The Basic Law of HKSAR, article 95; the Basic Law of Macao SAR, article 93

5.108 The Mainland China, Hong Kong SAR and Macao SAR are all Contracting Parties to Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (hereinafter, the Hague Service Convention. For detailed information, please refer to Annex V) In accordance with the Hague Service Convention, the main channel to accept the request of service of the documents is through the Central Authority designated by the respective Contracting Parties,[1460] who are the Ministry of Justice in the Mainland China, Chief Secretary for Administration in Hong Kong SAR and the Procuratorate of the Macao Special Administrative Region.[1461] Whereas founded on the Basic Law, bilateral arrangements with respect to service of documents in civil and commercial matters were entered into between the Mainland and the two SARs, in which it is stipulated that the service of judicial documents shall be conducted in a court-to-court manner.[1462] Requests for service of judicial documents shall be made through the various High People's Courts in the Mainland and the High Court of Hong Kong SAR or the Court of Final Appeal of Macao SAR. The Supreme People's Court in the Mainland can make the direct requests to the High Court of Hong Kong SAR and the Court of Final Appeal of Macao SAR for service of judicial documents.[1463]

6.2.2 Taking of Evidence

5.109 With respect to taking of evidence, the situation becomes more complicated. The Mainland, Hong Kong SAR and Macao SAR are all Contracting Parties to Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (hereinafter the Hague Evidence Convention. For detailed information, please refer to Annex V). Under most circumstances, a judicial authority of a Contracting State will send a letter of request to the Central Authority designated by another Contracting State to obtain evidence.[1464] The Central Authorities designated according to the Hague Evidence Convention are the same as under the Hague Service Convention. Between the Mainland and the Macao SAR, requests for taking of evidence shall be conducted in a court-to-court way like that under the bilateral arrangement of service of judicial documents.[1465] Nevertheless, the Mainland and the Hong Kong SAR have not reached any bilateral arrangement on taking of evidence. In practice, it occurred that certain High People's Court in the Mainland sent requests directly to the Hong Kong SAR

[1460] The Hague Service Convention, article 2

[1461] Please visit: http://www.hcch.net/index_en.php?act=conventions.authorities&cid=17 (Last visited on 14 June 2016)

[1462] Arrangement for Mutual Service of Judicial Documents in Civil and Commercial Proceedings between the Mainland and Hong Kong Courts, article 1; Arrangement for Mutual Service of Judicial Documents and Exchange of Evidence in Civil and Commercial Proceedings between the Mainland and the Macao SAR Courts, article 1

[1463] Arrangement for Mutual Service of Judicial Documents in Civil and Commercial Proceedings between the Mainland and Hong Kong Courts, article 2; Arrangement for Mutual Service of Judicial Documents and Exchange of Evidence in Civil and Commercial Proceedings between the Mainland and the Macao SAR Courts, article 2

[1464] The Hague Evidence Convention, article 1,2

[1465] Arrangement for Mutual Service of Judicial Documents and Exchange of Evidence in Civil and Commercial Proceedings between the Mainland and the Macao SAR Courts, article 1,2

for assistance in investigation and taking of evidence.[1466] Therefore, in 2013, the Supreme People's Court issued a notice in order to instruct the people's courts in the Mainland to properly handle the Hong Kong related judicial assistance in matters of investigation and taking of evidence (Notice of the Supreme People's Court on Further Regulating the Work of People's Courts concerning Hong Kong Related Judicial Assistance in Matters of Investigation and Taking of Evidence, the Notice). It is stipulated under the Notice that before any bilateral arrangement has been made between the Mainland and the Hong Kong SAR, any local people's court may not directly make a request for assistance in investigation and taking of evidence to the Hong Kong SAR or directly accept any request for assistance in investigation and taking of evidence from the Hong Kong SAR. Requests for taking of evidence and investigation of the local people's court shall be submitted level by level to the Supreme People's Court for approval and forwarded through the Hong Kong and Macao Affairs Office of the State Council in the Mainland to the Government of the Hong Kong SAR and vice versa.[1467]

6.2.3 Recognition and Enforcement of Civil and Commercial Judgments

5.110 The unbalance situations also exist in the bilateral arrangements with respect to recognition and enforcement of civil and commercial judgments. Under the Mainland and Macao SAR arrangement, the courts of one side can request the other side to verify the genuineness of the judgment.[1468] In order to implement the arrangement, the Supreme People's Court and the Court of Final Appeal of Macao shall mutually provide the relevant legal materials. The Supreme People's Court and the Court of Final Appeal of Macao shall mutually circulate the notice on the enforcement of the arrangement every year.[1469] That was remarked by Zhang and Smart as "a cross-border cooperative scheme" established under the Mainland and Macao SAR arrangement, which was "not considered appropriate to help to mediate the sharp disparities between the common law system in Hong Kong and the Mainland legal system".[1470]

6.3 Courts as Supervisors

5.111 It suffices to say that the legal foundation provided under the Basic Law can establish direct court-to-court cooperation and communication, such as bilateral judicial assistance in accordance with the Mainland and Macao

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[1466] Notice of the Supreme People's Court on Further Regulating the Work of People's Courts concerning Hong Kong Related Judicial Assistance in Matters of Investigation and Taking of Evidence, No. 26 [2013] of the Supreme People's Court, para.2

[1467] Notice of the Supreme People's Court on Further Regulating the Work of People's Courts concerning Hong Kong Related Judicial Assistance in Matters of Investigation and Taking of Evidence, No. 26 [2013] of the Supreme People's Court, para.3

[1468] Arrangement between the Mainland and the Macao Special Administrative Region on the Mutual Recognition and Enforcement of Civil and Commercial Judgments, article 7

[1469] Arrangement between the Mainland and the Macao Special Administrative Region on the Mutual Recognition and Enforcement of Civil and Commercial Judgments, article 23

[1470] Zhang Xianchu, Smart, Philip, Development of Regional Conflict of Laws: On the Arrangement of Mutual Recognition and Enforcement of Judgments in Civil and Commercial Matters between Mainland China and Hong Kong SAR, in: 36 Hong Kong L. J. 553, p.565

arrangements. However, it cannot be deemed as guarantee if either side is not yet ready to cooperate. Considering the absence of court-to-court cooperation and communication pursuant to the Mainland and the Hong Kong arrangements, the willingness of the courts between civil and common law jurisdictions to conduct direct cooperation and communication becomes a key obstacle to face up to. To find a balanced solution between limits on direct cooperation and communication and the courts as an essential element in supervising coordination, it is suggested that the courts under CICIA plays the role of supervisors, who monitor cooperation and communication actions conducted by the insolvency practitioners. For example, as to be discussed in Recommendation 7, cooperation and communication between the insolvency practitioners is designed in the form of cross-border insolvency agreements under CICIA, which shall be approved by the courts.

Recommendation 7 – Cross-border Insolvency Agreements

(1) In the course of cooperation and communication, insolvency practitioners, who are subject to the jurisdiction of their own courts, can cooperate with each other closely to enter into cross-border insolvency agreements, which shall be approved by the courts.

(2) The independence, sovereignty or jurisdiction of the relevant local courts should not be affected by the agreement.

(3) The agreement concluded can cover the following basic contents:
(a) Allocation of responsibilities between the different courts involved and between insolvency practitioners; including limitations on authority to act without the approval of the other courts or insolvency practitioners;
(b) methods of communication, including language, frequency and means;
(c) sharing of information on claims lodged, the verification and disputes concerning claims;
(d) location, use and disposal of assets;
(e) coordination and harmonization of reorganization plans;
(f) costs and fees
(g) all other elements that can contribute to efficient coordination of inter-regional insolvency proceedings

If the courts or the insolvency practitioners after discussion find something useful to add beyond the aforementioned scope, they shall not be limited as long as it is not inconsistent with the local mandatory rules.

(4) In matters of enterprise groups, the agreement can include:
(a) means of timely communication of any relevant information concerning the group members subject to insolvency proceedings, provided appropriate arrangements are made to protect confidential information;
(b) coordination of the administration and supervision of the affairs of the group members subject to insolvency proceedings;
(c) coordination of the proposal and of reorganization plans;
(d) allocation of powers or responsibilities between insolvency practitioners

(e) costs and fees
(f) all other elements that can contribute to efficient coordination of inter-regional group insolvency proceedings

If the courts or the insolvency practitioners after discussion find something useful to add beyond the aforementioned scope, they shall not be limited as long as it is not inconsistent with the local mandatory rules

(5) Complementary cross-border insolvency agreements shall also be allowed to address some issues upon prompt need on an ad hoc basis.

Comments to Recommendation 7

5.112 Recommendation 7 provides rules concerning cross-border insolvency agreements. It will examine the inherent features and possible contents of cross-border insolvency agreements under CICIA. It will also explain the incompatibility of a single insolvency practitioner for coordination of group insolvency proceedings in China's context and further discuss the possibility of complementary agreements.

7.1 Features of Cross-border Insolvency Agreements

5.113 Among various communication and cooperation instruments provided in accordance with the prevailing relevant international insolvency regimes, including EU Regulation (recast), UNCITRAL Model Law, UNCITRAL Practice Guide on Cross-border Insolvency Cooperation, UNCITRAL Legislative Guide on Insolvency Law: Part III Treatment of Enterprise Groups in Insolvency, the Global Principles and the EU JudgeCo Principles, cross-border insolvency agreement is the coordinating tool explicitly recommended under all of them.

5.114 As an instrument developed from the practice, the outstanding merit of a cross-border insolvency agreement is its flexibility. Ehricke cast doubt on the flexibility of a cross-border insolvency agreement and considered that the agreement entered into in advance might not be able to address the unexpected issues in the course of proceedings or deal with unforeseen events.[1471] To ease the concern about flexibility, it has to be pointed out other significant features of cross-border insolvency agreements. Due to inadequacy of cooperation and communication rules, cross-border insolvency agreements were invented by insolvency practitioners as the alternative solution, which could also generate binding effects. With development of cooperation and communication in practice, a cross-border insolvency agreement is no longer a pure coordinating instrument but gradually evolves into a medium, which contains framework of coordination as well as combination of coordinating instruments and facilitates them to function in an orderly manner. As for the potential disputes arising in the course of the insolvency proceedings, joint or coordinated hearings are

[1471] Ehricke, Ulrich, Die Zusammenarbeit des Insolvenzverwalter bei grenzüberschreitenden Insolvenzen nach der EUInsVo, Wertpapier-mitteilungen; Zeitschrift für Wirtschafts-ung Bankrecht (WM), 2005, 397

frequently incorporated into cross-border insolvency agreements as dispute settlement mechanism.[1472]

5.115 The other feature as pointed out by Part Three of the Legislative Guide that the cross-border insolvency agreements "can be regarded as contracts between the signatories or, in case of approval by the court, may obtain the legal status of a court order".[1473] Therefore, cross-border insolvency agreements, as contracts in nature, are entered into on the basis of consensus between the insolvency practitioners, or sometimes between the courts.[1474] Accordingly, a cross-border insolvency agreement should be deemed as a qualified cooperation instrument, which also falls within the ambit of the Basic Law that requires the judicial organs of each region to render assistance to each other on an equal footing.[1475]

7.2 Contents of the Agreements

5.116 The scopes of the contents that are addressed by the cross-border insolvency agreements vary in different legal systems. The contributions of the

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[1472] ABTC, Ontario Superior Court of Justice, Toronto, Case No. 31-OR-371448 (16 June 2000), and the United States Bankruptcy Court for the District of Nevada, Case No. 500-10534 (28 June 2000) (unofficial version). Everfresh, Ontario Court of Justice, Toronto, Case No. 32-077978 (20 December 1995), and the United States Bankruptcy Court for the Southern District of New York, Case No. 95 B 45405 (20 December 1995). Financial Asset Management, United States Bankruptcy Court for the Southern District of California, Case No. 01-03640-304, and the Supreme Court of British Columbia, Case No. 11-213464/VA.01 (2001). Laidlaw, Ontario Superior Court of Justice, Toronto, Case No. 01-CL-4178 (10 August 2001), and the United States Bankruptcy Court for the Western District of New York, Case No. 01-14099 (20 August 2001). Livent, United States Bankruptcy Court for the Southern District of New York, Case No. 98-B-48312, and the Ontario Superior Court of Justice, Toronto, Case No. 98-CL-3162 (11 June 1999). Loewen, United States Bankruptcy Court for the District of Delaware, Case No. 99-1244 (30 June 1999), and the Ontario Superior Court of Justice, Toronto, Case No. 99-CL-3384 (1 June 1999). Mosaic, Ontario Court of Justice, Toronto, Court File No. 02-CL-4816 (7 December 2002), and the United States Bankruptcy Court for the Northern District of Texas, Case No. 02-81440 (8 January 2003). 360Networks, British Columbia Supreme Court, Vancouver, Case No. L011792 (28 June 2001), and United States Bankruptcy Court for the Southern District of New York, Case No. 01-13721 (29 August 2001). Pope & Talbot, Supreme Court of British Columbia, Vancouver, Case No. SO77839, (14 December 2007), and the United States Bankruptcy Court for the District of Delaware, Case. No. 07-11738. Progressive Moulded, Ontario Superior Court of Justice, Commercial List, Court File No. CV-08-7590-00CL (24 June 2008), and United States Bankruptcy Court for the District of Delaware, Case No. 08-11253 (14 July 2008). PSINet, Ontario Superior Court of Justice, Toronto, Case No. 01-CL-4155 (10 July 2001), and the United States Bankruptcy Court for the Southern District of New York, Case No. 01-13213 (10 July 2001). Quebecor, Montreal Superior Court, Commercial Division, No. 500-11-032338-085, and the United States Bankruptcy Court for the Southern District of New York, No. 08-10152 (JMP) (2008). Solv-Ex, Alberta Court of Queen's Bench, Case No. 9701-10022 (28 January 1998), and the United States Bankruptcy Court for the District of New Mexico, Case No. 11-97-14362-MA (28 January 1998). Systech, Ontario Court of Justice, Toronto, Court File No. 03-CL-4836 (20 January 2003), and the United States Bankruptcy Court for the Eastern District of North Carolina, Raleigh Division, Case No. 03-00142-5-ATS (30 January 2003). Nortel Network, In *re Nortel Networks Corp*, 426 B.R. 84 (Bankr. D. Del. 2010), Exhibit A to the Declaration of John Ray, dated February 18, 2010.

[1473] Part III of the Legislative Guide, III, para.50

[1474] Wessels, Cross-border Insolvency Agreements: What Are They and Are They Here to Stay?, in: n: N.E.D. Faber, J.J. van Hees, N.S.G.J. Vermunt, Overeenkomsten en insolventie, Serie Onderneming en Recht, deel 72, Deventer: Kluwer 2012, p.370

[1475] The Basic Law of HKSRA, article 95; the Basic Law of Macao SAR, article 92

common law countries to the development of the cross-border insolvency agreements cannot be underestimated, where high level of discretion can be granted to judges and insolvency practitioners.[1476] In the event of potentially conflicting procedural and substantive interests or concerns, the courts and insolvency practitioners are allowed to set aside those contents out of the agreement and cooperate to the extent they can reach according to specific circumstances of individual cases.

5.117 The scopes of the contents can expand if there are no ready-made rules for reference. In the AIOC case, it involved insolvency proceedings concerning AIOC Corporation and AIOC Resources AG in the U.S. and in the Switzerland. By then, the U.S. did not adopt the Model Law. The Switzerland is neither an Enacting State of the Model Law nor a Member State of EU. In the absence of relevant international insolvency systems, the Chapter 11 Trustee assigned by the U.S. court and the Swiss Bankruptcy Office appointed by the Swiss court entered into a cross-border insolvency agreement and were committed to taking whatever actions required in accordance with the local legislations "to have any and all claims recognized in both the Chapter 11 Case and the Swiss Proceedings without the need for additional filings by any creditor that has not filed a claim in both proceedings".[1477] The scopes of the contents can also shrink if that is inconsistent with the substantive laws involved. The *Loewen* case in 1999 was such an example.[1478] It is said that the Loewen cross-border insolvency agreement has been regarded as a model and “repeated word-for-word in virtually every agreement jointly entered into by U.S. and Canadian courts in the ten years subsequent to its adoption”.[1479] The success of Loewen agreement has been summarized as “it says so little”[1480]. Based on the principle of comity, the Loewen agreement fully acknowledged the independent jurisdiction of the individual courts, i.e. the U.S. court and Canadian court[1481] and did not deal with disputable issues such as jurisdiction and applicable law. In addition to court-to-court communication provisions,[1482] the Loewen agreement focused on joint recognition of the stay of proceedings and actions as stipulated under the foreign law[1483] and dispute settlement procedure relating to the application of the agreement, including opening of a joint hearing of both courts.[1484]

[1476] Taylor, Stephen, The Use of Protocols in Cross Border Insolvency Cases, in: Pannen, Klaus (ed.), European Insolvency Regulation, De Gruyter Recht, 2007, p.682

[1477] Cross-Border Liquidation Protocol For AIOC Resources, AG, et al., II-C, available at http://www.casselsbrock.com/cb/pdf/AIOC.pdf (Last visited on 14 June 2016)

[1478] *In re Loewen Group Inc.*, Case No. 99-1244 (Bankr. D. Del. June 30, 1999); the protocol can be downloaded from http://www.iiiglobal.org/component/jdownloads/finish/573/1753.html (Last visited on 14 June 2016)

[1479] Maltese, Michele, Court-to-Court Protocols in Cross-border Bankruptcy Proceedings: Differing Approaches between Civil Law and Common Law Legal Systems, 2013, at 15-16 & ft.48. http://www.iiiglobal.org/iii-prize-in-insolvency/2013iiiprizeannouncement.html (Last visited on14 June 2016)

[1480] Wessels, Bob, Markell, BRUCE A., & Kilborn, JASON J., International Cooperation in Bankruptcy and Insolvency Matters, Oxford University Press, 1st ed., 2009, at 43

[1481] *In re Loewen Group Inc.*, Case No. 99-1244 (Bankr. D. Del. June 30, 1999), para. 6 - 9

[1482] *In re Loewen Group Inc.*, Case No. 99-1244 (Bankr. D. Del. June 30, 1999), para. 10 - 12

[1483] *In re Loewen Group Inc.*, Case No. 99-1244 (Bankr. D. Del. June 30, 1999), para. 22 - 24

[1484] *In re Loewen Group Inc.*, Case No. 99-1244 (Bankr. D. Del. June 30, 1999), para. 27

5.118 Besides, in accordance with Principle 1 of the Global Principles, nothing incorporated into the cross-border insolvency agreements should (1) interfere with the independence or exercise of jurisdiction of the relevant national courts involved; (2) interfere with the national rules or ethical principles applicable to an insolvency practitioner; (3) confer substantive rights, to interfere with any function or duty arising out of any applicable law and professional rules or to encroach upon any local law. In the EU, the Regulation has provided systematic rules of jurisdiction, applicable law, recognition and enforcement of cross-border insolvency proceedings. Accordingly, the contents of the cross-border insolvency agreements reached in EU shall also be reduced to accommodate themselves to the restrictions set under the binding legislations.

5.119 Pursuant to CICIA, as both SARs are vested with independent judicial power,[1485]any forms of cross-border insolvency cooperation, including cross-border insolvency agreements, should not interfere with the independence or exercise of jurisdiction of the relevant local courts involved. In addition, suggestions have been made on establishment of a balanced regime between a recognition-oriented approach and a jurisdiction-oriented approach. Considering that the uniform choice of law rules might possibly result in interference with local substantial law, it will be incompatible with the restrictions under the current Basic Law,[1486] which thus shall be avoided at this moment. With systematic arrangement of recognition, disputes settlement on jurisdiction issues and exclusion of choice of law rules, the contents of cross-border insolvency agreements under CICIA shall not cover the matters that have already been treated or are subject to deliberate omission. Besides, the contents of cross-border insolvency agreements should mainly focus more on procedure, instead of conferring substantive rights to interfere with any function or duty arising from any local law. In addition to those basic contents, the specific issues in the course of cooperation and communication are left to the courts or the insolvency practitioners to make decision as long as they are not inconsistent with the local mandatory rules. After all, a cross-border insolvency agreement is a flexible tool, whose merits shall be maintained in a flexible way. In the meantime, insolvency proceedings are usually enduring and continuous. Therefore, it is expected that the courts will play the significant supervisory role through the entire process.[1487]

7.3 Proper Means of Cooperation and Communication for Enterprise Groups

5.120 Cross-border insolvency agreements have been and recommended by UNCITRAL as an efficient means to coordinate the insolvency proceedings involving enterprise groups,[1488] which is also introduced into the EU Regulation (recast). [1489] Meanwhile, there is an instrument parallel to cross-border insolvency agreements in addressing issues concerning enterprise groups, which is appointment of a single insolvency practitioner as coordinator as to facilitate

[1485] The Basic Law of HKSAR, article 19; The Basic Law of Macao SAR, article 19
[1486] The Basic Law of HKSAR, article 18; The Basic Law of Macao SAR, article 18
[1487] UNCITRAL Practice Guide on Cooperation, III, para.148
[1488] UNCITRAL Legislative Guide on Insolvency Law Part III, para.14
[1489] The EU Regulation (recast), recital (49), article 56(1)

administration of multiple insolvency proceedings of the same group in different States as a whole. That approach has also been jointly suggested by the EU[1490] and UNCITRAL.[1491] However, that approach will not be adopted into CICIA.

5.121 The reasons are mainly three-folded. First of all, the appointment of a single coordinator is still a brand new legislative mechanism, which has not been broadly tested. Whether or not such coordination can be carried out successfully depends greatly on the level of integration of its members and its business structure as well as the qualification of that single or the same insolvency practitioner.[1492] Secondly, each region has different requirements regarding qualification of the insolvency practitioners in China. For example, in the Mainland, as aforementioned, a liquidating committee can also be appointed under the current EBL.[1493] In accordance with the judicial interpretation, the members of a liquidating committee can be appointed from the related government departments, from the social intermediary agencies included in the roster of administrators, from financial asset management companies as well as from the people's bank and the financial regulatory institution under relevant laws and administrative regulations.[1494] In practice, liquidating committee frequently participates in the insolvency proceedings,[1495] whereas there is no equivalent concept in Hong Kong SAR and Macao SAR. It could be quite difficult for the two SARs to accept appointment of liquidating committee as proper group coordinator. In addition, considering the active involvement of governments with extensive administrative powers in the insolvency proceeding of the Mainland, the coordinating ability of lawyers and accountants, who practice independently as individuals, is in doubt.[1496] Thirdly, among all those instruments, only cross-border insolvency agreements have been actually applied in Hong Kong SAR alone. Considering that China is at the very beginning of contemplating cross-border insolvency cooperation, it is better to start with some familiar cooperation instruments.

7.4 A Flexible Solution with Options

[1490] The EU Regulation (recast), recital (50), Ch.5 Section II

[1491] Working Group V (insolvency law), UNCITRAL, Facilitating the Cross-border Insolvency of Multinational Enterprise Groups, A /CN.9/WG.V/WP.128, 2015, Article 18(1); Legislative Guide Part III, Recommendation 251

[1492] Working Group V (insolvency law), UNCITRAL, Facilitating the Cross-border Insolvency of Multinational Enterprise Groups, A /CN.9/WG.V/WP.128, 2015, Article 18(1); Legislative Guide Part III, Ch.3, para.44

[1493] The EBL, article 24

[1494] Provisions of Designating the Administrator, article 19

[1495] [2007] Hubei Jinzhou Intermediate People's Court Civil Bankruptcy No.14-5 (in Chinese); Gao Changjiu, Tang Zhengyu, Fu Wang, Legal Dilemmas Encountered in the Course of Listed Corporation Reorganization: Taking ST Huayuan as Example (in Chinese), Nomocracy Forum, 2010, p.45. Please note the authors are judges who participated in the reorganization proceedings of the Huayuan case; Li Shuguang & Wang Zuofa, Review of the P.R.C. Bankruptcy Law in 2009, INSOL International Technical Series Issue No.11, March 2010, p.5; Zhang Haizheng, Kuang Jingting, Corporate Reorganization Case Analysis under China's New Bankruptcy Law, in: International Corporate Rescue, Vol.11, issue3, 2014, p.177

[1496] For more information regarding the status of legal profession in the Mainland, please refer to Li, Yuwen, The Judicial System and Reform in Post-Mao China: Stumbling Towards Justice, Ashgate Publishing, 2014, Chapter 7, p.199-234

5.122 Concluding a cross-border insolvency agreement under CICIA cannot contravene the Basic Law, under which the courts in the SARs are granted independent power and they cannot be obliged to cooperating in a way that they don't feel comfortable with. The independence, sovereignty or jurisdiction of the relevant national courts should not be affected by the agreement. The insolvency practitioners are only subject to the jurisdiction of its own court and can cooperate with each other closely to enter into cross-border insolvency agreements, which shall be approved by the courts as required in accordance with CICIA. Under the circumstances that the courts find it necessary to cooperate directly in a court-to-court manner, the courts can participate in the negotiation process of the agreements accordingly.

5.123 Cross-border insolvency agreements are created on an *ad hoc* basis in practice as a prompt and flexible reaction. Due to the on-going feature of insolvency proceedings, sometimes it is unlikely to predict the future shape of all conflicts that may emerge and provide legislative solutions in advance. On-going proceedings shall be accompanied with on-going coordination. According to Wessels, "it is not uncommon, for example, to have agreements addressing general communication and cooperation at the start of insolvency proceedings, followed by specific agreements on claims procedures at a later point."[1497] Hence under CICIA, complementary cross-border insolvency agreements shall also be allowed to address some issues upon prompt need on an *ad hoc* basis. In case of the conflicts arising from implementation of the cross-border insolvency agreements, the relevant dispute settlement solution is to be found under the Recommendation 8.

Recommendation 8 – Functional Dispute Settlement Mechanism

(1) In the course of inter-regional cross-border insolvency proceedings, a court that seeks explanation of the provisions under CICIA shall report to the Supreme Court of that region, which can request a special meeting to be convened.

(2) Explanation given by the special meeting on specific provisions of CICIA serves as proper interpretation on the specific issues arising from the individual case, which deserves due respect of the courts concerned. Upon consensus of the Supreme Courts concerned, the explanation shall have binding effect on that individual case. Upon consensus of all the Supreme Courts, the explanation shall have binding effect on the specific provisions under CICIA.

(3) In the course of implementing cross-border insolvency agreements, the courts in the concurrent proceedings can report to the Supreme Court from the respective regions, which can jointly request a special meeting to be convened and refer the disputes arising from cross-border insolvency agreements to the special meeting.

(4) In matters of the disputes arising from cross-border insolvency agreements, the opinions or part of the opinions come into binding effect to the extent that all the

[1497] Wessels, Bob, International Insolvency Law (3rd ed.), Kluwer, 2012, at 10855p

requesting courts involved agree to accept them, which should be expressly written into the judgments. The opinions are only binding on the individual case referred to the special meeting. If one of the requesting courts disagrees with the opinions or part of the opinions given by the special meeting, those opinions are not binding.

(5) Each court of the highest-level from the three regions can designate one or two in-house judges to participate in the meeting. After discussion, the participating judges will deliver their joint opinions on the case referred to them.

(6) As for Hong Kong, any reference handed down by the special meeting shall not be construed as a direct reference to the courts in Hong Kong SAR except for the disputes concerned or unless the Court of Final Appeal of HKSAR expressly indicates otherwise.

Comments to Recommendation 8

5.124 Given the fact that it is lack of legal basis to establish a trans-regional competent court, an embedded dispute settlement mechanism will be introduced into CICIA, which has three main functions, including safeguarding harmonious interpretation of CICIA, providing a solution to jurisdiction conflicts and settling down the disputes arising from cross-border insolvency agreements.

8.1 Harmonious Interpretation

5.125 In the course of regional integration, there are a lot of obstacles to harmonization or unification of the legal systems, such as different legal terminologies, different legal cultures and different languages etc. According to the experience of the EU, two of them (reluctance about unification and the means of adjustment) have to be in particular addressed on the scenario of regional harmonization, which is supposed to be overcome by the competent judicial authorities.

8.1.1 Reluctance about Unification and Common Awareness

5.126 Sometimes judges are reluctant to endorse unification, which is described as the “homeward trend”.[1498] Imagine a judge, who receives law education in his or her home country, passes the national law exam of his or her home country, deals with most of the cases in accordance with the national laws of his or her home country, is requested to adjudicate a case involving cross-border characters. Will he or she be willing to refer to it or have confidence in applying it correctly? I’m afraid at least not at the beginning.

5.127 In the EU, there was a landmark case of *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue*

[1498] Edlund, Hans Henrik, The Concept of Unification and Harmonization, in: Fogt, Morten M. (ed.), Unification and Harmonization of International Commercial Law – Interaction or Deharmonization?, the Netherlands: Wolters Kluwer, 2012, p.12

Administration (*Van Gend en Loos*), in which the national authority raised a very important question before the CJEU

"Whether Article 12 of the EEC Treaty has direct application within the territory of a Member State, in other words, whether nationals of such a state can, on the basis of the article in question, lay claim to individual rights which the court must project." [1499]

5.128 Both the Advocate-General[1500] and the CJEU gave the affirmative answers. Further, the CJEU made the following remarks

"The conclusions to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community Law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community."[1501]

5.129 Public policy is another example. Early in 1974, the CJEU held in the case of *Yvonne van Duyn v Home Office* that

"The concept of public policy in the context of the Community and where, in particular, it is used as a justification for derogating from a fundamental principle of Community law, must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without being subject to control by the institutions of the Community."[1502]

5.130 As for recourse to public policy in the matters of recognition of civil and commercial cases, the CJEU has repeatedly stressed that

"it is not for the Court to define the content of the public policy of a Contracting State, it is none the less required to review the limits within which the courts of a Contracting State may have recourse to that concept for the purpose of refusing recognition of a judgment emanating from another Contracting State."[1503]

5.131 The decision of the CJEU explicitly indicated the existence of a EU new legal order on the ground of the Treaties, which not only has effects on governments but also on peoples and on its own institutions. The CJEU clearly

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[1499] Case C-26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration,* [1963] ECR 1. Van Gend en Loos is a company registered in the Netherlands, which was charged an import duty on chemicals imported from Germany by the Dutch authorities. Van Gend en Loos then brought a lawsuit before the Tariefcommissie (a Dutch Tax court) in order to challenge the order and get the money back.

[1500] See Opinions of Mr Advocate-General Karl Roemer, delivered on 12 December 1962

[1501] Case C-26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration,* [1963] ECR 1, at II-B

[1502] Case C-41/74, *Yvonne van Duyn v Home Office* [1974] ECR I-01337, at 18

[1503] Case C-7/98, *Dieter Krombach v André Bamberski* [2000] ECR I-01935, at 23; Case C-38/98, *Régie nationale des usines Renault SA v Maxicar SpA and Orazio Formento* [2000] ECR I-02973, at 28

put in mind of national courts that "national legal system no longer form the central building block for authority within Europe. Rather, legal authority flows from the Treaties with national legal systems having to adapt as sub-units to it."[1504] The continuous efforts made by the CJEU[1505] contribute to common awareness of the EU legal order, which the judges, affiliated with national courts under the national legal systems of Member States, have to be repeatedly reminded of.

8.1.2 Adjustment and Constructive Interpretation

5.132 The other obstacle to harmonization of the legal systems is the means of adjustment.[1506] Unlike case law, the legal texts of statutory legislation are fixed and lack of dynamics. However, the wording of the legislation could be vague and thus needs further explanation. In addition, in the course of implementation, problems might occur in individual cases, which would result in different understanding of the same rules. Further, it is necessary to revise the content of the legislation with the development of the societies and the activities of the Member States. Before the systematic amendment procedure is initiated, which is time-consuming and complicated, the constructive interpretation is needed for successful daily operation of the legislation. In EU, the interpretation task concerning the EU Law is undertaken by the CJEU.

5.133 COMI is such an example. COMI is an influential and inevitable concept in matters of jurisdiction under the cross-border insolvency regimes. However, COMI has not been defined under the EC Regulation. Instead, it is designed in the form of a presumption, which is rebuttable. As a fact intensive criterion, numerous issues will doubtless arise in practice when the individual court has to utilize a terminology on its discretion without a precise definition. The CJEU handed down three important cases that set the tone of COMI in Europe, which are *Eurofood* case, *Interedil* case and *Rastelli* case. From *Eurofood* to *Interedil* and *Rastelli*, the CJEU clearly set up the central administration as the criterion for jurisdiction. It has also streamlined the key conditions to the rebuttal of the presumption, which attaches great importance to a comprehensive assessment of the relevant factors and objective and ascertainable by the third parties where

[1504] Chalmers, Damian, Davies, Gareth & Monti, Giorgio, European Union Law (2nd ed.), Cambridge University Press, 2010, p.15

[1505] Case C-9/70, Franz Grad v Finanzamt Traunstein [1970] ECR I-00825; Case C-93/71, *Orsolina Leonesio v Ministero dell'agricoltura e foreste* [1972] ECR II-00287; Case C-41/74, *Yvonne van Duyn v Home Office* [1974] ECR I-01337; Case C-403/98, *Azienda Agricola Monte Arcosu Srl v Regione Autonoma della Sardegna, Organismo Comprensoriale nº 24 della Sardegna and Ente Regionale per l'Assistenza Tecnica in Agricoltura (ERSAT)* [2001] ECR I-00103; Case C-8/81, *Ursula Becker v Finanzamt Münster-Innenstadt* [1982]; Case C-80/86, *Criminal Proceedings against Kolpinghuis Nijmegen BV* [1987] ECR I-03969; Case C-14/83, *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* [1984] ECR I-01891; Case C-152/84 *M. H. Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)* [1986] ECR I-00723; Case C-105/03, *Criminal Proceedings Against Maria Pupino* [2005] ECR I-05285; Joined Cases C-397/01 to C-403/01, *Bernhard Pfeiffer and Others v Deutsches Rotes Kreuz, Kreisverband Waldshut eV,* [2004] ECR I- 08835

[1506] Edlund, Hans Henrik, The Concept of Unification and Harmonization, in: Fogt, Morten M. (ed.), Unification and Harmonization of International Commercial Law – Interaction or Deharmonization?, the Netherlands: Wolters Kluwer, 2012, p.14

the central administration is not located in the state of incorporation. The influence of its contribution has found its way into the proposal with respect to the amendment to the Regulation prepared by the EU Commission as well as the EU Parliament.[1507] The key-points, such as "central administration", "objective and ascertainable by the third party" and "a comprehensive assessment of all the relevant factors", which directly derived from the judgment rendered by the CJEU, clearly left its track on both legislative proposals. In particular, the relevant opinions in *Interedil* has been mostly referred to and literally codified.[1508] All those clarification regarding COMI, which is derived from the case law of the CJEU, have been adopted into the EU Regulation (recast) in the end.[1509] It is observed that he CJEU plays a key role in safeguarding the autonomous meaning of COMI.

8.1.3 Lack of Regional Court in China and Its Consequences

5.134 In the course of implementing CICIA, China will meet the same problems caused by incoherent interpretation. First of all, although China is one sovereign state, the SARs are vested with independent judicial power, including that of final adjudication in accordance with the Basic Law.[1510] Hence, three "supreme courts" equally co-exist under the "one China, two systems" regime. Secondly, although there are regional legislation instruments, i.e. the laws listed in the Annex III to the Basic Law and bilateral arrangements, the Basic Law does not specify the means of constructive interpretation of them but only provides interpretation and amendment mechanisms of the Basic Law itself.[1511] It is stipulated under the bilateral arrangement concerning recognition and enforcement of judgments in civil and commercial matters between the Mainland and Hong Kong (the Mainland-HK Arrangement) that

"In the event of any problem arising in the course of implementing this Arrangement or a need for amendment of this Arrangement, it shall be resolved through consultations between the Supreme People's Court and the Government of the HKSAR."[1512]

5.135 So far, the only recorded adjustment to the Arrangement only has something to do with procedural issues. For example, due to modification of provisions in the amended Civil Procedure Law of the Mainland regarding the time limit for application for execution of judgments, the relevant amendment to the Mainland-HK Arrangement was made in 2008.[1513] However, the same

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[1507] European Parliament legislative resolution of 5 February 2014 on the proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings (COM(2012)0744 – C7-0413/2012 – 2012/0360(COD)) Amendment 6

[1508] *Interedil*, para.59

[1509] The EU Regulation (recast), recital (30)

[1510] The Basic Law of HKSAR, article 2; the Basic Law of Macao SAR, article 2

[1511] The Basic Law of HKSAR, article 158, 159; the Basic Law of Macao SAR, article 143, 144

[1512] 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 Pursuant to Choice of Court Agreements between Parties Concerned, article 18

[1513] Department of Justice of HKSAR, Enforcement of civil and commercial judgments between Hong Kong and the Mainland, http://www.doj.gov.hk/eng/public/enforcement.html (Last visited on 14 June 2016)

adjustment has not been done to the Mainland-Macao Arrangement.[1514] The identical provision can also be found under the bilateral agreement concerning recognition and enforcement of judgments in civil and commercial matters between the Mainland and Macao (the Mainland-Macao Arrangement).[1515]

5.136 Thirdly, although the parties concerned expect that the same judgments can receive the same treatment within a country, the Mainland-HK Arrangement and the Mainland-Macao Arrangement are different from each other in several aspects, such as the scope of application and the way of determining jurisdiction. Nevertheless, the Mainland, HK and Macao have not taken any measures to coordinate the differences in the two Arrangements. Moreover, recognition and enforcement of civil and commercial cases at the regional level are handled separately. Accordingly in the course of implementation, it will be the local courts that interpret the respective arrangements in accordance with their own local rules and legal culture, which gives rise to lack of legal certainty at the regional level.

8.2 A Solution to Jurisdiction Conflicts

8.2.1 A Crucial Jurisdictional Concept Needs Coherent Interpretation

5.137 As aforementioned, COMI (center of main interests), as a concept determining international jurisdiction in matters of cross-border insolvency proceedings, stirred up conflicts of jurisdiction from time to time in the EU or on a global level. Moreover, the question of where a COMI is located will always be a question of fact.[1516] As a fact intensive criterion, it is left to the courts on discretion to make decision concerning a jurisdictional terminology without a precise definition. In the EU, the role is played by the CJEU, who vigorously applied the fundamental principles as the basis "to manage the varying patterns of integration so that the Community structure does not fragment."[1517] In the matters of cross-border insolvency, the principle of mutual trust has also been diligently applied by the CJEU to prevent the distorted understanding of COMI and safeguard the coherent interpretation under the Regulation.[1518]

[1514] Song Xixiang, Reciprocal Recognition and Enforcement of Civil and Commercial Judgments between the Mainland and Macao, in: Academic Journal of One Country, Two Systems, Vol.4, 2012, p.93

[1515] Arrangement Concerning Mutual Recognition and Enforcement of Arbitral Awards between the Mainland and the Macao Special Administrative Region, article 22

[1516] Smart, Philip, Cross-border Insolvency, 2nd ed., London: Butterworth, 1998, p.162

[1517] Weatherill, Stephen, Beyond Preemption? Shared Competence and Constitutional Change in the European Community, in D. O'Keeff e and P.M. Twomey (eds), Legal Issues of the Maastricht Treaty, London: Chancery Law Publishing, 1994, p.13–33, 32. See Case C-6/64, *Flaminio Costa v E.N.E.L.* [1964] ECR I-01141, at 585, 594; Case C-22/70, *Commission of the European Communities v Council of the European Communities (ERTA)* [1971] ECR 273; at 263; Case C-165/91, *Simon J. M. van Munster v Rijksdienst voor Pensioenen* [1994] ECR I-04661, para.32; Case C-41/74, *Yvonne van Duyn v Home Office* [1974] ECR I-01337, para 12; Case C-51/76 *Verbond van Nederlandse Ondernemingen* [1977] ECR 113, para.23; Case C-148/78, *Criminal Proceedings against Tullio Ratti* [1979] ECR I-01629, paras.20–23. Case C-9/70, Franz Grad v Finanzamt Traunstein [1970] ECR I-00825, para.5; Case C-105/03, *Criminal Proceedings Against Maria Pupino* [2005] ECR I-05285, para.43

[1518] *Eurofood*, para. 39-42; *Interedil,* para.51; *Rastelli*, para.31

5.138 As observed by Magnus, the effects of principles for the purpose of unification set by international cooperation instruments, such as the Model Law, can be jeopardized without "a strong central institution" to make interpretation for further uniformity.[1519] As pointed out by Dawson, methodological approaches of interpretation are particularly salient in the context of the Model Law's harmonization efforts.[1520] A visible example, as aforementioned is interpretation concerning time to determine COMI in the American jurisprudence,[1521] which deviates tremendously from the relevant provisions, as a pre-insolvency concept, under the EU Regulation (recast)[1522] and the Guide and Interpretation of the Model Law (2013).[1523] That interpretation directly results in expansion of the scope of factors that can be taken into account to determine COMI so that liquidation activities and administrative functions can be validated as effective factors for the COMI determination. Consequently, more factors can be actually utilized for COMI relocation, which is inconsistent with the genuine purpose of the Model Law.

5.139 Although CICIA focuses on the recognition issues, the concept of a debtor's COMI is fundamental to the operation of the arrangement. By according more immediate and automatic reliefs to the main proceedings, which is determined by COMI, it becomes crucial to identify where COMI is. Otherwise, the decisive attributes of COMI could be manipulated. In China, there is no equivalent institutional arrangement to support the constant harmonization management like EU. That means the courts of equal legal supremacy in each region can make competing and conflicting judgments with respect to the interpretation of COMI on the same creditors. The distortion of autonomous meaning as provided under CICIA will put the overriding objective in jeopardy and ultimately impair the function of CICIA itself.

8.2.2 Different Interpretation in China

5.140 The concepts of real seat and the place of incorporation also coexist in China. In the Mainland, liquidation of a company shall be subject to the jurisdiction of the people's court at the place where the company is domiciled. The domicile of a company refers to the place where the principal office of a company is located. Where the principal office of a company is unclear, the case shall be subject to the jurisdiction of the people's court at the place where the

[1519] Magnus, Ulrich, Harmonization and Unification of Law by the Means of General Principles, Fogt, Morten M. (ed.), Unification and Harmonization of International Commercial Law – Interaction or Deharmonization?, the Netherlands: Wolters Kluwer, 2012, p.171

[1520] Dawson, Andrew B., The Problems of Local Methods in Cross-border Insolvencies, 2015, available at: http://iiiglobal.org/iii-prize-in-insolvency.html (Last visited on 14 June 2016)

[1521] In *re Fairfield Sentry Ltd.*, 714 F.3d (2d Cir. 2013); In *re Suntech Power Holdings Co., Ltd.*, Case No.: 14-10383(SMB), Written Opinion Signed On 17 November, 2014

[1522] The EU Regulation (recast), recital (31) (with the objective of preventing fraudulent or abusive forum shopping), article 3(1), para.2

[1523] Guide and Interpretation, para.141, 149, 159

company is registered.[1524] Hence, the registered office is kind of last resort in determining jurisdiction of bankrupt companies.

5.141 In Hong Kong, the HK courts can exercise jurisdiction over companies regardless of the place of incorporation. Although a non-Hong Kong company, which has a place of business in Hong Kong, must apply for registration,[1525] the HK courts only exercise jurisdiction of wind-up over them if the three core requirements are met, which include (1) There is sufficient connection with Hong Kong. In the context of insolvency there is commonly the presence of assets, but this is not essential; (2) There is a reasonable possibility that the winding-up order would benefit those applying for it; and (3) The court must be able to exercise jurisdiction over one or more persons interested in the distribution of the company's assets. [1526] If the core requirements (1) and (2) are sufficiently met, the jurisdiction can be established despite the third core requirement not being satisfied.[1527] The factors to establish the three core requirements may vary in individual case. For instance, In *Re Pioneer Iron and Steel Group*, the location of the controlling mind and the decision-maker is deemed as substantial and relevant factors to determine whether or not there is sufficient connection with Hong Kong.[1528]

5.142 Meanwhile, the place of incorporation plays an influential role in Macao. Companies with their registered office in Macao cannot avoid the application of the provisions of Commercial Code of Macao against the third parties by relying on the fact that they do not have their central administration there. [1529] Moreover, if the registered office or the central administration is not located in Macao but has a long-term of business in Macao, it should be bound by the relevant registration law.[1530] In Macao, it seems that the ascertainability of the third parties has been attached too much importance, which can result in rebuttal of the fact of central administration.

5.143 It is observed that Hong Kong SAR has developed its own jurisdiction criteria in handling cross-border insolvency cases and the Mainland and Macao attaches different emphasis to certain factors relevant to determination of COMI as stipulated under the Regulation. In that case, should China still follow the Model Law approach that does not define COMI on its own but directly refer to the jurisprudence under the EU Regulation? I'm afraid the answer is no. Considering its experienced development, it is true that interpretation of COMI under the Regulation may be relevant under certain circumstances but China also needs to establish its own interpretation system to safeguard its own autonomous meaning of COMI based on its inter-regional cross-border

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[1524] Provisions of the Supreme People's Court on Several Issues concerning the Application of the Company Law of the People's Republic of China (II) (2014 Amendment), Judicial Interpretation No. 2 [2014], 20 March 2014, article 24(1)

[1525] Cap 622, s776

[1526] *Yung Kee Holdings* [2012] 6 HKC 246, at 70 and *Re Beauty China Holdings Ltd* [2009] 6 HKC 351, at 23

[1527] [2013] HKCFI 324, para.28.

[1528] *Re Pioneer Iron and Steel Group* [2013] HKCFI 324, para.38.

[1529] Commercial Code of Macao, article 175-II

[1530] Commercial Code of Macao, article 178-I

insolvency cooperation regime. Therefore, it needs to be discussed how to build up a mechanism to safeguard the autonomous meaning on the basis of CICIA.

8.3 Dispute Settlement Concerning Cross-border Insolvency Agreements

8.3.1 Possible Solution through Arbitration

5.144 Cross-border insolvency agreements are utilized as the key mechanism for coordination of insolvency proceedings involving a single debtor as well as enterprise groups under CICIA. Conflicts can arise during the implementation of those agreements, such as the *Nortel Networks* case (see paras. 4.212 - 4.213).

5.145 In practice as well as advocated by some scholars, arbitration is recommended as a solution.[1531] A key impetus for this proposal is the New York Convention, an influential international instrument, which is effective in over 140 countries and can facilitate the enforcement of arbitral awards and thus efficiently settle down the related disputes in an efficient and timely manner.[1532] Nevertheless, the New York Convention does not apply to inter-regional recognition and enforcement of arbitral awards in China. (Please refer to para.5.18) If arbitral awards are rendered in the Mainland, in Hong Kong and Macao pursuant to the respective local arbitration laws, they will be recognized and enforced in the three regions on different legal basis, which are Arrangement between the Mainland and the Hong Kong SAR on Reciprocal Recognition and Enforcement of Arbitration Awards and Arrangement between the Mainland and the Macao SAR on Reciprocal Recognition and Enforcement of Arbitration Awards.[1533] Due to lack of reported cases from Macao's side, I will

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[1531] Gropper, Allan L., The Arbitration of Cross-border Insolvencies, 86 Am. Bankr. L.J., 201, 2012; Kovacs, Robert B, A Transnational Approach to the Arbitrability of Insolvency Proceedings in International Arbitration, Norton Journal of Bankruptcy Law and Practice Sept.-Oct. 2012: 521-635; Clement, Zack A., Position Paper Supporting Greater Use of Arbitration in Connection with Insolvency Matters, 21 April, 2014, http://www.iiiglobal.org (Last visited on 14 June 2016)

[1532] Gropper, Allan L., The Arbitration of Cross-border Insolvencies, 86 Am. Bankr. L.J., 201, 2012, p.203; Kovacs, Robert B, A Transnational Approach to the Arbitrability of Insolvency Proceedings in International Arbitration, Norton Journal of Bankruptcy Law and Practice Sept.-Oct. 2012: p.529; Clement, Zack A., Position Paper Supporting Greater Use of Arbitration in Connection with Insolvency Matters, 21 April, 2014, http://www.iiiglobal.org, (Last visited on 14 June 2016) p.8

[1533] Arrangements of the Supreme People's Court on the Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region (1999), Preamble:
In accordance with Article 95 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, after negotiations between the Supreme People's Court and the Government of the Hong Kong Special Administrative Region (hereinafter referred to as the "Hong Kong SAR"), the courts of the Hong Kong SAR agree to enforce the arbitral awards made by mainland arbitral institutions in accordance with the Arbitration Law of the People's Republic of China (a name list of mainland arbitral institutions shall be provided by the Legislative Affairs Office of the State Council through the Hong Kong and Macao Affairs Office of the State Council), and the people's courts in the Mainland agree to enforce the arbitral awards made in the Hong Kong SAR in accordance with the Arbitration Ordinance of the Hong Kong SAR.
Arrangement between the Mainland and the Macao SAR on Reciprocal Recognition and Enforcement of Arbitration Awards (2007), Article 1
When the people's courts in the mainland admit and enforce the civil and commercial arbitration awards made by arbitral institutions and arbitrators of the Macao SAR in accordance with the arbitration laws and regulations of the Macao SAR, and when courts in the Macao SAR admit and

mainly focus on discussion between the Mainland and Hong Kong.[1534] Judge Gao, affiliated with the Supreme People's Court, provided that there were 19 Hong Kong arbitral awards in total, which were accepted for recognition and enforcement by the Mainland courts from 2008 to 2014.[1535] According to information released by the Department of Justice of HKSAR, from 2009 to September 2012, 26 Mainland arbitral awards applied for enforcement and all have been granted enforcement in Hong Kong.[1536] However, recognition of the Mainland arbitral awards was not granted without debate. The most disputed issue is public policy.

5.146 In the case of *Hebei Import and Export Corporation v Polytek Engineering Co Ltd.,* [1537] a Mainland arbitral award was requested by *Hebei Import and Export Corporation* (Hebei) for enforcement in Hong Kong. *Polytek Engineering Co Ltd.* (*Polytek*) failed to set aside the award before the court in the Mainland and sought to resist enforcement in Hong Kong on the ground of lack of notice and inability to present its case in the arbitration proceeding. The decision was made by the Court of Appeal of the HKSAR unanimously in favor of *Polytek* and held it would violate the most basic notions of morality and justice of the Hong Kong system if the foreign award in question was to be enforced.[1538] Hebei appealed the case to the Court of Final Appeal of the HKSAR, who overturned the decision of the Court of Appeal of the HKSAR. The Court of Final Appeal acknowledged that it was considered unacceptable in Hong Kong to conduct the holding of the inspection in the absence of the respondent, but where the defendant proceeded with the arbitration proceeding without raising his objection in a timely manner, he shall be deemed to have waived his right to object. [1539] The refusal by a court of supervisory jurisdiction to set aside an award did not debar an unsuccessful applicant from resisting enforcement of the award in the court of enforcement.[1540] The position would, however, be different if a party had failed to raise the challenge before the supervisory court. It would then be estopped

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enforce the civil and commercial arbitration awards made by arbitration institutions in the mainland in accordance with the Arbitration Law of the People's Republic of China, this Arrangement shall apply.

For issues not provided for in this Arrangement, the procedural laws and rules of the place where the recognition and enforcement are to be done shall apply.

[1534] According to Tu, many PIL cases may have been settled in the Court of First Instance (CFI) and did not go to the Court of Second Instance (CSI) and the Court of Final Appeal (CFA). One cannot find such cases because court decisions in CFI are not reported in Macao. Tu Guangjian, The Conflict of Laws System in Macao, 40 Hong Kong L. J. 85, 2010, p.86

[1535] Gao Xiaoli, The Development of the Arrangements Made by the Mainland with Hong Kong and Macao for Legal Assistance in Civil an Matters from the Perspective of Mainland People's Courts, in: China Law, Issue 06, 2015, p.80

[1536] Department of Justice of HKSAR, LC Paper No. CB(4)333/12-13(01)

[1537] *Hebei Import and Export Corporation v Polytek Engineering Co Ltd.* [1999] HKCFA 40; [1999] 1 HKLRD 665; (1999) 2 HKCFAR 111; [1999] 2 HKC 205; FACV10/1998 (9 February 1999)

[1538] *Hebei Import and Export Corporation v Polytek Engineering Co Ltd.* [1998] HKCA 402; [1998] 1 HKLRD 287; [1998] 1 HKC 192; CACV116/1997 (16 January 1998), para.54, 67

[1539] *Hebei Import and Export Corporation v Polytek Engineering Co Ltd.* [1999] HKCFA 40; [1999] 1 HKLRD 665; (1999) 2 HKCFAR 111; [1999] 2 HKC 205; FACV10/1998 (9 February 1999), para.75

[1540] *Hebei Import and Export Corporation v Polytek Engineering Co Ltd.* [1999] HKCFA 40; [1999] 1 HKLRD 665; (1999) 2 HKCFAR 111; [1999] 2 HKC 205; FACV10/1998 (9 February 1999), para.85

from raising that point before the court of enforcement.[1541] The judgment was handed down before the Arrangements of the Supreme People's Court on the Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong SAR was concluded. It demonstrated pro-enforcement approach adopted by the Court of Final Appeal and at the same time exposed problems in arbitration proceedings in the Mainland.

5.147 Later in the case of *Gao Haiyan and Another v. Keeneye Holdings Ltd and Another* (Keeneye),[1542] the main concern of this case was whether the mediation-arbitration (med-arb) procedure in the Mainland[1543] is compatible with public policy in Hong Kong. In this case the Court of First Instance of the HKSAR and the Court of Appeal of the HKSAR have diverse opinions on this issue. There was an arbitral award rendered by a Mainland arbitration institution between *Gao Haiyan and Another (Gao)* and *Keeneye Holdings Ltd. (Keeneye). Keeneye* brought a lawsuit against Gao in order to set aside the arbitral award but failed. *Gao* applied for enforcement of arbitral award in Hong Kong and *Keeneye* resisted the enforcement of the Mainland arbitral award on ground of bias in the process of the Mainland mediation-arbitration. The fact *Keeneye* relied on was a private dinner in a hotel participated by an arbitrator nominated by *Gao* and the Secretary General of the Arbitration Institution and a person related to the *Keeneye*, pushing for a settlement. The Court of First Instance of the HKSAR stressed that he potential for an appearance of bias arises because of important differences between the mediation and arbitration processes in the Mainland and Hong Kong.[1544] The Court of First Instance of the HKSAR pointed out that

"In particular, what happened at the Shangri-la would give the fair-minded observer a palpable sense of unease. The fair-minded observer would [I (the Judge) believe] be concerned that the underlying message being conveyed to Zeng (affiliate with *Keeneye*) at the dinner with Pan (Secretary General of the Mainland arbitration institution) and Zhou (arbitrator) was that the Tribunal favoured the Applicants. Such underlying message was obviously not spelled out at the dinner. But, against the background of the reservations I have mentioned, there would be more than ample justification for the fair-minded observer's apprehension."[1545]

[1541] *Hebei Import and Export Corporation v Polytek Engineering Co Ltd.* [1999] HKCFA 40; [1999] 1 HKLRD 665; (1999) 2 HKCFAR 111; [1999] 2 HKC 205; FACV10/1998 (9 February 1999), para.88

[1542] *Gao Haiyan and Another v. Keeneye Holdings Ltd and Another* [2011] HKCA 459; [2012] 1 HKLRD 627; [2012] 1 HKC 335; CACV79/2011 (2 December 2011)

[1543] Arbitration Law, article 51: The arbitration tribunal may carry out mediation prior to giving an arbitration award. The arbitration tribunal shall conduct mediation if both parties voluntarily seek mediation. If mediation fails, an arbitration award shall be made promptly.

If mediation leads to a settlement agreement, the arbitration tribunal shall make a written mediation statement or make an arbitration award in accordance with the result of the settlement agreement. A written mediation statement and an arbitration award shall have equal legal effect.

[1544] *Gao Haiyan and Another v. Keeneye Holdings Ltd and Another*, [2011] HKCFI 240; [2011] 3 HKC 157; HCCT41/2010 (12 April 2011), para.73

[1545] *Gao Haiyan and Another v. Keeneye Holdings Ltd and Another*, [2011] HKCFI 240; [2011] 3 HKC 157; HCCT41/2010 (12 April 2011), para.54

5.148 *Gao* argured that *Keeneye* must be deemed to have waived any right to raise bias since it had not complained about what happened at the hotel but had instead proceeded with the arbitration. The Court of First Instance of the HKSAR was unable to accept the suggestion of waiver because the court considered *Keeneye* was placed in a dilemma. If they were to complain about bias and if the Arbitration Tribunal were actually biased, their complaint would be rejected and they would lose everything.[1546]The Court of First Instance of the HKSAR further held that there was no question of estoppel because the fact that *Keeneye* accused the Arbitration Panel of bias before the Mainland court does not prevent the Hong Kong Court from considering the question of bias from the viewpoint of Hong Kong public policy.[1547] The award was set aside on the public policy ground in the first instance.

5.149 The Court of Appeal of the HKSAR unanimously overturned the decision of the Court of First Instance of the HKSAR. First of all, the court believed that a clear case of waiver had been made out. *Keeneye* attacked *Gao*'s integrity in their supplemental submissions as they have done throughout the arbitral proceedings, but that is not a substitute for a complaint about impropriety or bias, apparent or real, against the Arbitral Tribunal.[1548] Moreover, the Arbitral Tribunal and the Xian Court would have been in a much better position to ascertain the facts and to decide whether those facts established a case of actual or apparent bias. Such finding, though not binding, is entitled to serious consideration by our court.[1549] As for holding a mediation over dinner in a hotel, a Mainland court is better able to decide whether that is acceptable.[1550]

5.150 The case of *Keeneye* incurred a wide-spread discussion in academia.[1551] Gu and Zhang pointed out that the Court of First Instance of the HKSAR and Court of Appeal of the HKSAR have "both gone too far in opposite directions."[1552] Imagine if the opinions of the Court of First Instance prevail, the Mainland arbitration institutions should have readjusted their public policy to the standard of Hong Kong. Otherwise, the parties concerned could always resist enforcement of

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[1546] *Gao Haiyan and Another v. Keeneye Holdings Ltd and Another*, [2011] HKCFI 240; [2011] 3 HKC 157; HCCT41/2010 (12 April 2011), para.85-87

[1547] *Gao Haiyan and Another v. Keeneye Holdings Ltd and Another*, [2011] HKCFI 240; [2011] 3 HKC 157; HCCT41/2010 (12 April 2011), para.95,96

[1548] *Gao Haiyan and Another v. Keeneye Holdings Ltd and Another* [2011] HKCA 459; [2012] 1 HKLRD 627; [2012] 1 HKC 335; CACV79/2011 (2 December 2011), para.60

[1549] *Gao Haiyan and Another v. Keeneye Holdings Ltd and Another* [2011] HKCA 459; [2012] 1 HKLRD 627; [2012] 1 HKC 335; CACV79/2011 (2 December 2011), para.64

[1550] *Gao Haiyan and Another v. Keeneye Holdings Ltd and Another* [2011] HKCA 459; [2012] 1 HKLRD 627; [2012] 1 HKC 335; CACV79/2011 (2 December 2011), para.99

[1551] Fan Kun, "The Risks of Apparent Bias When an Arbitrator Act as a Mediator: Remarks on Hong Kong Court's Decision in Gao Haiyan" (in Chinese), (2011) 13 China Yearbook of Private International Law 535-556; Morgan, Robert and Man Sin Yeung, "Enforcement of Foreign and Mainland Arbitral Awards in Hong Kong : Med-Arb, Public Policy and Waiver" (2012) Asian Dispute Review 28; Georgiou, Phillip, The Real Risk of Bias in "Chinese Style" Arbitrations (2011) Asian Dispute Review 89; Gu, Weixia, Zhang, Xianchu, The Keeneye Case: Rethinking the Content of Public Policy in Cross-Border Arbitration between Hong Kong and Mainland China, 42 Hong Kong L. J. 1001

[1552] Gu, Weixia, Zhang, Xianchu, The Keeneye Case: Rethinking the Content of Public Policy in Cross-Border Arbitration between Hong Kong and Mainland China, 42 Hong Kong L. J. p.1014

Mainland awards before the Hong Kong courts. On the contrary, the Court of Appeal seems to remit everything to the Mainland court. Of course, the points of view of supervisory courts shall receive due respect but the Hong Kong courts are also in the position, as explained by the Court of Final Appeal of the HKSAR in the *Hebei* case, to examine whether or not there is bias on the basis of its own authority.

5.151 Influenced by Confucian philosophy of conflict avoidance, mediation is a more acceptable way in arbitration practice of the Mainland. It is reported that around 58% of the Mainland arbitration cases were handled by means of mediation in 2013.[1553] Chinese way of mediation is characterized of "the most complete integration of mediation and arbitration".[1554] The arbitrators also have a dual role as mediators and the mediation proposal can be raised several times during the course of the proceedings.[1555] In Hong Kong, if a mediator to the same dispute is appointed to act as arbitrator upon consent of the parties, the arbitrator must, before resuming the arbitral proceedings, disclose to all other parties as much of that information as the arbitrator considers is material to the arbitral proceedings.[1556] As pointed by Fan, Chinese arbitrator-mediators prefer to meet parties privately and separately, "known as 'caucusing' as long as both parties give their consent".[1557] The process is lack of transparency.

5.152 The disagreement between the courts of Hong Kong towards the Mainland mediation-arbitration leaves the inter-regional arbitration in an uncertain situation. Moreover, the Mainland mediation-arbitration is in need of reform and improvement. Hence, it is difficult to expect arbitration as an appropriate solution to cross-border insolvency before a healthy and reliable local as well as inter-regional arbitration schemes are built up in China. In addition, learning from the experience of the Nortel Networks case, it may not be easy or possible to enter into an agreement to resolve disputes by arbitration in a cross-border insolvency case in the first place.[1558]

8.3.2 The Alternative Solution: Joint Hearing

5.153 Recall the disputes in the Nortel Networks, what the parties and the courts looked for is a single jurisdiction with a single constituency to deal with the disputes.[1559] In the end, the Nortel Networks case was not coordinated via

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[1553] Zhang Wei, Annual Acceptance of Arbitration Cases Exceeded 100,000 for the First Time, 7 June, Legal Daily, 2014, at 6

[1554] Donahey, Seeking Harmony: Is the Asian Concept of the Conciliator/ arbitrator Applicable in the West, 50. Disp. Res. J.,1995, p.74-78

[1555] Fan Kun, Arbitration in China – A Legal and Cultural Analysis, Oxford and Portland, Oregon, 2013, p.166

[1556] Cap 609, s32, 33

[1557] Fan Kun, Arbitration in China – A Legal and Cultural Analysis, Oxford and Portland, Oregon, 2013, p.166

[1558] Motion, In *re Nortel Networks, Inc.* (Apr. 25, 2011), ECF No. 5307; Opposition & Cross-Motion to Compel Arbitration; In *re Nortel Networks, Inc.* (May 19, 2011), ECF No.5444; Reply, In *re Nortel Networks, Inc.* (June 2, 2011), ECF No. 5571

[1559] In *re Nortel Networks Corp*, 426 B.R. 84 (Bankr. D. Del. 2010), Exhibit A to the Declaration of John Ray, dated February 18, 2010, para.16

arbitration but by a joint hearing held between U.S. and Canadian courts simultaneously,[1560] which is the way U.S. and Canadian often utilize in the process of cross-border insolvency coordination. Therefore, there are two approaches to resolve the inter-group disputes, joint hearing in practice and arbitration for consideration. Although arbitration cannot be the solution to CICIA, arbitration is able to give a final answer to the dispute. The joint hearing is a cooperation and communication mechanism between the courts, which can help to facilitate exchange of information and negotiation. However, the possibility of competing decision is not removed.

5.154 In addition, there is a common concern with respect to joint hearing and arbitration, which is the cost involved. Bankruptcy cases deal with insolvent debtors, whose assets are limited. Over the last three decades, it is remarked by Kirgis that the Supreme Court of the U.S.A. "recognized only one limitation on arbitrability: cost."[1561] In the case of *Green Tree Financial Corp.- Alabama and Green Tree Financial Corporation v. Larketta Randolph* (Green Tree),[1562] the dispute involved a mobile home financing agreement, which included an arbitration clause. The respondent contended that the arbitration agreement's silence with respect to costs creates a "risk" that she would be required to bear prohibitive arbitration costs, and thus be unable to vindicate her statutory rights in arbitration. Although the plaintiff presented no evidence to prove how expensive the arbitration would be, the Supreme Court acknowledged that a claim of this type might have validity: "It may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum."[1563] According to a recent survey carried out by White & Case and Queen Mary University, 68% of respondents considered the cost as a deterrent from arbitration, which was placed at the top of the most complained aspects of international arbitration.[1564]

5.155 In 2016, Lord Chief Justice Thomas Cwmgiedd delivered a speech and stated, "open justice is a hallmark of democratic society."[1565] In contrast, confidentiality is often regarded as one of the most valuable characteristics of

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[1560] Wessels, Bob, Nortel Network Joint hearing as a test case for EU JudgeCo Principle 10?, 13 May, 2014, http://bobwessels.nl/2014/05/2014-05-doc8-nortel-network-joint-hearing-as-a-test-case-for-eu-judgeco-principle-10/ (Last visited on 14 June 2016)

[1561] Kirgis, Paul F., Arbitration, Bankruptcy and Public Policy: A Contractarian Analysis, American Bankruptcy Institute Law Review, Volume 17, Number 2, Winter 2009, 503, p.515

[1562] *Green Tree Financial Corp.- Alabama and Green Tree Financial Corporation v. Larketta Randolph*, 531 U.S. 79, 2000

[1563] *Green Tree Financial Corp.- Alabama and Green Tree Financial Corporation v. Larketta Randolph*, 531 U.S. 79, 2000, at 90

[1564] The survey was conducted over a six-month period and comprised two phases: an online questionnaire completed by 763 respondents (quantitative phase) and, subsequently, 105 personal interviews (qualitative phase). See White & Case and Queen Mary University, 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, 2015, p.7, available at: http://www.arbitration.qmul.ac.uk/docs/164761.pdf

[1565] Cwmgiedd, Thomas, Developing Commercial Law through the Courts: Rebalancing the Relationship between the Courts and Arbitration, The Bailii Lecture 2016, 9 March 2016, para. 39, available at: https://www.judiciary.gov.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf

arbitration.[1566] In the aforementioned survey, 33% of the surveyed respondents claimed confidentiality as one of the most predominant benefits of arbitration.[1567] Confidentiality results in lack of openness, which could "perpetuate public ignorance of continuing hazards, systemic problems, or public needs".[1568] Lack of openness also deprives the ability of individuals and lawyers apart from the few who are instructed in arbitrations, to access the law, to understand how it has been interpreted and applied.[1569] Moreover, 64% of the surveyed respondents chose arbitration for the purpose of avoiding specific legal systems/national courts, which was the second most frequently listed valuable characteristics in the survey.[1570] Consequently, it reduces the potential for the courts to develop and explain the law and lowers the degree of certainty in the law that comes through the provision of authoritative decisions of the court. In the eye of a common law judge, that is "a serious impediment to the growth of the common law."[1571] Neither can it help to generate harmonized interpretation or provide instructive guidance on an inter-regional legal cooperation arrangement.

8.4 Functional Dispute Settlement Mechanism in China's Regional Context

5.156 To find a balanced approach in China's context, I submit to establish a functional dispute settlement mechanism, which is also built upon interregional court-to-court cooperation and communication. Inspired by the idea of joint hearing, a special meeting can be organized in order to deal with the all those aforementioned problems and disputes. The functional dispute settlement mechanism shall also fit into the framework of CICIA and be consistent with the Basic Law.

8.4.1 Legal Basis

5.157 The Basic Law vests the independent judicial power upon the SARs and sets the tone that the way of life in the SARs shall remain unchanged at least within 50 years.[1572] Therefore, establishment of a trans-regional court has not

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[1566] Zlatanska, Elina, To Publish, or Not to Publish Arbitral Awards: That is the Question..., in: Arbitration, Vol.81, No.1, 2015, 25-37, p.26

[1567] White & Case and Queen Mary University, 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, 2015, p.7, available at: http://www.arbitration.qmul.ac.uk/docs/164761.pdf

[1568] Doré, L. K., Public courts versus Private Justice: It's Time to Let Some Sun Shine in on Alternative Dispute Resolution, 81 Chi-Kent L. Rev 463, 2006, p.487

[1569] Cwmgiedd, Thomas, Developing Commercial Law through the Courts: Rebalancing the Relationship between the Courts and Arbitration, The Bailii Lecture 2016, 9 March 2016, para. 23, available at: https://www.judiciary.gov.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf

[1570] White & Case and Queen Mary University, 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, 2015, p.7, available at: http://www.arbitration.qmul.ac.uk/docs/164761.pdf

[1571] Cwmgiedd, Thomas, Developing Commercial Law through the Courts: Rebalancing the Relationship between the Courts and Arbitration, The Bailii Lecture 2016, 9 March 2016, para. 34, available at: https://www.judiciary.gov.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf

[1572] Basic Law of HKSAR, article 2, 5; Basic Law of Macao SAR, article 2, 5

been put in the agenda of integration because that arrangement will definitely interfere with the independency of the courts in each region. Instead, the judicial organs are encouraged to render judicial assistance and maintain judicial relations with each other through consultations. Under the Basic Law of HKSAR

"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."[1573]

5.158 Under the Basic Law of Macao SAR

"The Macao Special Administrative Region may, through consultations and in accordance with law, maintain judicial relations with the judicial organs of other parts of the country, and they may render assistance to each other."[1574]

5.159 So far the judicial cooperation is conducted in a hybrid manner. All the aforementioned bilateral legal cooperation arrangements were entered into between the Supreme People's Court from the Mainland side and two administrative authorities from the two SARs, i.e. Department of Justice of HKSAR and Secretariat for Administration and Justice of Macao SAR. Moreover, any problem encountered or any amendment needed in the implementation of the arrangements shall be settled by the Supreme People's Court and the governments of the SARs through negotiations.[1575]

5.160 It is noteworthy that under both Mainland-Macao arrangements with respect to mutual recognition and enforcement of civil and commercial judgments and arbitration awards, the Supreme People's Court and the Court of Final Appeal of Macao are allowed to directly cooperate and communicate with each other for relevant assistance to implementation of the arrangements.

"In order to implement this Arrangement, the Supreme People's Court and the Court of Final Appeal of Macao shall provide the relevant legal documents to each other.

The Supreme People's Court and the Court of Final Appeal of Macao shall mutually circulate the notice on the implementation situation of this Arrangement on an annual basis."[1576]

5.161 Nevertheless, the equivalent provisions cannot be found in the Mainland-HK arrangements. The direct cooperation and communication between the

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[1573] Basic Law of HKSAR, article 95

[1574] Basic Law of Macao SAR, article 93

[1575] Arrangements of the Supreme People's Court on the Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region, article 11; Arrangement of the Supreme People's Court between the Mainland and the HKSAR on Reciprocal Recognition and Enforcement of the Decisions of Civil and Commercial Cases under Consensual Jurisdiction, article 18; Arrangement between the Mainland and the Macau SAR on Reciprocal Recognition and Enforcement of Arbitration Awards, article 15; Arrangement between the Mainland and the Macao Special Administrative Region on the Mutual Recognition and Enforcement of Civil and Commercial Judgments, article 22

[1576] Arrangement between the Mainland and the Macau SAR on Reciprocal Recognition and Enforcement of Arbitration Awards, article 14; Arrangement between the Mainland and the Macao Special Administrative Region on the Mutual Recognition and Enforcement of Civil and Commercial Judgments, article 23

courts of the Mainland and Macao is established on the legal basis provided under the Basic Law, which is the same legal basis to establish the Mainland-HK arrangement. Therefore, in theory the same legal basis will suffice to enable direct cooperation and communication between the courts of the Mainland and HK, although in reality, as aforementioned, the constitutional conflicts between the Mainland and HK and the untrust towards the judicial system of the Mainland probably hinder the willingness of HK to accept the direct cooperation and communication between the courts from the both sides.

5.162 Over thirty years ago, in *Smith Kline & French Laboratories Ltd. v. Bloch*, there was a conflict of jurisdiction between the courts in England and the courts in the United States. Lord Denning made the following remarks

"In the interests of comity, one [court] or other must give way. I wish that we could sit together to discuss it. But as that is not possible, I propose to put the case forward, as we see it here, in the hope that we may come to an agreed solution."[1577]

5.163 Lord Denning's remarks are instructive. It would be very disappointing that the courts within one country, which have shared language and culture, cannot cooperate and communicate with each other. Moreover, nowadays due to the development of international business, cooperation and communication becomes an inherent need of cross-border insolvency, in particular, in the case of coordination of insolvency proceedings involving multinational enterprise groups. The courts from different jurisdictions are interrelated by the multiple debtors that belong to one group and they can hardly make a decision "wholly independent of the future actions of the other court".[1578] For instance, on 11 June 2015, the CJEU delivered a significant judgment also concerning the Nortel Networks.[1579] One of the questions referred to the CJEU was whether the courts opening the secondary proceedings have exclusive jurisdiction, or concurrent jurisdiction with the courts opening the main insolvency proceedings, to rule on the determination of the debtor's assets falling within the scope of the effects of those secondary proceedings. The CJEU held that both the courts opening the main proceedings and the courts opening the secondary proceedings have jurisdiction, concurrently to rule on the determination of the debtor's assets falling within the scope of the effects of the secondary proceedings. As pointed out by Wessels, that decision will "create huge cross-border coordination challenges"[1580] and accordingly demands the competent courts to jointly work with each other, in particular for fair distribution of the group assets.

5.164 Considering the current growth of regional economic integration, it is more likely that the economic reality will drive the courts in China to accept the appropriate mechanism to coordinate the cross-border insolvency proceedings at the regional level, which is to cooperate and communicate with each other.

[1577] *Smith Kline & French Laboratories Ltd. v. Bloch*, [1983] 1 W.L.R. 730

[1578] Westbrook, International Judicial Negotiation, 38 Tex. Int'l L.J., 2003, p.567

[1579] Case C-649/13, *Comité d'entreprise de Nortel Networks SA and Others v Cosme Rogeau and Cosme Rogeau v Alan Robert Bloom and Others* [2015]

[1580] Please visit Wessels, http://bobwessels.nl/2015/06/2015-06-doc9-cjeu-gives-significant-judgment-in-nortel-networks/ (Last visited on 14 June 2016)

8.4.2 A Special Meeting

5.165 Given the fact that it is lack of legal basis to establish a trans-regional competent court and the need for safeguarding autonomous interpretation of related provisions peculiar to CICIA, which is crucial to its function, as well as a solution to disputes incurred in the course of its implementation, I propose to establish a functional dispute settlement mechanism on the basis of cooperation and communication.

8.4.2.1 Meeting as the Proper Form

5.166 The functional dispute settlement mechanism is to be established in the form of meeting. Why should such a meeting be convened? It is inspired by the idea of joint hearing as developed in North America. In 1998, the joint hearing was firstly put in practice in *Re Livent*,[1581] in which the joint hearing was allowed by the courts of the U.S.A and Canada via telephone or video-conference.[1582] More courts followed this approach either by incorporating the joint-hearing provision in the cross-border insolvency protocol or convened a joint-hearing in practice.[1583] It fits within the rationale of Article 27 of the Model Law. It is also

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[1581] In *Re Livent Inc*. between United States Bankruptcy Court for the Southern District of New York (Hon. Arthur Gonzales), Case No. 98-B-48312, and Ontario Superior Court of Justice, Toronto (Mr. Justice J.D. Ground), Case No. 98-CL-3162, (June 11, 1999).

[1582] Dargan, Sean, The Emergence of Mechanisms for Cross-Border Insolvencies in Canadian Law, 17 CONN . J. INT 'L L., 122 (2001).

[1583] *Everfresh*, Ontario Court of Justice, Toronto, Case No. 32-077978 (20 December 1995), and the United States Bankruptcy Court for the Southern District of New York, Case No. 95 B 45405 (20 December 1995); *Solv-Ex Canada Limited and Solv-Ex Corporation*, Alberta Court of Queen's Bench, Case No. 9701-10022 (28 January 1998) and the United States Bankruptcy Court for the District of New Mexico, Case No. 11-97-14362-MA (28 January 1998); *Livent*, United States Bankruptcy Court for the Southern District of New York, Case No. 98-B-48312 and the Ontario Superior Court of Justice, Toronto, Case No. 98-CL-3162 (11 June 1999); *Loewen*, United States Bankruptcy Court for the District of Delaware, Case No. 99-1244 (30 June 1999) and the Ontario Superior Court of Justice, Toronto, Case No. 99-CL-3384 (1 June 1999); *AgriBioTech Canada Inc.*, Ontario Superior Court of Justice, Toronto, Case No. 31-OR-371448 (16 June 2000), and the United States Bankruptcy Court for the District of Nevada, Case No. 500-10534 (28 June 2000) (unofficial version); *Greater Beijing First Expressways Limited*, United States Bankruptcy Court for the Southern District of California, Case No. 01-03640-304, and the Supreme Court of British Columbia, Case No. 11-213464/VA.01 (2001); *Financial Asset Management Foundation*, United States Bankruptcy Court for the Southern District of California, Case No. 01-03640-304 and the Supreme Court of British Columbia, Case No. 11-213464/VA.01 (2001); *360Networks*, British Columbia Supreme Court, Vancouver, Case No. L011792 (28 June 2001) and United States Bankruptcy Court for the Southern District of New York, Case No. 01-13721 (29 August 2001); *Laidlaw*, Ontario Superior Court of Justice, Toronto, Case No. 01-CL-4178 (10 August 2001), and the United States Bankruptcy Court for the Western District of New York, Case No. 01-14099 (20 August 2001); *PSINet*, Ontario Superior Court of Justice, Toronto, Case No. 01-CL-4155 (10 July 2001) and the United States Bankruptcy Court for the Southern District of New York, Case No. 01-13213 (10 July 2001); *Mosaic, Ontario Court of Justice*, Toronto, Court File No. 02-CL-4816 (7 December 2002) and the United States Bankruptcy Court for the Northern District of Texas, Case No. 02-81440 (8 January 2003); *Systech Retail Systems Corp.*, Ontario Court of Justice, Toronto, Court File No. 03-CL-4836 (20 January 2003), and the United States Bankruptcy Court for the Eastern District of North Carolina, Raleigh Division, Case No. 03-00142-5-ATS (30 January 2003); *Quebecor*, Montreal Superior Court, Commercial Division, No. 500-11-032338-085 and the United

stated under UNCITRAL Practice Guide on Cross-border Insolvency Cooperation that "joint hearings or conferences have the advantage of enabling the courts to deal with the complex issues of different insolvency proceedings directly and in a timely manner."[1584] In accordance with the Guideline 10 of the Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (Court-to-Court Guidelines) that a court may conduct a joint hearing with another court.

5.167 As aforementioned, a trans-regional court is too sensitive to be accepted due to the possibility of violating the Basic Law. Nevertheless, a functional dispute settlement mechanism is needed to facilitate the dialogues between the judges from the three regions in a country, which can also promote the regional judicial interaction on the cross-border insolvency issues. The form of meeting conforms with the requirements of the Basic Law, which allows the two SARs to maintain juridical relations with and render assistance to the judicial organs of other parts of the country through consultations.[1585] Further, with the development of e-technology, to convene such a meeting does not mean "physical relocation".[1586] Both the Mainland and HK have adopted e-tech in the process of adjudicating civil and commercial cases. For instance, in the Mainland since use of video-link has been incorporated into the Civil Procedure Law of P.R.C. in 2012, the video-link has been applied by courts in several cases to examine key witnesses living outside the province, where proceedings have been commenced.[1587] According to the case law, the courts of Hong Kong also accept e-technology, such as video-conference, to be applied to cross-border insolvency cases.[1588] Therefore, a meeting is a pragmatic way, which can be facilitated by use of e-technology in China.

8.4.2.2 Participants

5.168 The participants of the meeting are judges of the highest-level court from the three regions. So far, as abovementioned, the juridical relations between the Mainland and the two SARs are maintained in a judicial and administrative mixed character. Nevertheless, insolvency proceedings are a court-dominant system in in the Mainland and the two SARs, where the courts are the sole authorities that exercise the jurisdiction over the insolvency proceedings.[1589] If CICIA were entered between the Mainland and the two SARs, should the problems encountered in the course of implementation thereof, such as

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States Bankruptcy Court for the Southern District of New York, No. 08-10152 (JMP) (2008) (Date collected from Annex I to UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation)

[1584] UNCITRAL Practice Guide on Cross-border Insolvency Cooperation, para.154

[1585] The Basic Law of HKSAR, article 95; the Basic Law of Macao SAR, article 93

[1586] Wessels, International Insolvency Law, 3rd ed., Vol.X, Deventer: Kluwer, 2012, para.10334e

[1587] On a number of occasions, the courts have used "QQ", a software service that is widely used in China, to establish the video-link. See Hague Conference on Private International Law (HCCH), Draft Practical Handbook on the operation of the Evidence Convention (Prel. Doc. No 1 - provisional edition pending completion of the French version), ft. 624, http://www.hcch.net/upload/wop/2014/2014sc_pd01en.pdf (Last visited on 14 June 2016)

[1588] *Re Chow Kam Fai David* [2004] HKCA 111; [2004] 2 HKLRD 260; [2004] 2 HKC 645; CACV295/2003

[1589] EBL, article 3; HK Companies Ordinance (Cap 32), s. 176; Civil Procedure Code of Macao, article 20

interpretation of COMI, also be solved in the way of negotiation between the court and two government institutions? That might not be deemed as appropriate. Slaughter has remarked a new development in the course of global legal cooperation, i.e. judicial comity, which has four distinct strands.[1590] The first strand she indicated is the ability of the courts to resolve disputes and interpret and apply the law honestly and competently, rather than that of a government.[1591] The cross-border insolvency is a matter, which should be left to the courts to decide and interference from the government, though more or less inevitable, should be reduced as much as possible. The judges of the highest-level court from the three regions, who represent the highest judicial authority in each independent jurisdiction, can better undertake the specialized duties and make the trans-regional judicial cooperation more judicialized.

8.4.2.3 Objectives of the Meeting

5.169 One of the most important objectives of the meeting is to provide the opportunity to the judges to exchange points of view on the jurisdiction disputes that are referred to them by the requesting courts. After discussion, they will issue their opinions on specific issues referred to them, which can contain proper interpretation that prevents the autonomous meaning related to jurisdiction under CICIA from distortion or guiding solutions to certain disputes related to cross-border insolvency agreements. What are the effects of those opinions? It depends on the type of references that the requesting courts seek. In the course of inter-regional cross-border insolvency proceedings, the courts that seek explanation of the related provisions under CICIA shall report to the Supreme Court of that region, which can request a special meeting to be convened. In accordance with the current regional legal cooperation arrangements, if there is any problem incurred by implementation of the arrangements, the Supreme People's Court and the governments of the SARs are authorized to solve them through joint negotiation.[1592] Considering the judicial specialized nature of cross-border insolvency proceedings, it is suggested to grant authority to the Supreme Courts to make a joint explanation. To refrain from interfering with the internal superior judicial authority of the Supreme Courts in the respective region, whether or not to submit such a request is subject to the discretion of the Supreme Courts. Besides, to safeguard the independence of the judicial powers of each region,[1593] whether or not the joint

[1590] Slaughter, Anne-Marie, A Global Community of Courts, 44 Harv. Int'l L.J. 2003, p. 206
[1591] Ibid.
[1592] Arrangement of the Supreme People's Court between the Mainland and the HKSAR on Reciprocal Recognition and Enforcement of the Decisions of Civil and Commercial Cases under Consensual Jurisdiction, article 18: Any problem encountered or any amendment needed in the implementation of this Arrangement shall be settled by the Supreme People's Court and the HKSAR Government upon negotiations.
Arrangement between the Mainland and the Macao Special Administrative Region on the Mutual Recognition and Enforcement of Civil and Commercial Judgments, article 22: Where this Arrangement meets any problem during the course of implementation thereof or needs to be altered, the Supreme People's Court and the Macao Special Administrative Region shall solve it through negotiation.
[1593] The Basic Law of HKSAR, article 2: The National People's Congress authorizes the Hong Kong Special Administrative Region to exercise a high degree of autonomy and enjoy executive,

explanation handed down by the special meeting can have binding effect on individual case shall also depend on joint consensus of the Supreme Courts concerned. Otherwise, it merely serves as proper reference to the individual case. Besides, upon consensus of all the Supreme Courts, the explanation shall have binding effect on the specific provisions under CICIA.

5.170 In the course of implementing cross-border insolvency agreements, the courts in the concurrent proceedings can report to the Supreme Court from the respective region, which can jointly request a special meeting to be convened and refer the disputes arising from the cross-border insolvency agreement to the special meeting. In matters of the disputes arising from the cross-border insolvency agreement, the opinions or part of the opinions come into binding effect to the extent that all the requesting courts involved agree to accept them, which should be expressly written into the respective judgment. The effects are merely binding on the individual case. If one of the requesting courts disagrees with the opinions or part of the opinions given by the special meeting, those opinions are not binding.

5.171 The reference procedure concerning cross-border insolvency agreements is different from the procedure in pursuit of explanation of the related provisions. In the case involving cross-border insolvency agreements disputes, the function of the special meeting are more akin to a joint forum, to which the disputes are submitted for a final decision. Due to the restrictions set up under the Basic Law, it is prohibited to drag the courts concerned into that kind of procedure because it will contravene the rules concerning the power of final adjudication granted by the Basic Law. That's why an extra agreement between the Supreme Courts in the concurrent proceedings is required. It is meant to be designed on a voluntary basis. In addition, the opinions are only binding on the individual case referred to the special meeting, which enables that kind of arrangement not to interfere with the independent judicial power granted to the SARs by the Basic Law.[1594] By doing so, it will also make the opinions handed down by the special meeting more acceptable.

5.172 Both the Mainland and Macao SAR are civil law jurisdictions, where case law does not have general application. As for Hong Kong, it is suggested to include into CICIA that any reference to the special meeting shall not be

legislative and *independent* judicial power, including that of final adjudication, in accordance with the provisions of this Law.

The Basic Law of Macao SAR, article 2: the National People' s Congress authorizes the Macao Special Administrative Region to exercise a high degree of autonomy and enjoy executive, legislative and *independent* judicial power, including that of final adjudication, in accordance with the provisions of this Law. (italics added by the author)

[1594] The Basic Law of HKSAR, article 2: The National People's Congress authorizes the Hong Kong Special Administrative Region to exercise a high degree of autonomy and enjoy executive, legislative and *independent* judicial power, including that of final adjudication, in accordance with the provisions of this Law.

The Basic Law of Macao SAR, article 2: The National People' s Congress authorizes the Macao Special Administrative Region to exercise a high degree of autonomy and enjoy executive, legislative and *independent* judicial power, including that of final adjudication, in accordance with the provisions of this Law. (italics added by the author)

construed as a direct reference to the courts in Hong Kong SAR except for the disputes concerned or unless the Court of Final Appeal of HKSAR expressly indicates otherwise.

5.173 In addition to resolving the conflicts, the second objective of the meeting is to enable integrated negotiation. As pointed out by Westbrook,

"Judges are not always comfortable with the idea that a court "negotiates" with another court (much less that it negotiates with the parties). Many of the cases in which such negotiation is happening contain no explicit acknowledgement of the negotiation process, but negotiation is in fact an inescapable necessity in modem, cross-border commercial litigation."[1595]

5.174 The current solution to disputes arising from regional legal cooperation in China is designed in form of bilateral arrangements,[1596] which is through bilateral negotiation. Bilateral negotiation can probably be influenced by the imbalance of political power between the Mainland and SARs, which has been described as "Hong Kong proposes, the Mainland disposes" in the course of implementing CEPA.[1597] Legal conflicts arising from cross-border insolvency are legal disputes, which should be dragged from bilateral negotiation to open debate in a more adjudicative manner.

5.175 Furthermore, as illustrated by a global community of courts is emerging, which

"is constituted above all by the self-awareness of the national and international judges who play a part. They are coming together in all sorts of ways. Literally, they meet much more frequently in a variety of settings, from seminars to training sessions and judicial organizations. Figuratively, they read and cite each other's opinions, which are now available in these various meetings, on the Internet, through clerks, and through the medium of international tribunals that draw on domestic case law and then cross-fertilize to other national courts."[1598]

5.176 On the contrary, the opportunity of national judges, which including both the Mainland judges and judges from the two SARs, to engage in direct discussion and exchange of points of view is not that much. The third objective is

[1595] Westbrook, International Judicial Negotiation, 38 Tex. Int'l L.J., 2003, p. 569

[1596] Arrangement of the Supreme People's Court between the Mainland and the HKSAR on Reciprocal Recognition and Enforcement of the Decisions of Civil and Commercial Cases under Consensual Jurisdiction, article 18: any problem encountered or any amendment needed in the implementation of this Arrangement shall be settled by the Supreme People's Court and the HKSAR Government upon negotiations.
Arrangement between the Mainland and the Macao Special Administrative Region on the Mutual Recognition and Enforcement of Civil and Commercial Judgments, article 22: Where this Arrangement meets any problem during the course of implementation thereof or needs to be altered, the Supreme People's Court and the Macao Special Administrative Region shall solve it through negotiation.

[1597] Puig, Gonzalo Villalta, A Quasi-adjudicative Dispute Settlement Mechanism for CEPA: The Rule of Law in Trade Relations between Mainland China and Hong Kong, in: Chinese Journal of International Law, 2013, Vol. 12(2), p.306

[1598] Slaughter, Anne-Marie, A Global Community of Courts, 44 Harv. Int'l L.J. 2003, p. 192

to promote direct court-to-court communication between the Mainland and the two SARs. A more integrated negotiation mechanism built up to include all the three regions in the same platform will help to generate an awareness of a common identity and community, which may gradually increase the mutual understanding and achieve consensus between the Mainland and the two SARs.

8.4.3 Costs

5.177 As for the costs incurred, although the disputes arising out of the cross-border insolvency proceedings, which shall be covered by the debtor's assets, the functional solution under CICIA in fact will promote the court-to-court cooperation and communication and thus will enhance the regional judicial cooperation. Considering its possible influence on the public interests, it is also expected to receive some public funding from the support of the governments.

Recommendation 9 - Inter-regional Case Register

(1) Each region should be required to publish relevant information in cross- border insolvency cases in a publicly accessible electronic register.

(2) Once a cross-border insolvency proceeding is commenced in one region, the court shall immediately inform the communication authority in its own region. The communication authority must publish the information concerning opening of insolvency proceedings on its e-portal and is also mandatory to inform its counter-part communication authorities concerned in the other regions. Meanwhile, the e-portal of each region should provide interconnection system that links to the registers in other regions.

(3) The minimum amount of information is required to be published in the inter-regional insolvency registers, including
(a) the date of the opening of insolvency proceedings
(b) the court opening insolvency proceedings and the case reference number, if any;
(c) the debtor's name, registration number, registered office and current correspondence address;
(d) the name, postal address or e-mail address of the insolvency practitioner, if any, appointed in the proceedings
(e) the time limit and place for lodging claims, if any, or a reference to the criteria for calculating that time limit;
Additional information subject to the local laws shall not be precluded.

(4) The official language for the relevant information shall be Chinese. The information can also be published in English in Hong Kong SAR or Portuguese in Macao SAR but shall always be accompanied with Chinese translation.

Comments to Recommendation 9

5.178 Recommendation 9 calls for embedding an inter-regional case register into CICIA. It examines the feasibility of such a register by taking into consideration

the current practice in the regional legal assistance. It also sets out the basic contents of information that can be disclosed.

9.1 Reasons for Establishment of an Inter-regional Case Register

5.179 The publicity related to the insolvency proceedings plays a significant role in good functioning of a cross-border insolvency regime. Under the EC Regulation, it is up to the insolvency practitioners to decide whether or not to request publication and registration of the judgment opening insolvency proceedings in another Member State[1599] and it is also up to Member States to impose mandatory rules of publication and registration.[1600] For a jurisdiction-dominant system, it is of importance that a court is informed about whether the company is already subject to insolvency proceedings in another Member State when it decides the commencement of insolvency proceedings. The lack of information on existing proceedings has resulted in unnecessary concurrent proceedings being launched.[1601] According to EU Commission, there was a public consultation results illustrated that "the vast majority of respondents (86%) who expressed an opinion agreed that the absence of mandatory publication of the decision opening proceedings was a problem".[1602]

5.180 In addition, it has been acknowledged under the Regulation and the Model Law that protection of all interested persons is linked to notification requirements.[1603] Some of the persons concerned are not aware that insolvency proceedings have been opened, which may have serious consequences on the capacity of the insolvent companies and on the rights of interested or potentially interested persons if they continue to act in good faith in a way that conflicts with the new circumstances, which is thus detrimental to their rights. It is even more so when it comes to creditors. Information concerning publication and registration of the judgment opening insolvency proceedings is necessary for the efficient lodging of claims for creditors in other States. Under both the EC Regulation and the Model Law, notification to foreign creditors is conducted individually under the national rules,[1604] which vary as to the form, time and content of notice required to be given in regard to the foreign proceedings. Consequently there is risk that the information and requirements regarding the lodging of claims given to the foreign creditors might not be sufficient. Therefore, the EU Regulation (recast) formulates mandatory rules of publication of relevant information in cross-border insolvency proceedings in publicly accessible

[1599] The EC Regulation, article 21(1)

[1600] The EC Regulation, article 21(2)

[1601] EU Commission Explanatory Memorandum, Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings, Strasbourg, 12.12.2012, COM(2012) 744 final, p. 24-25

[1602] EU Commission Explanatory Memorandum, Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings, Strasbourg, 12.12.2012, COM(2012) 744 final, p.25

[1603] EU Commission Explanatory Memorandum, Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings, Strasbourg, 12.12.2012, COM(2012) 744 final, p. 25; Guide and Interpretation, para.199

[1604] The EC Regulation, article 40(2); the Model Law, article 14(2)

electronic registers[1605] and requires interconnection of such insolvency registers on EU level.[1606]

9.2 Feasibility of an Inter-regional Case Register

5.181 Publicity can be better realized through communication, which is of fundamental importance that helps to remove the uncertainty caused by parallel insolvency proceedings subject to different insolvency legislations. With respect to enterprise groups, cross-border communication can generate better understanding of facts and some potential benefits, which may be difficult to be found, due to the complexity of the organization structure and business arrangement of the groups. It can also avoid information distortion, which results from difference in foreign law. Through communication, more reliable responses can be expected from the parties concerned as well as from the courts, which may contribute to a better way of resolution.

5.182 As aforementioned, the Basic Law provides the legal foundation for inter-regional legal cooperation.[1607] In practice, the legal assistance is not conducted directly between the courts but between the Supreme People's Court and the administrative authorities of the two SARs, in particular, the China Law Unit of the Legal Policy Division of the DoJ of Hong Kong and International Laws Affairs Division of Law Reform and International Law Bureau of Macao. Those two offices serve as regular institutional communication channels between the courts from each side and each of the institutions has their own online e-portal for information regarding inter-regional cross-border legal cooperation.[1608] Besides, development of judicial informatization seems to be work as top priority to the people's courts.[1609] The Supreme People's Court enacted Provisions on the Issuance of Judicial Documents on the Internet by the People's Courts in 2013.[1610] Accordingly since 1 January, 2014 the courts are mandatorily required to publish their judgments on the internet.[1611] The Supreme People's Court also

[1605] The EU Regulation (recast), article 24

[1606] The EU Regulation (recast), article 25

[1607] 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.

Basic Law Macao SAR, article 93: the Macao Special Administrative Region may, through consultations and in accordance with law, maintain judicial relations with the judicial organs of other parts of the country, and they may render assistance to each other.

[1608] China Law Unit of the Legal Policy Division of the DoJ of Hong Kong http://www.doj.gov.hk/eng/about/lpd.html (Last visited on 14 June 2016)

International Laws Affairs Division of Law Reform and International Law Bureau of Macao http://www.dsrjdi.ccrj.gov.mo/en/zzjg_show.asp?#l (Last visited on 14 June 2016)

[1609] Supreme People's Court: Five-Year Plan of the People's Courts on Development of Informatization (2013-2017)

[1610] Provisions on the Issuance of Judicial Documents on the Internet by the People's Courts, [2013] Judicial Interpretation No.26, hereinafter the 2013 Interpretation.

[1611] The predecessor of the 2013 interpretation was Provisions on the Issuance of Judicial Documents on the Internet by the People's Courts, [2010] Judicial Interpretation No.48, which was passed by the Supreme People's Court in 2010. By then, it was stated that the courts may issue judgments on the internet ([2010] Judicial Interpretation No.48, article 2). Now it has been replaced by the 2013 Interpretation, which provides that the courts should issue judgments on the internet ([2013] Judicial Interpretation No.26, article 4).

established an internet portal as a central public access to the judgments of all levels.[1612] In February 2016, the Supreme People's Court further issued Five-Year Plan of the People's Courts on Development of Informatization (2016-2020), in which it is required that the High People's Courts in each province need to promote and update informatization development, in particular, formulate detailed implementation measures, in the respective jurisdiction.[1613] In March 2016, a national online case database portal was launched, which aims at providing comprehensive and in-depth information concerning judgments, case analysis and expert opinions.[1614]

5.183 Those abovementioned institutions can readily be utilized as communication authorities that provide technical assistance for establishment of an inter-regional case register. Once a cross-border insolvency proceeding is commenced in one region, the court shall immediately inform the communication authority in its own region. The communication authority must publish the information concerning opening of insolvency proceedings on its e-portal and is also mandatory to inform its counter-part communication authorities concerned in the other regions. Meanwhile, the e-portal of each region should provide interconnection system that links to the registers in other regions.

9.3 Basic Contents of Information

5.184 For CICIA, it is suggested to include the minimum amount of information mandatorily to be published in the inter-regional insolvency registers, in addition to which additional information subject to the local laws is not precluded.

5.185 As for what can constitute the basic contents of information to be published, both the Regulation and the Model Law provides some answers. In accordance with National Reports collected in the Heidelberg-Luxembourg-Vienna Report, the following information is considered extremely essential in the course of cross-border insolvency communication: time limits, language requirements, costs and the specific procedures for lodging and proving claims under the *lex fori concursus*.[1615] The Model Law requires that a reasonable time period for filing claims and place for filing should be specified.[1616] In addition, whether secured creditors need to file their secured claims should also be

[1612] [2013] Judicial Interpretation No.26, article 2; for the central internet portal, please visit: http://www.court.gov.cn/zgcpwsw/zscqhz/ (Last visited on 14 June 2016)
[1613] Qin Jin, Zhou Qiang Host a Supreme People's Court Meeting on Specialized Topics: to promote transformation and upgrading of the People's Courts on Development of Informatization (in Chinese), in: Legal Daily, 23 February 2016, available at: http://www.legaldaily.com.cn/index_article/content/2016-02/23/content_6495307.htm
[1614] Please visit: http://www.faxin.cn/about.aspx?t=us
[1615] Hess, Oberhammer, Pfeiffer, European Insolvency Law-The Heidelberg-Luxembourg-Vienna Report on the Application of Regulation No.1346/2000/EC on Insolvency Proceedings (External Evaluation JUST/2011/JCIV/PR/0049/A4), C.H.Beck.Hart.Nomos, 2014, para.944-945; See also all National Reports on Q37
[1616] The Model Law, article 14(3)(a)

indicated.[1617] The EU Regulation (recast) provides a more comprehensive list of information mandatorily to be published in the insolvency registers, including

"(a) the date of the opening of insolvency proceedings;
(b) the court opening insolvency proceedings and the case reference number, if any;
(c) the type of insolvency proceedings referred to in Annex A that were opened and, where applicable, any relevant subtype of such proceedings opened in accordance with national law;
(d) whether jurisdiction for opening proceedings is based on Article 3(1), 3(2) or 3(4);
(e) if the debtor is a company or a legal person, the debtor's name, registration number, registered office or, if different, postal address;
(f) if the debtor is an individual whether or not exercising an independent business or professional activity, the debtor's name, registration number, if any, and postal address or, where the address is protected, the debtor's place and date of birth;
(g) the name, postal address or e-mail address of the insolvency practitioner, if any, appointed in the proceedings;
(h) the time limit for lodging claims, if any, or a reference to the criteria for calculating that time limit;
(i) the date of closing main insolvency proceedings, if any;
(j) the court before which and, where applicable, the time limit within which a challenge of the decision opening insolvency proceedings is to be lodged in accordance with Article 5, or a reference to the criteria for calculating that time limit."[1618]

5.186 Considering the experiences of the international insolvency regimes as well as the character of CICIA, which is a recognition-based system, it is suggested to include the following information into the basic contents required:

(a) the date of the opening of insolvency proceedings
(b) the court opening insolvency proceedings and the case reference number, if any;
(c) the debtor's name, registration number, registered office and current correspondence address;
(d) the name, postal address or e-mail address of the insolvency practitioner, if any, appointed in the proceedings
(e) the time limit and place for lodging claims, if any, or a reference to the criteria for calculating that time limit

5.187 With respect to the language of communication, in addition to Chinese, English and Portuguese are both official languages can be used as an official language by the executive authorities, legislature and judiciary of the respective SAR.[1619] For the sake of respecting the ordinary usage of languages in the two SARs, English and Portuguese can be applied but shall always accompanied with Chinese translation in the course of cooperation and communication, which is

[1617] The Model Law, article 14(3)(b)
[1618] The EU Regulation(recast), article 24(2)
[1619] The Basic Law of HKSAR, article 9: in addition to the Chinese language, English may also be used as an official language by the executive authorities, legislature and judiciary of the Hong Kong Special Administrative Region.
The Basic Law of Macao SAR, article 9: in addition to the Chinese language, Portuguese may also be used as an official language by the executive authorities, legislature and judiciary of the Macao Special Administrative Region.

the common official language in the three regions, so as to facilitate convenient and efficient communication.

Recommendation 10 – Independent Intermediaries: Separate Arrangement for Cross-strait Insolvency Cooperation (The Mainland and Taiwan)

(1) The cross-strait insolvency proceedings shall be coordinated in the way of appointment of independent intermediaries from both sides.

(2) To guarantee the qualification as well as impartiality, the criteria to be appointed as an independent intermediary shall be agreed upon by the both sides. The role and competence of the intermediary can be set out in a protocol or an order of the court.

(3) The main duty of the independent intermediaries is to maintain the connection with its counterpart and device a practical means of conducting cooperation and communication between the courts concerned.

(4) Before the appointment of the independent intermediaries, the opinions of the administrators should be consulted especially in matters of the way of conducting communication and coordination. Once appointed, an intermediary should be accountable to the court that appoints him or her and a related protocol can be reached with the approval of the respective courts.

(5) The independent intermediaries from the both sides can hold regular meeting either onsite or via e-technological means so that they can keep the courts from the both sides informed of the possible conflicts or problems in the cross-strait insolvency proceedings.

(6) Considering the difference of professional qualification criteria in the each side, each side recommends some candidates of independent intermediaries for itself, holding a discussion to select someone both sides can trust and then putting those candidates separately in a close list so that a consensus can be reached in advance to make sure that the qualifications of the independent intermediaries can be accepted by both sides in the process of coordination.

(7) The independent intermediaries should observe the duties in an impartial manner, free from bias, prejudice and any conflicts of interest. If its impartiality is in doubt, the court, after consulting the opinions of the administrators of both sides, can dismiss the independent intermediaries appointed by itself or request the counterpart court to dismiss its independent intermediaries with specific reasons upon the request of the administrators. A new independent intermediary can be selected from the list.

(8) The independent intermediaries will be remunerated from the estate of the insolvency proceedings in which the court appointed him or her.

Comments to Recommendation 10

5.188 Recommendation 10 builds up a separate arrangement for cross-strait insolvency cooperation through independent intermediaries. Reasons for such an arrangement will be briefly introduced through features of cross-strait cooperation, problems with the right to access and lack of rules on cross-strait cooperation and communication.

10.1 Private Intermediaries in the Process of Cross-strait Cooperation

5.189 Different from direct official contact between the Mainland and the SARs, two non-governmental institutes have been established in order to facilitate the cross-strait cooperation and communication. They deal with public affairs and undertake some of the government functions. One is the Association for Relations across the Taiwan Straits (hereinafter the ARATS) from the Mainland side, the other is the Straits Exchange Foundation (hereinafter the SEF) from the Taiwan side. It is stated on the website of SEF that

"Due to the complex and unique nature of relations across the Taiwan Strait and lack of official contacts between the two sides, the government had been unable to directly exercise public authority in handling issues arising from cross-strait exchanges. Therefore, it had to entrust a ***private intermediary body*** to exercise public authority over cross-strait matters. In March 1991, the Straits Exchange Foundation (SEF) was established with funds provided by the government and private sector to serve this function." [1620] (bold and italics added by the author)

5.190 As the counterpart to the SEF in the P.R.C, the ARATS is a non-governmental organization with the similar function set up by the P.R.C in dealing with the matters with Taiwan, including entering into the cross-strait agreements and assisting in cross-strait communication.[1621] The two non-governmental intermediaries have engaged in both the cross-strait economic cooperation and legal cooperation. For example, the ECFA was signed by the ARATS and the SEF. There are also institutional arrangements under the ECFA. Different from the CEPA, the Joint Steering Committee is replaced with a Cross-Straits Economic Cooperation Committee, which consists of representatives designated by the ARATS and the SEF.[1622] The Committee shall be responsible for handling matters relating to this Agreement, including but not limited to:

(1) concluding consultations necessary for the attainment of the objectives of this Agreement;
(2) monitoring and evaluating the implementation of this Agreement;
(3) interpreting the provisions of this Agreement;
(4) notifying important economic and trade information;
(5) settling any dispute over the interpretation, implementation and application of this Agreement in accordance with Article 10 of this Agreement.[1623]

[1620]Please visit: http://www.sef.org.tw/ct.asp?xItem=48843&CtNode=3987&mp=300 (Last visited on 14 June 2016)
[1621]Please visit: http://www.arats.com.cn/bhjs/200904/t20090417_871060.htm (Last visited on 14 June 2016)
[1622] The ECFA, article 11 (1)
[1623] The ECFA, article 11 (1)

5.191 To settle down the disputes in the course of implementing the ECFA, the ARATS and the SEF shall engage in consultations on the establishment of appropriate dispute settlement procedures and expeditiously reach an agreement in order to settle any dispute arising from the interpretation, implementation and application of ECFA.[1624] Before any consensus on the dispute settlement mechanism has been reached, any dispute over the interpretation, implementation and application of ECFA shall be resolved through consultations by the ARATS and the SEF or in an appropriate manner by the Cross-Straits Economic Cooperation Committee.[1625]

5.192 In regard to the legal cooperation, prior to the 2009 agreement, the SEF, the ARATS and China Notary Public Association entered into the Agreement on Verification of Application of the Notarized Certificates in 1993, in which it states that the two organizations sent copy of notarized certificate involving inheritance, adoption, marriage, birth, death, trust, education, settlement, custody and property rights etc.[1626] between China Notary Public Association or the local notary public associations and the SEF.[1627] If there is any dispute with respect to the implementation of the agreement, it should be resolved via negotiation.[1628] It is also provided under the 2009 agreement that any dispute arises in the process of application of this arrangement, which shall be settled in the way of negotiation between the SEF and the ARATS as soon as possible.[1629]

10.2 Problems with the Right to Access

5.193 The qualifications of the administrators pose obstacles to the cross-strait insolvency cooperation. In accordance with the insolvency laws of the Mainland and Taiwan,[1630] the lawyers and accountants can be appointed as administrators. Since 2008 the Taiwan residents are allowed to take part in the National Judicial Examination of P.R.C.[1631] Once they pass the exam, they can apply for practice as lawyer in the Mainland.[1632] There are some limitations. If they are appointed as entrusted agent before the court, they can only deal with Taiwan-related marital and inheritance disputes.[1633] Otherwise they can only be appointed as consultant in matters of non-litigation cases.[1634] In 1999, the Ministry of Finance issued an order, in which it is stated that residents from Taiwan are allowed to sit exam of China's Certified Public Accountant Examination.[1635] If they pass the exam, they

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[1624] The ECFA, article 10 (1)
[1625] The ECFA, article 10 (2)
[1626] The 1993 Agreement on Verification of Application of the Notarized Certificates (the 1993 Agreement), article 10 (2)
[1627] The 1993 Agreement, article 1(1)
[1628] The 1993 Agreement, article 7
[1629] The 2009 Agreement, article 22
[1630] The EBL, article 24; the 2015 Draft (Taiwan), article 31
[1631] Measures for the Implementation of National Judicial Examination, article 24
[1632] Administrative Measures for the Practice of Law in the Mainland by Taiwan Residents Holding the National Legal Profession Qualifications, article 2
[1633] Administrative Measures for the Practice of Law in the Mainland by Taiwan Residents Holding the National Legal Profession Qualifications, article 3
[1634] Id
[1635] [1999] The Ministry of Finance Assistance Order No. 12 (abolished), article 3; Later it was superseded by [2008] The Ministry of Finance Accounting Order No. 4 (article 3)

can apply for the membership with the Chinese Institute of Certified Public Accountants.[1636] Once they obtain the membership, they can be granted the qualification of accountant after they have more than two years relevant working experience in an accounting firm in the Mainland.[1637] Moreover, Taiwanese accounting firms can apply for provisional license to perform audit-related services[1638] and the valid time period of provisional license has been extended from half one year to one year based on the ECFA.[1639] However, Taiwan does not lift the ban on the professional qualification of the lawyers and accountants from the Mainland. It is stated under the Act Governing Relations between People of the Taiwan Area and Mainland Area that the people from the Mainland cannot take part in the professional examinations unless they have had a household registration in the Taiwan Area.[1640] In addition, neither the Mainland nor Taiwan enacted the Model Law. Are the Mainland administrators entitled to have direct access to a court in Taiwan? Probably not. In the aforementioned Lehman Brothers case, the joint liquidators appointed by the Hong Kong High Court applied twice with the same Taiwanese court for the recognition of their appointment, one for the appointment as provisional liquidators,[1641] one for the appointment as joint liquidators.[1642]

5.194 Considering the unbalanced rules of the professional market entry permit, it is suggested to make simplified proof requirements, especially for the Mainland administrators, to apply for recognition before the Taiwanese courts. Furthermore, in order to facilitate the direct access to the courts, the common requirements of qualification for insolvency practitioners can be set up, which can be discussed and negotiated between the two sides in advance. Under the conditions set by the common requirements, the insolvency practitioners can be provided with procedural standing for participation in the insolvency proceeding in the enacting State.

10.3 Lack of Rules on Cooperation and Communication

5.195 Considering the legal cooperation between the Mainland and Taiwan has just started as well as the instability of the cross-strait cooperative relationship, it is difficult to expect that a comprehensive cross-strait insolvency framework can be built up right now. In particular, consensus on the crucial criteria of recognition and jurisdiction of cross-strait insolvency is unlikely to be reached now partly because the local insolvency system is still developing, partly because the legal basis of cross-strait legal cooperation itself is undergoing challenges

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[1636] [1999] The Ministry of Finance Assistance Order No. 12 (abolished), article 15; [2008] The Ministry of Finance Accounting Order No. 4, article 13
[1637] Measures on Certification of Accountants, [2005] The Ministry of Finance Order No. 25, article 4, 23
[1638] Notice of the Ministry of Finance on Issuing Provisional Measures on Oversea Accounting Firms Perform Temporary Audit-related Services in the Mainland (2011, Decree No.4), article 2
[1639] Notice of the Ministry of Finance on Issuing Provisional Measures on Oversea Accounting Firms Perform Temporary Audit-related Services in the Mainland (2011, Decree No.4), article 7
[1640] The Act Governing Relations between People of the Taiwan Area and Mainland Area, article 22-II
[1641] Taipei District Court Trial on Application No. 1037 [2008]
[1642] Taipei District Court Trial on Application No. 514 [2009]

(i.e. the legality issue of the cross-strait agreements). However, due to the rise of the cross-strait business, there are needs of cross-strait insolvency cooperation and communication, which is not dependent on recognition. In the Yaxin reorganization case, Yaxin Electronics and Yaxin Circuit Board (hereinafter referred to as Suzhou Yaxin) were two enterprises incorporated in Suzhou, the Mainland. Their parent company, Taiwan Yaxin Corporation was ordered bankrupt by the Taiwan Court. As the result, the cash receivables could not be collected, cash flow failed, and the business plunged into financial difficulties, which dragged Suzhou Yaxin also into insolvency. In 2007, the Taiwan Court opened the reorganization proceeding of the Taiwan Yaxin Corporation upon the application of the banking creditors in Taiwan.[1643] On 25 April 2008, a banking group composed of fifteen banks filed a reorganization petition to the local court in the Mainland.[1644] The banking creditors from the both sides held a meeting together and during the meeting the administrators of the parent company gave up the leading administrative authority on its Suzhou subsidiaries.[1645] From then on, the two reorganization proceedings were operated separately in the two regions. In the end, the reorganization of the parent company failed[1646] but the reorganization of the Mainland subsidiaries succeeded.[1647]

5.196 As aforementioned, the 2015 Draft provides some general rules concerning the duty of the domestic and foreign liquidators or administrators to cooperate with each other. The liquidators or administrators appointed in the Taiwan debt clearance proceedings can request the foreign liquidators or administrators for necessary cooperation and information as well as provide the foreign liquidators or administrators with necessary cooperation and information.[1648] However, it has not been specified what kind of assistance and information can be deemed as necessary. From the Mainland side, there is no equivalent provision. In the Yaxin reorganization case, the give-up decision of the administrator of the parent company was very crucial, which later served as one of the reasons that the Taiwan court turned down the reorganization plan because it no longer had any control over the assets located in the Mainland.[1649] Moreover, if that give-up decision could be deemed as a protocol, it had not been submitted to the Taiwan court for approval. Therefore, it is better to insert a provision in the cross-strait cooperation between the court and the administrators that the administrators should be required to bear the reporting

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[1643] Taipei Shilin District Court Reorganization No.1 [2007]
[1644] Suzhou Intermediate Court, Analysis of the Bankruptcy Reorganization in Practice – Study of the Yaxin Case, in: People's Court Daily, 07/05/2009
[1645] Gu Zhihao, The First Successful Reorganization Case of Unlisted Company after the New EBL Is Implemented: Comments on Reorganization of Yaxin Electronics and Yaxin Circuit Board (in Chinese), in: Law Review of Corporate Reorganization & Restructuring, 2012, p. 43
[1646] Taipei Shilin District Court Reorganization No.3 [2010]
[1647] Gu Zhihao, The First Successful Reorganization Case of Unlisted Company after the New EBL Is Implemented: Comments on Reorganization of Yaxin Electronics and Yaxin Circuit Board (in Chinese), in: Law Review of Corporate Reorganization & Restructuring, 2012, p. 46-57
[1648] The 2015 Draft, article 317(1)
[1649] Taipei Shilin District Court Reorganization No.3 [2010]

duties. The courts should encourage liquidators to report periodically, including any practical problems, which have been encountered.[1650]

5.197 Moreover, the case of Yaxin only revealed the tip of the iceberg. Considering the annual cross-strait investment flow between the Mainland and Taiwan (Please refer to Table I in Part II), Yaxin will probably not be the last cross-strait enterprise group that needs cross-strait cooperation if it unfortunately goes insolvent. Under that circumstance, exchange of information in cross-strait insolvency cases related to enterprise groups is very important. As stated under the Part III of UNCITRAL Legislative Guide on Insolvency Law, it may promote better understanding of the foreign law in order to lower the possibility of unnecessary conflicts. It also advances the resolution of issues through a negotiated result acceptable to all, encourages the parties concerned to preserve value that would otherwise be lost through fragmented judicial action, which will especially contribute to rescue of the group. In addition, communication generates more reliable responses, avoiding the inherent bias and adversarial distortion that may be apparent where parties represent their own particular concerns in their own jurisdictions.

10.4 Role of Independent Intermediaries

5.198 Generally speaking, the orderly administration of the insolvency cases is governed under the authority of the courts, which is the same case in the both insolvency systems. Nonetheless, it should be taken into account the possible difficulty that the administrators can meet caused by the access barriers in the course of cross-strait insolvency cooperation. The Model Law provides the possibility of the direct or indirect cooperation between the courts.[1651] Against the current economic, political and social background, direct cooperation between the courts is not yet possible in the cross-strait context.

5.199 Indirect cooperation and communication can be achieved through liquidators or through any person or body appointed to act at the direction of the courts.[1652] Moreover, in the Global Principles, an independent intermediary is introduced, as a new professional function to overcome any hurdles in global communication.[1653] It is stated in the comment to Principle 23 of the Global Principles that

> "Under certain circumstances, the court may wish to refrain from conducting direct communication with another foreign court… The court could consider appoint an independent intermediary, whose task is to ensure that an international insolvency case is operated in accordance with these Global Principles and with any specific provisions that are either set out in a protocol or specified in the order made by the court."[1654]

[1650] Guideline 16.5, European Communication and Cooperation Guidelines for Cross-border Insolvency, Developed under the aegis of the Academic Wing of INSOL Europe, July 2007

[1651] The Model Law, article 25

[1652] The Model Law, article 25 (1)

[1653] ALI/III Global Principles for Cooperation in International Insolvency Cases, 2010, http://www.iiiglobal.org/component/jdownloads/viewdownload/36/5897.html (Last visited on 14 June 2016)

[1654] Global Principles, Comment to Principle 23

5.200 It is also stipulated under the EU JudgeCo Principles that courts should consider the appointment of one or more independent intermediaries to ensure that an international insolvency case proceeds in accordance with these EU JudgeCo Principles.[1655]

5.201 The way that both sides get used to is to cooperate and communicate via the non-governmental intermediaries, i.e. the ARATS and the SEF. As non-governmental intermediaries, they were granted a wide range of power, including entering into the cross-strait agreements and handling the economic and legal matters concerning the agreements in the way of negotiation. Therefore, it is relatively easier for both sides to accept the role of independent intermediaries in coordinating the cross-strait insolvency issues. If there is dispute arising out of cross-strait insolvency, the courts from the each side can appoint the independent intermediaries to facilitate the communication and cooperation. To guarantee the qualification as well as impartiality, the criteria to be appointed as an independent intermediary shall be agreed upon by the both sides. The relationship between the independent intermediaries and the administrators are also very important. Before the appointment of the independent intermediaries, the opinions of the administrators should be consulted especially in matters of the way of conducting communication and coordination. The role and competence of the independent intermediary can be set out in a protocol or an order of the court.[1656] A model of protocol can also be formulated between both sides in dealing with the role of independent intermediaries in the cross-strait insolvency coordination and the main content of the agreement shall include:

(1) equal treatment towards any administrators; e.g. any notice made by a court should be given to each of the liquidators
(2) communication methods that can be used and deemed effective
(3) the way of confirmation of receipt and keeping the exchange of information in store in case of any mistake or misunderstanding
(4) circumstances that require immediate notice

5.202 The main duty of the independent intermediaries is to maintain the connection with its counterpart and device a practical means of conducting communication between the courts concerned. The independent intermediaries from the both sides can hold regular meeting either onsite or via e-technological means so that they can keep the courts from the both sides informed of the possible conflicts or problems in the cross-strait insolvency proceedings.

5.203 An intermediary should be accountable to the court that appoints him or her and will be remunerated from the estate of the insolvency case in which the court appointed him or her.[1657] To qualify as an independent intermediary, the independent intermediary should also hold relevant educational background,

[1655] EU JudgeCo Principles, Principle 17
[1656] Global Principles, Principle 23.4; EU JudgeCo Principles, Principle 17(1)
[1657] Global Principles, Principle 23.5(iii); EU JudgeCo Principles, Principle 17(2)(iii)

professional license, experience, as well as any other relevant experience or accomplishments.[1658] Considering the difference of professional qualification criteria in the each side, a consensus should be reached in advance to make sure that the qualifications of the independent intermediaries can be accepted by both sides in the process of coordination.

5.204 There is another requirement, which is crucial to the cross-strait insolvency cooperation. The independent intermediaries should observe the duties in an impartial manner, free from bias, prejudice and any conflicts of interest.[1659] In particular, if an independent intermediary holds very strong political tendency of opinions towards the cross-strait relationship, the independent intermediary and the court from the other side might have doubt in its impartiality, which might lead to failure of cooperation. The possible solution is that each side recommends some candidates of independent intermediaries for itself, holding a discussion to select someone both sides can trust and then putting those candidates separately in a close list. In the course of cross-strait cooperation and communication, the court, after consulting the opinions of the insolvency practitioners of both sides,[1660] can dismiss the independent intermediary appointed by itself or request the counterpart court to dismiss its independent intermediary with specific reasons upon the request of the administrators. Such a request for the dismissal should be given due regard by the counterpart court since it is difficult to proceed with the cooperation and communication if the court from the other side no longer trusts the appointed independent intermediary. A new independent intermediary can be selected from the list. Last but not the least, the independent intermediaries should be compensated from the estate of the insolvency proceedings in which the court appointed him or her.[1661]

Conclusion

5.205 In pursuit of a solution to China's inter-regional cross-border insolvency cooperation, neither the Regulation nor the Model Law can be entirely referred to. Based on comparison between the two regimes, the guiding principle, it is desired to make a balanced arrangement, which tailors the merits of the Regulation and the Model Law into China's context. Accordingly, there are 10 recommendations provided under CICIA, which covers the overriding objective, the form, the scope, recognition and reliefs, public policy, cooperation and communication, cross-border insolvency agreements, establishment of case register and cross-strait insolvency cooperation.

5.206 Recommendation 1 provides the guiding principle of CICIA. The principle of universality is the golden rule of cross-border insolvency, which is accepted by the majority of the academia and professionals. It meets constant resistance

[1658] Global Principles, Principle 23.5(i); EU JudgeCo Principles, Principle 17(2)(i)
[1659] Global Principles, Principle 23.5(ii); EU JudgeCo Principles, Principle 17(2)(ii)
[1660] Global Principles, Principle 23.4; EU JudgeCo Principles, Principle 17(1): The court should give due regard to the views of the insolvency practitioners in the pending insolvency cases before appointing an intermediary.
[1661] Global Principles, Principle 23.5(iv); EU JudgeCo Principles, Principle 17(2)(iv)

from the principle of territorialism because the latter mirrors the concern of judicial sovereignty of each independent jurisdiction. In reality, the main and non-main proceedings are inevitably to be allowed to co-exist. Hence, there is a common solution under the Regulation and the Model Law to the conflicts between universalism and co-existence of parallel proceedings, which is cooperation and communication. Cooperation and communication is more neutral to ease the tension caused by competition among jurisdictions, in particular in the case of enterprise groups because it is difficult to identify a "home" for multiple debtors. Therefore, it is suggested to adopt the coordinated approach by attaching emphasis on cooperation and communication for CICIA.

5.207 The main purpose of Recommendation 2 is to find a balanced solution between the jurisdiction-based approach under the Regulation and a recognition-based approach under the Model Law by setting out the overriding objective of CICIA. The decision depends on whether or not the equivalent legal basis is available in China's context. To establish a cross-border insolvency system involving compulsory jurisdiction and automatic recognition, like the Regulation, it should rely on the strong legal foundations, which is governed by the principle of mutual trust, flowing from the principle of sincere cooperation under the EU Treaties. Without fundamental principles incorporated into binding legal documents as concrete provisions, it is quite difficult to reach such consensus. In China, a regional legal system is established under the Basic Law. Driven by the legal pluralism, problems arise from proper interpretation of the relevant provisions of the Basic Law in the process of judicial intersection between the Mainland and SARs. Meanwhile, limited trust towards the judicial system of the Mainland as well as concern about non-recognition of the Mainland courts has negative influence on regional legal cooperation. It is obvious that the principles of sincere cooperation and mutual trust are pretty much at the primary stage in China's regional legal system. Thus, it is premature to make direct allocation of jurisdiction in CICIA since these two fundamental principles are still under construction. Accordingly, It is suggested to adopt a recognition-based system for CICIA, which focuses on recognition and reliefs. Meanwhile, a functional dispute settlement mechanism will be tentatively invented to ease the possible tension between recognition and jurisdiction.

5.208 There are two objectives of Recommendation 3: to find a proper form for China's inter-regional cross-border insolvency cooperation as well as to which extent, the arrangement shall apply. China's complex group composition has impact in the form to be chosen. Even under the circumstances that the international conventions can be implemented in both the Mainland and the two SARs, it is still necessary to make some regional arrangements since those conventions are only applicable to the "States", which is deemed as inappropriate to deal with the relevant domestic issues and the content will be subject to relevant adjustment. As a soft law instrument, Model Law is a recommendation in essence. However, for a region that is undergoing integration governed by common constitutional arrangements, the degree of certainty achieved in relation to harmonization is expected to be higher. Although China's regional legal cooperation is still conducted in a segmented manner and there is no equivalent mandatory instrument like regulation under

the EU law directly applicable throughout the whole region, it is suggested to establish a uniform and comprehensive cooperation arrangement for cross-border insolvency so that the courts in the different jurisdictions can refer to the same rules in handling parallel proceedings.

5.209 With respect to the scope, although Taiwan is also engaged in economic cooperation with the Mainland, there is still a lack of sufficient legal basis, such as the Basic Law, to ensure the involvement of Taiwan into an integrated inter-regional legal cooperation arrangement at this moment. Also considering the political reality and the public opinion on the cross-strait relationship, cross-strait insolvency cooperation has to be treated in a separate manner. In addition, based on common constitutional foundation, CICIA shall apply only to the intra-regional insolvency proceedings that the center of the debtor's main interests should be located in the Mainland, Hong Kong SAR or Macao SAR. CICIA shall cover insolvency proceedings that are collective proceedings regardless of for the purpose of reorganization or liquidation or interim proceedings. They should be based on a law relating to insolvency, according to which the schemes of arrangement adopted in Hong Kong SAR should be excluded. The collective proceedings should also be subject to control or supervision by a court. Publicity of collective proceedings is also required. CICIA will cover the corporate insolvency proceedings alone. Personal insolvency related to more fundamental questions about personal exemptions and discharge. Considering that there is no personal insolvency system in the Mainland and it is better to start the cooperation with something in common, personal insolvency will also be excluded from my proposal for CICIA. Financial institutions are subject to the special measures and thus do not fall in the ambit of the arrangement, either.

5.210 Recommendation 4 provides rules concerning recognition and reliefs. Recognition in essence invokes an evaluation process of whether or not to defer to a foreign state in any given situation. The evaluation process is different due to varied legal basis. The principle of mutual trust that generates the effects of automatic recognition waives the right of the Member States to evaluate whether or not to grant recognition by referring to their internal rules. Due to lack of equivalent legal basis, the evaluation process cannot be waived in accordance with the Model Law. In practice, there are two legal basis for international cooperation in the area of cross-border insolvency: reciprocity and comity. The doctrine of comity prevails in common law countries and its inherent imprecision and vagueness makes the doctrine a seemingly unreliable basis for recognition. However, it is also because of its flexible feature that has enabled comity to adapt itself to different geopolitical circumstances. Moreover, both mutual trust and comity have shared historic roots in the 17th century Dutch doctrine of 'comitas gentium' and mutual trust within the EU can be deemed as a strengthened version of comity, which turns the latter from a discrete element into an obligation of respect. The recognition mechanism under CICIA is built up among the regions where the mutual trust is still under construction and meanwhile some jurisdiction strictly adheres to the principle of reciprocity, which the Model Law tried to get rid of. To find a balanced way, comity can serve as proper foundation for recognition under CICIA, which is softer than mutual

trust (strengthened comity) but strong enough to promote cooperation between equals.

5.211 Without uniform choice of law rules, which have been intentionally excluded from this arrangement, the arrangement provides a list of minimum reliefs to make up for the effects of insolvency proceedings, which are composed of automatic reliefs solely upon recognition of main proceedings and discretionary reliefs. When deciding whether or not to grant discretionary reliefs, the law, on the basis of which the discretionary reliefs can be granted, shall only refer to the substantive domestic law of the region in order to avoid recourse to *renvoi* and reduce complexity and uncertainty.

5.212 As a bar to recognition and enforcement of cross-border insolvency proceedings, it is suggested to apply more self-restraint interpretation of public policy under Recommendation 5 on a regional level in cross-border insolvency cooperation than under the domestic law. Given the fact that public policy is an ambiguous and elusive concept, disputes arising from application of public policy can be referred to the functional dispute settlement mechanism (Recommendation 8).

5.213 Recommendation 6 formulates provisions regarding cooperation and communication under CICIA. The Basic Law provides the fundamental legal basis for judicial cooperation between the Mainland and the SARs, which contributes to closer cooperation between the courts within one country. However, whether or not to conduct direct court-to-court cooperation depends on the willingness of the courts, in particular between civil law and common law jurisdictions. Considering that courts is regarded as an essential element in the process of cooperation, a balanced solution is proposed that the courts play the role of supervisors, who monitor cooperation and communication actions conducted by the insolvency practitioners.

5.214 Rules of cross-border insolvency agreements are introduced into CICIA through Recommendation 7. The scope of the issues that are addressed by the cross-border insolvency agreements varies in different legal systems. With systematic arrangement of recognition, jurisdiction and exclusion of choice of law rules, the scope of cross-border insolvency agreements under CICIA, the cross-border insolvency agreements shall not cover the matters that have already been treated or are subject to deliberate omission. Regardless of different legal systems, cross-border insolvency agreements will be more acceptable if they focus more on procedure by referring to the experience of the EU and UNCITRAL. Besides, cross-border insolvency agreement is a flexible tool, whose merits shall be maintained in a flexible way. If the courts or the insolvency practitioners after discussion find something useful to add beyond the aforementioned scope, they shall not be limited as long as it is not inconsistent with the local mandatory rules because not everything that is not explicitly permitted is actually inadmissible. Cross-border insolvency agreements have been and recommended by UNCITRAL as an efficient means to coordinate the insolvency proceedings involving enterprise groups, which is also introduced into the EU Regulation (recast). It is also the only means that has been actually

applied in cross-border insolvency proceedings in Hong Kong alone. In addition, appointment of a single insolvency practitioner, as a brand new legislative mechanism, which has not been broadly tested, will not be incorporated into CICIA. Besides, the various qualification requirements of the insolvency practitioners and the existence of liquidator committee with involvement of governments make the single insolvency practitioner an unacceptable option.

5.215 Recommendation 8 develops a functional dispute settlement mechanism under CICIA. Given the fact that it is lack of legal basis to establish a trans-regional competent court, an embedded dispute settlement mechanism will be introduced into the regional arrangement, which has three main functions, including safeguarding harmonious interpretation of the arrangement, providing a solution to jurisdiction conflicts and settling down the disputes arising from cross-border insolvency agreements. In the course of regional integration, there are a lot of obstacles to harmonization of the legal systems, such as reluctance about unification and adjustment of the harmonized system. According to the experience of the EU, it is the CJEU that helps to safeguard the coherent interpretation of the EU law and thus generates common awareness of the Union legal order. Without equivalent central authority as the CJEU, which makes interpretation for further uniformity, such decisive jurisdiction term might be manipulated. In China, each region has its own jurisdiction criteria. That's why China also needs to establish its own interpretation system to safeguard its own autonomous meaning of COMI based on CICIA. In addition, cross-border insolvency agreements are utilized as the key mechanism for coordination of insolvency proceedings involving a single debtor as well as enterprise groups under CICIA. In practice, conflicts arise during the implementation of those agreements, which needs to be properly settled down.

5.216 In China's context, to find a balanced approach, it is suggested to establish a functional dispute settlement mechanism, which is also built upon interregional court-to-court cooperation and communication. Inspired by the idea of joint hearing, a special meeting can be organized in order to deal with all those aforementioned problems and disputes. First of all, the functional dispute settlement mechanism shall fit into the framework of CICIA, which is consistent with the Basic Law. There is legal basis under the Basic Law that provides direct cooperation and communication between the courts of the Mainland and SARs. Nowadays due to the development of international business, the courts from different jurisdictions are interrelated by the multiple debtors that belong to one group and they can hardly make a decision wholly independent of the future actions of the other court for fair distribution of the group assets and prevention of parallel litigations. Considering the current growth of regional economic integration, it is more likely that the economic reality will drive the courts in China to accept the appropriate mechanism to coordinate the cross-border insolvency proceedings at the regional level, which is to cooperate and communicate with each other.

5.217 The functional dispute settlement mechanism is to be established in the form of special meeting, which is inspired by the idea of joint hearing. The special meeting has three main objectives. One of the most important objectives

of the meeting is to provide the opportunity to the judges to exchange points of view on the disputes that are referred to them by the requesting courts. The second objective of the meeting is to enable integrated negotiation. To include all the three regions in the same platform it can better prevent the influence caused by the imbalance of political power between the Mainland and SARs. The third objective of the mechanism is to encourage direct communication between the judicial authorities from the three regions, which will help to generate an awareness of a common identity and community, which may gradually increase the mutual understanding between the Mainland and the two SARs.

5.218 The effect of the special meeting depends on the type of references that the requesting courts seek. The courts that seek explanation of the related provisions under CICIA shall report to the Supreme Court of that region, which can request a special meeting to be convened. Explanation given by the special meeting on specific provisions of CICIA serves as proper interpretation on the specific issues arising from the individual case, which deserves the due respect of the courts concerned. Upon consensus of the Supreme Courts concerned, the explanation shall have binding effect on that individual case. Upon consensus of all the Supreme Courts, the explanation shall have binding effect on the specific provisions under CICIA. In the case involving cross-border insolvency agreements disputes, the function of the special meeting are more akin to a joint forum, to which the disputes are submitted for a final decision. Due to the restrictions set up under the Basic Law, it meant to be designed on a voluntary basis. Accordingly, in matters of the disputes arising from the cross-border insolvency agreement, the opinions or part of the opinions come into binding effect to the extent that all the requesting courts involved agree to accept them and shall only be effective on individual case.

5.219 Establishment of inter-regional case register is proposed under Recommendation 9 because the publicity related to the insolvency proceedings plays a significant role in good functioning of a cross-border insolvency regime. The Basic Law provides the legal foundation for inter-regional legal cooperation. In practice, there are institutions that can readily be utilized as communication authorities that provide technical assistance for establishment of an inter-regional case register. Once a cross-border insolvency proceeding is commenced in one region, the court shall immediately inform the communication authority in its own region. The communication authority must publish the information concerning opening of insolvency proceedings on its e-portal and is also mandatory to inform its counter-part communication authorities concerned in the other regions. Meanwhile, the e-portal of each region should provide interconnection system that links to the registers in other regions. For CICIA, it is suggested to include the minimum amount of information mandatorily to be published in the inter-regional insolvency registers, in addition to which additional information subject to the local laws is not precluded. With respect to the language of communication, in addition to Chinese, the information can also be published in English in Hong Kong SAR or Portuguese in Macao SAR but shall always be accompanied with Chinese translation.

5.220 Separate cross-strait insolvency arrangement is established under Recommendation 10 through independent intermediaries. Due to lack of the legal basis and uncertainty of the cross-strait relations, Taiwan does not fall within the ambit of the regional cooperation regime but will be treated in a separate manner. Given the complex and unique nature of relations across the Taiwan Strait and lack of official contacts between the two sides, two non-governmental institutes have been established in order to facilitate the cross-strait cooperation and communication, which have engaged in both the cross-strait economic cooperation and legal cooperation. In addition, the rules of the professional market entry permit are unbalanced. When the Mainland gradually opens its professional market to people from Taiwan, Taiwan does not lift the ban on the professional qualification of the lawyers and accountants from the Mainland. Therefore, the Mainland administrators do not have direct access to a court in Taiwan. Meanwhile, with accession to the ECFA, more investment flows across the strait from each side, more cross-strait enterprise groups emerge, which incur needs of cross-strait insolvency cooperation and communication.

5.221 Considering the legal cooperation between the Mainland and Taiwan has just started as well as the instability of the cross-strait cooperative relationship, it is difficult to expect that a comprehensive cross-strait insolvency framework can be built up right now. Instead, emphasis should be laid on cooperation and communication. The direct or indirect communication and cooperation between the courts can probably better facilitate the progress of the insolvency proceedings, which also provided under the Model Law. The way that both sides get used to is to cooperate and communicate via the non-governmental intermediaries. With respect to cross-border insolvency, in accordance with the Principle 23 of the Global Principles and Principle 17 of the EU JudgeCo Principles, an independent intermediary, a new professional function, is introduced to overcome any hurdles in global communication. By referring to the current means of cooperation, it seems that the gaps between the Mainland and Taiwan will tentatively be filled in via the intermediaries, which is relatively easier for both sides to accept. The main duty of the independent intermediaries is to maintain the connection with its counterpart and device a practical means of conducting communication between the courts concerned.

Summary

6.01 The idea of China's Inter-regional Cross-border Insolvency Arrangement (CICIA) reflects an ongoing trend concerning harmonization of cross-border insolvency law through internal legislation of regional institutions and also best practices set out in soft law, including guidelines and principles contributed by the international organization (UNCITRAL), non-governmental organizations (III, INSOL etc.) and even private parties active in the area of restructuring and insolvency law. That trend is a response to regional integration and globalization, which make inter-regional and international legal interaction intensify and the need for one jurisdiction to always apply its own law gradually reduced.

6.02 Such harmonization is accompanied with challenges. The first problem is the diversity of cross-border insolvency laws and the lack of clear understanding thereof. For instance, throughout the Asian regions, there appears to be a great deal of reluctance to follow this trend.[1662] The adoption rates of the Model Law in Asia remain very low, which has only been enacted by Japan (2000), Republic of Korea (2006) and Philippines (2010). In addition, most of the cross-border insolvency rules applied in the Asian jurisdictions are conservative. China is such an example. In the Mainland, there is only one article (Article 5 of the EBL) that provides merely recognition criteria of foreign cross-border insolvency proceedings, which are subject to a set of public policy exceptions with no clear standards. Hong Kong's current insolvency laws are based loosely on law from England that dates back to 1929. In 2016, the Hong Kong government is still pondering whether it is appropriate to introduce section 426 of the UK Insolvency Act 1986 into Hong Kong.[1663] The current cross-border insolvency rules of Macao (1999) and Taiwan (1935) are dependent on the principle of territoriality. Both rules have the same goal that creates a ring fence of assets in favor of local creditors.[1664] What is the reason for the common phenomenon of undeveloped cross-border insolvency in Asia? A speech delivered by Chief Justice of Singapore CHAN Sek Keong provided some proper reference. The answer relates to the correlation between law and economy. His Justice mentioned that "ring-fencing of assets of foreign companies for the benefit of local creditors has been a feature of the Singapore insolvency regime since 1967".[1665] At that time, Singapore, as a developing economy, was only a recipient of capital and therefore did not experience the problems of cross-border

[1662] J J Spigelman, International Commercial Litigation: An Asian Perspective, 37 Hong Kong Law Journal 859, 2007, p.859

[1663] Bills Committee on the Companies (Winding Up and Miscellaneous Provisions) (Amendment) Bill 2015, Summary of views of submissions and Government's responses, CB(1)481/15-16(04), 25 January 2016, Government's responses no. 60

[1664] Garcia, Augusto Teixeira, Macao Insolvency Law and Cross-border Insolvency Issues, New Zealand Association for Comparative Law: hors série (Wellington) XIX, 2015, p.341; Gong Xinyi, To Recognize or Not to Recognize? Comparative Study of Lehman Brothers Cases in the Mainland China and Taiwan, International Corporate Rescue, Vol. 10, Issue 4, Chase Cambria Publishing, 2013, p.242

[1665] CHAN Sek Keong, Cross-border Insolvency Issues Affecting Singapore, 23 SAcLJ 413, 2011, p.419

insolvency affecting global companies from those economies that make investment.[1666] Accordingly, the need for a well-established cross-border insolvency system was relatively low.

6.03 The landscape of Asian economy is undergoing changes. According to the World Investment Report, outward investments by multinational enterprises (MNEs) based in developing Asia increased by 29 per cent to $432 billion in 2014.[1667] In South-East Asia, the increase was principally the result of growing outflows from Singapore, to $41 billion in 2014.[1668] In 2015, China remained the third largest investor in the world after the United States and Japan, which has become a major investor in some developed countries, especially through cross-border M&As.[1669] It is apparent that the current Asian cross-border insolvency systems do not reflect how individual nations have experienced the growth of economies. What is the possible consequence then? Given the fact that the assets no longer move in a single direction, insistence on a territorial approach can possibly invite reciprocal treatment by other jurisdictions, which may ultimately affect the assets invested abroad. For instance, Hong Kong is now in the process of reforming its corporate insolvency law. In deciding whether or not to introduce the Model Law into its statutory insolvency legislation, Hong Kong government considered that the attitude of its major trading partners (including the Mainland and Singapore[1670]) in this regard should be closely monitored in advance.[1671] More importantly, such reciprocal attitude may trigger more concerns about economic cooperation within a country or a possible regional economic community, where there are integrated agreements on trade and commerce (such as CEPA and FTAAP[1672]) and assets that can be moved out of the jurisdictions more easily.

6.04 The second problem is some jurisdictions may not have trust relations with those jurisdictions they have to deal with and thus the consideration of the rights and authority of other jurisdictions may vary. (For detailed discussion on this topic, please refer to Part V Comments to Recommendation 2) As result, the

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[1666] CHAN Sek Keong, Cross-border Insolvency Issues Affecting Singapore, 23 SAcLJ 413, 2011, p.415

[1667] UNCTAD, World Investment Report 2015: Reforming International Investment Governance, 2015, Geneva: United Nations, p.5

[1668] UNCTAD, World Investment Report 2015: Reforming International Investment Governance, 2015, Geneva: United Nations, p.5

[1669] UNCTAD, World Investment Report 2016: Reforming International Investment Governance, 2015, Geneva: United Nations, p.7

[1670] Trade and Industry Department of Hong Kong SAR, Hong Kong's Principal Trading Partners in 2015, available at: https://www.tid.gov.hk/english/trade_relations/mainland/trade.html (Last visited on 14 June 2016)

[1671] Bills Committee on the Companies (Winding Up and Miscellaneous Provisions) (Amendment) Bill 2015, Summary of views of submissions and Government's responses, CB(1)481/15-16(04), 25 January 2016, Government's responses no. 59

[1672] Asia – Pacific Economic Cooperation (APEC) is a regional economic forum established in 1989, which is composed of 21 members. Its recent activity involves discussions on the possible pathways to the Free Trade Area of the Asia-Pacific (FTAAP). In November 2014, APEC Leaders endorsed the "Beijing Roadmap for APEC's Contribution to the Realization of the Free Trade Area of Asia-Pacific (FTAAP)". The roadmap provides for a "Collective Strategic Study on Issues related to the Realization of the FTAAP" to be concluded by the end of 2016.

focus of harmonization is heavily dependent on the level of interaction between the jurisdictions because it requires proper balance between "retention of forum-state regulatory authority and acknowledgment of the equal authority of other states within their own territory".[1673] According to the classic perspective, such harmonization should abide by the principle of universality, which attached importance to concentration of insolvency proceedings within one forum. That principle above all raises important questions regarding the jurisdictional subpart of private international law. As Beale once remarked, "the power of a sovereign to affect the rights of persons, whether by legislation, by executive decree or by the judgment of a court is called jurisdiction."[1674] In order to approach the traditional principle of universality, it entailed that the states needed to compromise their sovereign authority for cooperation in cross-border insolvency. That approach was only partly achieved in the EU. Through its decade-long integration process, the EU has evolved into a single community of laws with the common values and legal principles shared within its members.[1675] As result, the Member States has delegated part of their "sovereign" function of law-making to the regional institutions.[1676] That possibly explains why the Regulation is able to adhere to the principle of universality albeit in a modified manner because it harmonized the inter-regional cross-border insolvency in such a way by removing the need for reference to national rules for purposes of determining the proper jurisdiction, applicable law or recognition.

6.05 In the more globalized societies of today, insolvency proceedings requires cooperation across many different jurisdictions around the world. Nonetheless, without geographic advantages, overlapping time zones, shared culture and shared languages, we no longer live enmeshed in such "thick trust relationships"[1677] as the EU legal system relies on. Against that background, UNCITRAL set up facilitating recognition of foreign insolvency proceedings as the main line of the Model Law. The most important jurisdictional element, COMI, is utilized under the Model Law merely to determine the degree to which a court must recognize a foreign proceeding, whereas COMI helps determine which Member State takes precedence when proceedings have commenced in

[1673] Brand, Ronald A., Balancing Sovereignty and Party Autonomy in Private International Law: Regression at the European Court of Justice, University of Pittsburgh School of Law Working Paper Series, 2005, p.9, available at: http://law.bepress.com/pittlwps/art25 (Last visited on 14 June 2016)

[1674] Beale, Joseph H., The Jurisdiction of a Sovereign State, in: Harvard Law Review, Vol. 36, No. 3, 241-262, 1923, p. 241

[1675] Justice policy was incorporated into the regular framework of EU decision-making through the Treaty of Amsterdam (signed in 1997), nearly forty years after the signing of the Treaties of Rome. In 2007, the Treaty of Lisbon abolished the three-pillar structure. From then on, "sovereign" function of law-making in all fields of justice policy, albeit with a few particularities, were eventually delegated to regional institutions under the Union method. See Treaty on the Functioning of the EU, article 2(2), article 4(2)(j)

[1676] Brand, Ronald A., Balancing Sovereignty and Party Autonomy in Private International Law: Regression at the European Court of Justice, University of Pittsburgh School of Law Working Paper Series, 2005, p.2, available at: http://law.bepress.com/pittlwps/art25 (Last visited on 14 June 2016)

[1677] Cook, Karen S., Hardin, Russell, Levi, Margaret, Cooperation without Trust?, Volume IX in the Russell Sage Foundation Series on Trust, 2005, p.196

multiple jurisdictions within the EU.[1678] Moreover, before the Model Law was drafted, UNCITRAL conducted several consultations with judges, practitioners, interested organizations and governments. One of its key findings was that the crucial function in cross-border insolvency cooperation was performed by the judges and practitioners from various jurisdictions, in which assets of the debtor might be found, especially by entering into cross-border insolvency agreements.[1679] That way of cooperation was voluntarily driven by the individual insolvency case itself, which efficiently linked the insolvency proceedings together, and its feasibility has been tested in practice worldwide. Instead of a centralized and concentrated way suggested by the classic principle of universality, the Model Law created an interconnected network structure via cooperation and communication between the courts and the practitioners. That coordinated approach, by which the recast EU Regulation also chose to abide, corresponds to the way the different jurisdictions interact with each other in a flattened globalized world and promote mutual understanding through directly exchange of information and opinions.

6.06 China's inter-regional cross-border insolvency cooperation involves the interplay between an emerging regional legal order and cross-border insolvency. For a sovereign state that has gone through reunification and closer economic interaction, whether or not the creditors can recover their claims in the event of trans-regional insolvency will become a decisive factor for inter-regional investment. Besides, it is also necessary to harmonize regional legal conflicts for the purpose of further integration. After comparing the cross-border insolvency systems in the four regions and referring to two leading international insolvency regimes, the Regulation and the Model Law, the dissertation provides 10 recommendations for China's Inter-regional Cross-border Insolvency Arrangement (CICIA)[1680] by tailoring the merits of relevant international experience into China's context in a balanced manner. First of all, CICIA opts for the coordinated approach as its guiding principle (Recommendation 1). In order to smoothly attain the goal of reunification, the Mainland made commitments that it would partly restrict its sovereign authority to guarantee the high degree of autonomy of the SARs, including the legislative power and the independent judicial power.[1681] Those commitments have been honored and incorporated into the Basic Law with an effective term for 50 years.[1682] To arrange for a centralized cross-border insolvency cooperation structure, as advocated by the principle of universality, it requires the Mainland to further compromise its sovereign authority and the SARs to restrain the high degree of autonomy. That

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[1678] Story, Sean E., Cross-border Insolvency: A Comparative Analysis, 32 Ariz. J. Int'l & Comp. L. 431 2015, p. 455

[1679] UNCITRAL/INSOL Colloquium on Cross-Border Insolvency, 17-19 April 1994, Vienna, A/CN.9/398 - Cross-border insolvency: report on UNCITRAL-INSOL Colloquium on Cross-Border Insolvency, paras.12-13

[1680] Please note that the Summary aims at reinforcing the main line of CICIA. Therefore, in the Summary, the 10 recommendations of CICIA may not be discussed strictly in sequence.

[1681] Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, 3(3); Joint Declaration of the Government of the People's Republic of China and the Government of the Portuguese Republic on the question of Macao 2(2)

[1682] Basic Law of Hong Kong SAR, article 5; Basic Law of Macao SAR, article 93

has been unlikely to happen so far. For example, the Mainland and the Hong Kong SAR had difficulty in reaching consensus on rules of jurisdiction when negotiating the bilateral arrangement about reciprocal enforcement of judgments in civil and commercial matters.[1683] In order to avoid the deadlock situation, both sides decided to allow the parties concerned to enter into choice of court agreements instead. More importantly, the legal cooperation between the Mainland and the SARs is established in the way of granting legal assistance based on consensus via the judicial organs in each region,[1684] which serves as a proper legal foundation for the coordinated approach.

6.07 It also needs to be taken into account that the principle of universality lays a great deal of emphasis on the matter of jurisdiction. As Westbrook remarked, choice of forum was the "explicit focus of the universalist rule and choice of law was a result of universalism often implicitly assumed".[1685] For instance, the Regulation adopted *lex fori concursus* as the basic rule of its uniform choice of law system.[1686] It requires that the law of the Member State, in which its court is competent to open insolvency proceedings, shall determine the conditions for the opening, conduct and closure of insolvency proceedings.[1687] Hence, under the Regulation, the outcome of insolvency proceedings essentially depends much more on jurisdiction. In addition, allowing only one single proceeding running worldwide could lead to "fight over who gets to be the COMI in any given bankruptcy". [1688] That's why the Regulation and the Model Law allow the opening of non-main (territorial/secondary) proceedings, which can make the competition less intensive. However, the main insolvency proceedings are ensured to play the dominant role under the Regulation.[1689] Main insolvency proceedings rendered by a competent court of a Member State, once opened, shall be automatically recognized in all other Member States. Such automatic recognition is guaranteed by the principle of mutual trust under the EU Treaties. The problem is the COMI model is a fact-sensitive criterion. It took some time for the CJEU to receive the opportunities to clarify some issues surrounding the use of the COMI concept. However, the manipulability of COMI remains since the facts can be changed[1690] and more importantly, the advantages to become the main proceedings are considerable under the EU regime. That incentivised forum shopping, abusive or not, and resulted in the disputes over jurisdiction. Although the recast Regulation provided suspension periods hoping to counter

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[1683] Jiang Baoguo, A Comparative Study on the Recognition and Enforcement of Civil and Commercial Judgments Arrangements between the Mainland, Hong Kong and Macao – with special reference to the Practice of Hong Kong (in Chinese), in: Legal Forum, No .5(Vol .22, Ser .No .113), Sep., 2007, p.71

[1684] Basic Law of Hong Kong SAR, article 95; Basic Law of Macao SAR, article 5

[1685] Westbrook, Jay L., Theory And Pragmatism In Global Insolvencies: Choice of Law and Choice of Forum, 65 Am. Bankr. L.J. 457 1991, p.461

[1686] Moss, Gabriel, Fletcher, Ian F, Isaacs, Stuart (ed.), The EU Regulation on Insolvency Proceedings (3rd ed.), Oxford University Press, 2016, at 4.05

[1687] EC Regulation, Recital (23), Article 4; EU Regulation (recast), Recital (66), Article 7

[1688] Pottow, John A.E., A New Role for Secondary Proceedings in International Bankruptcies, 46 Tex. Int'l L.J., 2011, p.582

[1689] EU Regulation (recast), Recital (48)

[1690] Eidenmüller, Horst, Abuse of Law in the Context of European Insolvency Law, 6 ECFLR 1 2009, p.5

abusive forum shopping,[1691] it has been argued by the Commission that these types of measures are not sufficiently effective to achieve the objective of resolving the issues of abusive forum shopping, reasoning that such a measure could be circumvented by skilled professionals and would not improve legal certainty for creditors because it would replace the current uncertainty relating to the determination of COMI by a new uncertainty relating to the time the COMI shifted.[1692] It seems that the effects of the suspension periods still need to be tested in the course of implementation even though the measure has been finally introduced into the recast Regulation.

6.08 It is acknowledged that mutual trust is essential to a regional legal order. By comparing development of mutual trust in the EU and in China, it is observed that mutual trust is pretty much at the primary stage in China's regional legal system. To foster the trust relationship, it is better to avoid fighting tooth and nail on jurisdictional issues. Besides, the legal foundation for establishment of such a compulsory jurisdiction system for cross-border cooperation in insolvency cases as under the Regulation is still under construction. Therefore, CICIA set out for a balanced approach by choosing the recognition-based system as its overriding objective (Recommendation 2). Considering that each jurisdiction has its territorial judicial authority in China, it is suggested to use comity as the foundation for recognition under CICIA (Recommendation 4). That approach results from a balance between mutual trust (strengthened comity) that functions in the EU and reciprocity that actually operates in China and its underlying requirement is the equal respect of the authority of one jurisdiction for another. As for the effects of recognition, they are not governed by the uniform choice of law rules because of the restricted scope of uniform legislation under the Basic Law regime and the difficulty in harmonization of substantive law in reality. Instead, they are guaranteed by a list of minimum reliefs under CICIA by referring to the experience of the Model Law. In accordance with the limits on the exercise of judicial authority connoted by comity, public policy is the only exception to recognition under CICIA, which needs to be interpreted in a self-restrained manner (Recommendation 5).

6.09 In consistence with the guiding principle based on the coordinated approach adopted by both the Regulation and the Model Law, cooperation and communication is the cornerstone of CICIA (Recommendation 6). The coordinated approach is not established on the basis of solid trust relationship but out of pragmatic necessity. Above all, the courts and the insolvency practitioner play an indispensible role in the insolvency systems. That is also the case in China. In the Mainland, the courts have been granted substantial and procedural power in accordance with the EBL.[1693] The EBL also provides for a set

[1691] EU Regulation (recast), Recital (31), Article 3(1)

[1692] EU Commission, EU Commission Staff Working Document Impact Assessment Accompanying the document - Revision of Regulation (EC) No 1346/2000 on insolvency proceedings, Strasbourg, 12.12.2012, p.35

[1693] Substantial powers mainly include adjudication of the matters affecting the amount and value of the bankruptcy estate, including revocation of preferences and fraudulent transactions (EBL, article 31-33), determining the claims of the parties in relation to their entitlement to the ownership of some of the properties in the bankruptcy estate (EBL, article 58) and approving

of functions of the administrators,[1694] which is accompanied with a couple of judicial interpretations concerning appointment and compensations of administrators.[1695] Considering that Hong Kong SAR is a common law jurisdiction, the dominant role of the courts is self-explanatory. The insolvency practitioners are most of the time liquidators, whose duties are considered onerous, including the functions to "conduct a thorough investigation into the affairs of a company, winding up its business and distribute the remaining assets between parties who hold an interest in the company".[1696] In Macao SAR, any creditor can bring an insolvency proceeding to the court.[1697] Once the insolvency proceedings begin, the court immediately appoints a bankruptcy administrator,[1698] who will help and supervise the debtor both in running his business[1699] as well as managing his other assets.[1700] Since the local insolvency system relies on the courts and the insolvency practitioners to operate smoothly, they are also key actors in the field of cross-border insolvency. One of their most important contributions is the invention of cross-border insolvency agreements (protocol). Faced with the daily necessity of dealing with insolvency cases, the insolvency profession developed the most common means that facilitates cross-border cooperation and communication of multiple insolvency proceedings in different jurisdictions in the absence of widespread adoption of facilitating national or international law.[1701] Due to the inherent flexibility, cross-border

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their application to take back their ownership (EBL, article 34-39) and approving the application of set off rights (EBL, article 40). Procedural powers mainly include the power to accept the case (EBL, article 10), appoint the administrators (EBL, article 22), to convene the first creditors' meeting (EBL, article 62), to approve the asset realization plan and the distribution (EBL, article 116) and the plan of reorganization (EBL, article 86), to declare the debtor bankrupt (EBL, article 107), to terminate the procedure (EBL, article 108), and to supervise the implementation of the plan of reorganization (EBL, article 91). See also Li Shuguang, Wang Zuofa, The Function of China's Court in Enterprise Bankruptcy and the Future Trend – Observations from the Background of the Four Year Implementation of China's Existing Bankruptcy Law, in: INSOL World, the Quarterly Journal of INSOL International, Fourth Quarter, 2012, p.8-10

[1694] In accordance with article 25 of the EBL, they mainly include:
(1) taking over the property, seals, account books, documents and other data of the debtor;
(2) investigating into the financial position of the debtor and preparing a report on such position;
(3) deciding on matters of internal management of the debtor;
(4) deciding on the day-to-day expenses and other necessary expenditures of the debtor;
(5) deciding, before the first creditors' meeting is held, to continue or suspend the debtor's business;
(6) managing and disposing of the debtor's property;
(7) participating in legal actions, arbitrations or any other legal procedure on behalf of the debtor;
(8) proposing to hold creditors' meetings; and
(9) performing other duties that the people's court deems that he should.

[1695] Provisions of the Supreme People's Court on Designating the Administrator during the Trial of Enterprise Bankruptcy Cases [2007] Judicial Interpretation No. 8; Provisions of the Supreme People's Court on Determination of the Administrator's Remunerations [2007] Judicial Interpretation No.9

[1696] Hickin, John, Role and Status of Liquidators, in: Kwan, Susan, Company Law in Hong Kong (Insolvency), Sweet & Maxwell, 2012, at 2.001

[1697] Macao Civil Procedure Code, article 1082

[1698] Macao Civil Procedure Code, article 1049-1(a),

[1699] Macao Civil Procedure Code, article 1050

[1700] Macao Civil Procedure Code, article 1050-1

[1701] UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation, Ch.II, para.12

insolvency agreements gradually shift from a coordination instrument to a medium, which contains framework of coordination as well as combination of coordinating instruments and facilitates them to function in an orderly manner. Therefore, cross-border insolvency agreements are recommended as a key mechanism that can be utilized by the courts and the insolvency practitioners to coordinate the inter-regional insolvency proceedings involving a single debtor and enterprise groups under CICIA (Recommendation 7). Cooperation and communication is also possible because each region have the same language, i.e. Chinese and the technical assistance on exchange of relevant information provided by the responsible authorities are also available on the basis of the Basic Law. Therefore, it is suggested to include the minimum amount of information mandatorily to be published in the inter-regional insolvency registers under CICIA so as to promote the publicity related to the insolvency proceedings (Recommendation 9).

6.10 Furthermore, it is suggested to establish a functional dispute settlement mechanism under CICIA (Recommendation 8). The main focus of CICIA, which is quite identical to the Model Law, lies on two aspects: recognition and coordination. Both Fletcher and Wessels have previously pointed out that the success of the Model Law is not dependent on the number of States that decide to enact the law, but heavily relies on in what manner countries choose to enact it.[1702] As observed, there are indeed a number of deviations from the Model Law in the Enacting States, most significantly including diverse interpretation of COMI (see Part IV, Section 2.1.2.2, 2.1.3.2), proper understanding of public policy (see Part IV Section 3.3), penetration of reciprocity requirement (see Part V, Comments to Recommendation 4, Section 4.1). As explored and examined in the aforementioned case studies, those deviations pose a great obstacle to the objective of uniformity and predictability as required under the Model Law.[1703] They are partly caused by its flexible nature since the states might not adopt the Model Law uniformly.[1704] They may also be attributed to a lack of efficient institutional support equivalent to that from the CJEU. In compliance with the Basic Law and the guiding principle of CICIA, a functional dispute settlement mechanism is proposed in the form of a special meeting, which is convened on the basis of inter-regional court-to-court cooperation and communication. A special meeting can be initiated for two grounds. One relates to explanation of the related provisions under CICIA. The other arises from disputes concerning the cross-border insolvency agreement. The effects of those two kinds of explanation are different. Upon consensus of the Supreme Courts concerned, explanation given by the special meeting on specific provisions of CICIA shall have binding effect on that individual case. Furthermore, upon consensus of all the Supreme Courts, the explanation shall have binding effect on the specific

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[1702] Fletcher, Ian F., Insolvency in Private International Law: National and International Approaches, Oxford, 2005, para.873; Wessels, Bob, Will UNCITRAL Bring Changes to Insolvency Proceedings Outside the USA and Great Britain? It Certainly Will, in: International Corporate Rescue, vol.3, issue 4, 2006, p.200.

[1703] The Model Law, Article 3, 8; See also Dawson, Andrew B., The Problem of Local Methods in Cross-border Insolvencies, 2015, available at: https://www.iiiglobal.org/node/1929 (Last visited on 14 June 2016)

[1704] Guide and Interpretation, para.92

provisions under CICIA. Under this circumstance, the courts are supervisors for the entire arrangement through cooperation and communication, which achieve harmonious interpretation on regional level, in particular safeguard China's own autonomous jurisdiction meaning and resolve the jurisdiction conflicts. In the case involving cross-border insolvency agreements disputes, the function of the special meeting are more akin to a joint forum, to which the disputes are submitted for a final decision. The opinions are only binding upon consensus of all the requesting courts involved and only effective on the individual case referred to the special meeting. As remarked by Rabatel and Deparis based on their observation of concerning appointment of liaison magistrates, "nothing quite compares to a direct exchange, face-to-face, between two people who know each other and meet regularly".[1705] The special meeting is expected to provide the opportunity to the judges to exchange points of view and achieve consensus. Thus, it can further help to generate an awareness of a common identity and community, which may gradually increase the mutual understanding between the Mainland and the two SARs.

6.11 Nonetheless, doubts arise over the feasibility of that functional dispute settlement mechanism. Indeed, there are alternative methods, whereas the functional dispute settlement mechanism proposed under CICIA is a balanced approach between popular academic recommendation and government preference. Some insolvency scholars give serious consideration to the use of arbitration as a supplement to international insolvency cases.[1706] Due to wide adoption of the New York Convention, enforceability of awards is regarded as arbitration's most valuable characteristic,[1707] which is accordingly the "principal attraction for using international arbitration in the context of international insolvency cases".[1708] However, as aforementioned in Part V (para.5.18 & 5.145),

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[1705] Bernard Rabatel, Olivier Deparis, 'Liaison Magistrates' Their Role in International Judicial Cooperation and Comparative Law, in: Mads Andenas and Duncan Fairgrieve (ed.), Courts and Comparative Law, Oxford University Press, 2015, p.617

[1706] Ehmke, David, and Lewis, Alfred, Navigating Scylla and Charybdis: International Arbitration and National Insolvency, p.23, available at: https://www.iiiglobal.org/node/1932 (Last visited on 14 June 2016); Bufford, Samuel, International Insolvency Law & International Arbitration - A Preliminary Perspective, 23 Journal of Bankruptcy Law & Practice 670 (2014); See also Bufford Urges United Nations to Consider Arbitration in Insolvency Cases, available at: http://news.psu.edu/story/332495/2014/10/29/academics/bufford-urges-united-nations-consider-arbitration-insolvency-cases (Last visited on 14 June 2016); Westbrook, Jay L., International Arbitration and Multinational Insolvency, 29 Penn St. Int'l. Rev. 635 (2011); Gropper, Allan, The Arbitration of Cross-Border Insolvencies, 86 Am. Bankr. L.J. 201 (2012); Clement, Zack A., Position Paper Supporting Greater Use of Arbitration in Connection with Insolvency Matters, available at: https://www.iiiglobal.org/sites/default/files/17_-_position_paper_supporting_greater_use_of_arbitration_in_connection_....pdf (Last visited on 14 June 2016)

[1707] White & Case, 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, p.5, available at: http://www.arbitration.qmul.ac.uk/docs/164761.pdf (Last visited on 14 June 2016)

[1708] Bufford, Samuel, International Insolvency Law & International Arbitration - A Preliminary Perspective, 23 Journal of Bankruptcy Law & Practice 670 (2014), p.670; See also Westbrook, International Arbitration and Multinational Insolvency, 29 Penn St. Int'l. Rev. 635 (2011), p.635; Gropper, Allan L., The Arbitration of Cross-border Insolvencies, 86 Am. Bankr. L.J., 201, 2012, p.203; Kovacs, Robert B, A Transnational Approach to the Arbitrability of Insolvency Proceedings

inter-regional recognition and enforcement of arbitral awards is granted on different basis in China.[1709] According to Hong Kong International Arbitration Center (HKIAC), the Mainland remains the most frequent users of Hong Kong arbitration service.[1710] For instance, there were about 116 (2010), 96 (2011), 93 (2012) and 65 (2013) Mainland-related arbitration cases handled by HKIAC on annual basis.[1711] Nevertheless, from 2008 to 2014, there were only 19 Hong Kong arbitral awards in total, which were accepted for recognition and enforcement by the Mainland courts.[1712] Those associated amounts are considerably uneven, which indicates that enforceability of inter-regional arbitral awards in the Mainland may not be very promising. The other important benefit of arbitration is neutrality.[1713] As aforementioned in the main text of the dissertation (see Part III, Section 1.1.2.2), it is true that there is government interference, in particular local protectionism, on the insolvency proceedings in the Mainland. Considering the impartiality of the judicial systems, arbitration can be used to avoid the local courts. Nevertheless, the law and legal institutions cannot be independent of or altogether immune from politics.[1714] For example, unemployment rate and the revenue are the common concern of most governments all over the world. Accordingly under insolvency regimes, some creditors, such as employees and tax authorities are usually entitled to special priority[1715] in addition to the principle of equal treatment of creditors. Under that circumstance, who should have the proper authority to settle down the disputes arising from the insolvency proceedings without jeopardizing the objectives of national insolvency law? Depending on the nature of the issue, it might be difficult for the states to cede that kind of authority to independent arbitrators who are not bound to adhere to any country's bankruptcy laws.[1716] In addition, arbitration "is a matter of consent, not coercion".[1717] In practice, it is

in International Arbitration, Norton Journal of Bankruptcy Law and Practice Sept.-Oct. 2012, p.529

[1709] Arrangement between the Mainland and the Hong Kong SAR on Reciprocal Recognition and Enforcement of Arbitration Awards; Arrangement between the Mainland and the Macao SAR on Reciprocal Recognition and Enforcement of Arbitration Awards

[1710] Annual Statistic Report of HKIAC, available at: http://www.hkiac.org/zh-hans/about-us/statistics (Last visited on 14 June 2016)

[1711] Annual Statistic Report of HKIAC, available at: http://www.hkiac.org/zh-hans/about-us/statistics (Last visited on 14 June 2016)

[1712] Gao Xiaoli, The Development of the Arrangements Made by the Mainland with Hong Kong and Macao for Legal Assistance in Civil an Matters from the Perspective of Mainland People's Courts, in: China Law, Issue 06, 2015, p.80

[1713] Westbrook, International Arbitration and Multinational Insolvency, 29 Penn St. Int'l. Rev. 635 (2011), p. 639; Ehmke, David, and Lewis, Alfred, Navigating Scylla and Charybdis: International Arbitration and National Insolvency (2016), p.23, available at: https://www.iiiglobal.org/node/1932 (Last visited on 14 June 2016)

[1714] Zhang Wenliang, Recognition and Enforcement of Foreign Judgments in China - Rules, Practice and Strategies, Kluwer Law International, 2014, p. 324

[1715] Martin, Nathalie, The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation, in: 28 B.C. Int'l & Comp. L. Rev. 1, 2005, p.33

[1716] Peacock, Lauren L., A Tale of Two Courts: The Novel Cross-border Bankruptcy Trial, in: 23 Am. Bankr. Inst. L. Rev. 543, 2015, p.567

[1717] *In re* Nortel Networks, Inc., No. 09-10138, 2013 WL 1385271, at 10

difficult for the parties concerned to reach an agreement to arbitrate since insolvency proceedings are associated with crucial interests.[1718]

6.12 More importantly, China prefers to resolve the sovereignty-related disputes through negotiation and consultation by parties concerned, rather than submitting them to any third-party settlement procedures. The recent arbitration on the South China Sea issue is such an example, in which Chinese government refused to participate in the arbitration and claimed that it could legally ignore the pending arbitral award.[1719] In matters of inter-regional legal cooperation, if there is any dispute arising from the current arrangements, as aforementioned in Part V Section 8.4.2.3, it should also be settled through negotiations. China's inter-regional cross-border insolvency arrangement is a part of China's regional legal order. CICIA, however, recommends placing the power of balance in the hands of the judiciary. Although the regional legal order emerged upon reunification, it is not purely sovereignty-related. In essence, it requires a balance between two equally important political considerations, i.e. the local prosperity and stability and the sound and sustainable development of regional integration. Nonetheless, the result of a government-led negotiation can probably be influenced by the political power, which might not be deemed as impartial and equal and thus could not be acceptable to the public.[1720] Arbitration is a form of party choice of dispute settlement mechanism. Its party-driven nature requires adaptability of the system and processes in order to meet private needs. For example, confidentiality is one of its outstanding merits.[1721] Therefore, arbitrators in the cross-border insolvency context are under no obligation to take into consideration the development of regional legal order. That reduces the potential to give proper interpretation or guidance on CICIA, which can impede on its implementation. It is the courts on behalf of each region that have the ultimate authority to decide whether or not to recognize the rights and authority of other jurisdictions, which consequently contributes to the growth and progress of China's regional legal order. Hence, it is more appropriate for the courts to play the key role in performing the correctional function to restore the balance in China's inter-regional context.

[1718] *In re* Nortel Networks, Inc., No. 09-10138, 2013 WL 1385271, at *2–5 (Bankr. D. Del. Apr. 3, 2013) (despite numerous meetings and multiple rounds of mediation, Nortel parties "could not agree on a protocol which would govern the allocation process" and they did not agree to arbitrate).

[1719] Vice Foreign Minister Liu Zhenmin Meets with US Media Delegation to Discuss South China Sea Issue (20 May 2016); Wang Yi Talks about South China Sea Issue: Facts will Tell and Justice will Prevail (24 May 2016); Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on May 27 2016; Article by Ambassador Tian Xuejun: China Will Not Fall into the Trap of South China Sea Arbitration; Foreign Ministry Spokesperson Hong Lei's Regular Press Conference on June 8, 2016, all available at: http://www.fmprc.gov.cn/wjb/eng_search.jsp (Last visited on 14 June 2016)

[1720] Puig, Gonzalo Villalta, A Quasi-adjudicative Dispute Settlement Mechanism for CEPA: The Rule of Law in Trade Relations between Mainland China and Hong Kong, in: Chinese Journal of International Law, 2013, Vol. 12(2), p.306

[1721] White & Case and Queen Mary University, 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, 2015, p.7, available at: http://www.arbitration.qmul.ac.uk/docs/164761.pdf (Last visited on 14 June 2016)

6.13 Abiding by the principle of collectivity and seeking an integrated regional legal order, it is intended to establish a uniform and comprehensive inter-regional cooperation arrangement in China (Recommendation 3). Nonetheless, it is lack of a binding constitutional foundation on legal cooperation between the Mainland and Taiwan. Therefore, Taiwan is to be put in a separate cooperative mechanism under CICIA (Recommendation 10). Given the experience of the cross-strait cooperation, which is mainly conducted via two non-governmental intermediaries from each side, as well as the significance of communication and cooperation, independent intermediaries are introduced to overcome the hurdles in the course of cross-strait insolvency cooperation. The main duty of independent intermediaries is to maintain the connection with their counterpart, device a practical means of conducting communication between the courts concerned and keep the courts from the both sides informed of the possible conflicts or problems in the course of cross-strait insolvency proceedings.

6.14 To conclude, CICIA with its 10 recommendations is merely a modest and elementary attempt to address one of the issues arising out of China's inter-regional legal cooperation. It tentatively seeks the balance between the desire for law unification and the reality of legal diversity, levels of integration and conflicts of interests, international standards and characteristics unique to China as well as sovereignty and autonomy within a country. Considering the challenges and difficulties encountered, it is fully acknowledged that it must take time to finally achieve a well-accepted solution. Nonetheless, legal cooperation is not for the conventions, treaties or agreements. It is for the common welfare of the national economy and its citizens. That's why we have to work on something. For each inter-regional cooperation and communication and for each dispute properly resolved, the individual courts make contribution to forming mutual trust and shaping the inter-regional legal order. Trust is not a given. It has to be built bit by bit.

Naar een evenwichtige benadering van China's interregionale grensoverschrijdende samenwerking in insolventiezaken

Samenvatting

6.01 Hoe beschrijf je een zomernacht? Vanuit mijn Chinese gezichtspunt was het een beeld van de maan aan de donkere hemel, maar reizend door Noorwegen zag ik de zon rond middernacht. Mensen uit verschillende regio's (China en Noorwegen) kunnen een veelvoorkomend fenomeen (een zomernacht) vanuit totaal verschillende gezichtspunten bekijken (de maan en de zon). Die metafoor gaat ook op voor mogelijke verschillende opvattingen van mensen uit verschillende rechtsgebieden over bepaalde juridische vraagstukken. Soms kan dat een verschil zijn tussen dag en nacht.

6.02 Nadat China de soevereiniteit over Hong Kong en Macao had herkregen, ontstond langzaamaan een interregionaal rechtssysteem met voorschriften voor de dwarsverbanden tussen het vasteland en de twee SARs (Speciale Administratieve Regio's). Het eerste dwarsverband betreft de interpretatie van het oprichtingsdocument, d.w.z. de basiswet die bindend is op het vasteland en in de twee SARs. Het tweede heeft betrekking op de bilaterale juridische samenwerking tussen het vasteland en de twee SARs betreffende een aantal specifieke onderwerpen. Het derde krijgt gestalte in de rechtszalen van de regio's. Met of zonder een bilaterale wettelijke regeling moeten de rechtbanken uitspraken doen over zaken waarbij sprake is van interregionale factoren, omdat als gevolg van de actieve rol van economische integratie mensen, kapitaal, goederen en diensten de grens kunnen oversteken. Helaas behoort grensoverschrijdende insolventie tot die derde categorie dwarsverbanden, met als ondertitel "vrij van regionale juridische samenwerkingsregels". De interregionale grensoverschrijdende insolventiesamenwerking van China zou gemakkelijker zijn geweest als de insolventiestelsels en de uitvoering ervan in de afzonderlijke regio's een aantal belangrijke aspecten gemeen zouden hebben. Dat is echter niet de realiteit. Het huidige grensoverschrijdende insolventierecht op het vasteland is gebaseerd op een insolventiestelsel dat twintig jaar lang alleen voor staatsbedrijven gold, en de overheid speelt nog steeds een zeer belangrijke rol bij de tenuitvoerlegging ervan. Bij gebrek aan regels op het gebied van internationale jurisdictie, rechtskeuze en handhaving, is er slechts één artikel (Artikel 5 van de EBL – Faillissementswet voor Ondernemingen) dat erkenningscriteria verschaft inzake buitenlandse grensoverschrijdende insolventieprocedures, bestaande uit een pakket beleidslijnen van de overheid zonder duidelijke normen, met als gevolg onduidelijkheid in de praktische uitvoering. Er zij opgemerkt dat op internationaal en regionaal niveau bijzondere maatregelen zijn getroffen om de bevoegde rechtsinstantie op het vasteland te omzeilen in gevallen van grensoverschrijdende insolventie.

6.03 Onder invloed van de algemene rechtspraktijk ontwikkelt de grensoverschrijdende insolventiewetgeving van Hong Kong zich stapsgewijs aan

de hand van jurisprudentie. Dit geldt in het bijzonder voor de drie basiscriteria van de rechtsbevoegdheid. Voor wat betreft erkenning moet een buitenlandse curator veelal een nieuwe insolventieprocedure beginnen in Hong Kong, omdat rechtbanken daar niet over een onafhankelijke juridische basis beschikken om een secundaire procedure te beginnen. De vraag om ondersteuning op zich is niet voldoende voor een bevel tot faillissementsliquidatie, als niet is voldaan aan de drie kerneisen. Om die reden speelt jurisdictie ook een rol bij de erkenning van buitenlandse insolventieprocedures. Daarnaast kunnen de gevolgen van insolventieprocedures ook worden erkend door het gerechtshof van Hong Kong in het kader van de regels voor regles voor burgerlijke rechtsvordering. Dit behelst geen directe vorm van samenwerking met betrekking tot de buitenlandse insolventieprocedure, maar is een factor die in aanmerking dient te worden genomen bij de afhandeling van het burgerlijkrechtelijk vonnis. Bovendien kan de bevoegdheid van de rechterlijke instanties om overeenkomsten te bekrachtigen ook worden aangewend om erkenning te bevorderen. Voor wat betreft samenwerking en coördinatie bestaat de mogelijkheid tot ondersteuning in de vorm van protocollen, zonder dat daarbij inbreuk wordt gemaakt op de jurisdicties van de afzonderlijke gerechtshoven. Ook videoconferenties kunnen worden overwogen bij de communicatie en coördinatie van gelijktijdige insolventieprocedures. Het is vermeldenswaard dat de belangrijkste zorg van Hong Kong bij de invoering van grensoverschrijdende wetgeving onder verwijzing naar de UNCITRAL Modelwet de mogelijkheid is van synchrone ontwikkeling in de regelgeving van de buurlanden, in het bijzonder het vasteland.

6.04 Het grensoverschrijdende insolventiestelsel van Macao is relatief gesloten, en er is een gebrek aan interactiviteit met overige jurisdictie. De belangrijkste reden daarvoor is dat de lokale rechtbanken de exclusieve bevoegdheid hebben om insolventieprocedures te voeren ten aanzien van bedrijven, die in Macao SAR wettelijk zijn geïncorporeerd dan wel het beheer van hun belangrijkste belangen vanuit Macao SAR voeren. Wat de verdeling van lokale activa van een buitenlands bedrijf betreft, hebben lokale vorderingen in Macao bovendien voorrang boven buitenlandse vorderingen. Daarom bestaat er ook jurisprudentie die erin voorziet dat de jurisdictie van het gerechtshof van Macao inzake grensoverschrijdende insolventie wordt vermeden door toepassing van het vennootschapsrecht. Onder de huidige Taiwanese faillissementswet, die in 1935 werd ingevoerd, zijn er geen specifieke regels inzake internationale samenwerking op het gebied van insolventie. In plaats daarvan is in de huidige faillissementswetgeving (Artikel 4) met betrekking tot buitenlandse insolventieprocedures een beperking aangegeven die niet bindend is voor de activa van de debiteur gelegen in Taiwan. De meeste rechtbanken kiezen voor een flexibele interpretatie van die beperking. Daarenboven hanteren sommige rechtbanken de regel dat buitenlandse insolventieprocedures automatisch van kracht zijn op grond van artikel 49 van de Non-litigatiewet en dat erkenning door de Taiwanese rechter dus niet noodzakelijk is. Die benadering is problematisch, vanwege de toepassing door Taiwan van parallelle regels voor erkenning van civielrechtelijke vonnissen ten aanzien van het vasteland en SARs. Civielrechtelijke uitspraken en vonnissen van het vasteland worden erkend op basis van verschillende rechtsgronden, hetgeen een grondige herziening vereist

van de uitspraken op het vasteland na ontvangst van de erkenningsaanvraag. Dit levert problemen op bij de gelijke behandeling van schuldeisers uit verschillende regio's. In juni 2015 heeft de Rechterlijke Yuan van Taiwan het goedgekeurde ontwerp van de Kwijtscheldingswet (Ontwerp 2015) vrijgegeven, als herschikking van de huidige tien jaar oude Faillissementswet. In het Ontwerp 2015 is één nieuw hoofdstuk opgenomen over grensoverschrijdende insolventie, dat een redelijk uitgebreid regime omvat met betrekking tot dit onderwerp. Aan de orde komen onder meer bevoegdheidsregels, erkenningscriteria, van toepassing zijnde wetten en een samenwerkingsverplichting. Bovendien is bepaald dat Taiwan onder het Ontwerp 2015 uniforme regels dient toe te passen op het gebied van erkenning van grensoverschrijdende insolventieprocedures, ongeacht de plaats van herkomst: China, Hong Kong, Macao of andere landen. Dit is een andere benadering dan bij de erkenning van gerechtelijke beslissingen in burgerlijke en handelszaken.

6.05 Op internationaal niveau zijn voor grensoverschrijdende insolventie eigen door landen toe te passen internationale normen en beginselen ontwikkeld, om te voorkomen dat de samenwerking op het gebied van grensoverschrijdende insolventie wordt gehinderd door verschillen tussen rechtsstelsels. De Europese insolventieverordening en de UNCITRAL Model Law on Bankruptcy Proceedings zijn twee toonaangevende gespecialiseerde regimes om landen bij te staan bij de efficiënte, eerlijke en kosteneffectieve hantering van grensoverschrijdende insolventiestelsels. Desalniettemin hebben deze twee regimes verschillende uitgangspunten. Met de verordening wordt niet beoogd oplossingen te bieden voor wereldwijde geschillen inzake grensoverschrijdende insolventie; deze is alleen van kracht in EU-lidstaten, gebaseerd op gemeenschappelijke waarden en rechtsbeginselen. Dienovereenkomstig is het mogelijk, als gevolg van de hogere mate van integratie tussen de lidstaten, dat door de verordening algemene regelgeving wordt verschaft op EU-niveau inzake internationaal privaatrecht, met inbegrip van jurisdictie, toepasselijk recht, erkenning en handhaving, ter vervanging van de nationale wetgeving. Dat verklaart ook waarom uitsluitend de verordening de doelstelling heeft om forum shopping te voorkomen, wat verband houdt met de kenmerken van het recht ter zake van grensoverschrijdende insolventie en de vereisten voor het effectief functioneren van de interne markt. In de verordening kunnen ook de procedures worden benoemd die vallen onder het toepassinggebied ervan binnen de bijlage, vanwege het vaststaande aantal lidstaten. Bovendien kan de interpretatie van de verordening consequent worden geregeld door het Unierecht, dat voorrang heeft, en is aan het Hof van Justitie van de Europese Unie de bevoegdheid verleend om bij wijze van prejudiciële beslissing uitspraken te doen over de interpretatie van de verordening, waarmee de coherente interpretatie van autonome betekenissen wordt gewaarborgd.

6.06 De Modelwet is gebaseerd op een ander juridisch uitgangspunt, omdat de werkingssfeer ervan verder reikt dan een gemeenschap van staten, en zij van toepassing is op landen over de hele wereld, met hun verschillende onderliggende waarden en rechtsbeginselen. Om die reden bestrijkt de Modelwet een beperkter terrein dan de verordening; zij is hoofdzakelijk gericht op vereenvoudigde erkenning waarmee bevoegdheden indirect worden bezien,

en op grensoverschrijdende samenwerking en communicatie tussen rechterlijke instanties en insolventievertegenwoordigers. Door de flexibiliteit van de Modelwet zijn tekstwijzigingen mogelijk. Hoewel het noodzakelijk is om uniformiteit te bevorderen, zal het niet altijd gemakkelijk zijn om in het kader van de Modelwet tot een geharmoniseerde interpretatie te komen. In de insolventieregels van de EU wordt de nadruk gelegd op jurisdictie als basis voor erkenning. Een hoofdinsolventieprocedure ter behandeling door een bevoegde rechtbank van een lidstaat zal na opening van de zaak automatisch in alle andere lidstaten worden erkend. Deze automatische erkenning wordt gewaarborgd door het beginsel van wederzijds vertrouwen op grond van de EU-verdragen. De verordening voorziet ook in een uniform rechtskeuzesysteem (*lex fori concursus* als grondbeginsel) ten behoeve van het universele effect, dat vereist dat de voorwaarden voor het openen, het verloop en het beëindigen van insolventieprocedures worden bepaald door de wet van het land waar de procedure in behandeling is genomen. Dit versterkt de dominante invloed van de hoofdprocedure. Om de dominante rol van de hoofdprocedure en het efficiënte beheer van activa te waarborgen en de redding van bedrijven te bevorderen, wordt bovendien via de EU-verordening (herschikking) een aantal mogelijkheden geboden aan de curator in de hoofdprocedure om in te grijpen in een secundaire insolventieprocedure. Dit betreft in het bijzonder een eenzijdige toezegging van de hoofdcurator aan de lokale schuldeisers en een tijdelijke opschorting van de opening van een secundaire procedure. Een van de belangrijkste doelstellingen van de Modelwet is de invoering van vereenvoudigde procedures voor de erkenning van daarvoor in aanmerking komende buitenlandse procedures. Omdat de Modelwet dezelfde bevoegdheidsbasis hanteert als de verordening, te weten COMI (centrum van de voornaamste belangen) en 'establishment' (vestiging, zijnde een permanente operationele locatie gebruikt door een onderneming om zaken te doen), moet de rechter bij erkenning van buitenlandse procedures bepalen of het gaat om hoofdprocedures of om niet-hoofdprocedures. De buitenlandse hoofdprocedure krachtens de Modelwet heeft niet dezelfde superieure status als de hoofdinsolventieprocedure volgens de verordening, en voor het openen van parallel lopende procedures onder de Modelwet gelden veel minder beperkingen dan onder de EU-Verordening (herschikking). De rechtsgevolgen van erkenning als hoofd- of niet-hoofdprocedure verschillen echter aanzienlijk, omdat de uit erkenning voortvloeiende effecten en vrijstellingen kunnen afhangen van de categorie waarin een buitenlandse procedure valt. Desalniettemin zijn onder de landen die ressorteren onder de Modelwet de meningen over de juiste duiding van COMI verdeeld, als gevolg van het flexibele karakter ervan en het ontbreken van een bindende interpretatie. Doordat insolventiestelsels van land tot land uiteenlopen vanwege sociale, politieke, financiële en andere factoren, is in de Modelwet geen uniform rechtskeuzesysteem neergelegd, omdat het te ingewikkeld is om daarin wereldwijd consensus te bereiken. Om de kloof te dichten en de nodige steun te geven aan de erkende procedure, is in het kader van de Modelwet een lijst gepubliceerd van 'minimale' effecten of maatregelen als gevolg van erkenning. Tegelijkertijd wordt echter ruimte gelaten aan de rechter om ingeval van erkenning effecten en maatregelen toe te voegen. Dergelijke effecten of maatregelen worden beschouwd als voorzieningen (voorlopige voorzieningen voorafgaand aan de erkenning en voorzieningen na

de erkenning) in het kader van de Modelwet. Openbare orde is de enige grond voor een verbod op erkenning volgens de verordening en de Modelwet. Openbare orde in de EU kan in uitzonderlijke gevallen worden toegepast en dit wordt door het Hof van Justitie van de Europese Unie zeer strikt gehanteerd, terwijl openbare orde onder de Modelwet een breder toepassingsgebied kent. In de praktijk kan openbare orde soms worden uitgebreid naar recht op vrijstelling en vaker inhoudelijk worden toegepast door de landen die vallen onder de Modelwet, bijvoorbeeld ter bescherming van de belangen van lokale schuldeisers.

6.07 Vanwege de complexiteit van het bestaan van groepen van ondernemingen ('concerns') wordt de benadering waarvoor is gekozen onder de EU-Verordening (herschikking) en de Wetgevingsleidraad Deel IIII (Legislative Guide on Insolvency Law Part III) van de UNCITRAL (Commissie der Verenigde Naties voor Internationaal Handelsrecht) bepaald door het belang dat wordt gehecht aan samenwerking van insolventieprocedures met betrekking tot verschillende entiteiten van dezelfde groep door middel van maatregelen op het gebied van samenwerking en communicatie. Samenwerkings- en communicatiebepalingen onder de EU-Verordening (herschikking) voor ondernemingen die tot een groep behoren betreffen voornamelijk de samenwerking en communicatie tussen curatoren en rechtbanken, in hoge mate beïnvloed door en in overeenstemming met de Wetgevingsleidraad Deel III. Daarnaast is de één-curator-benadering opgenomen in de EU-Verordening (herschikking) en wordt deze nog eens versterkt door de invoering van het systeem van groepscoördinatieprocedures. In het kader van de groepscoördinatie is door UNCITRAL Werkgroep V (insolventierecht) voorgesteld om een ondernemingsgroep insolventieoplossing op te zetten, gericht op het faciliteren van gecoördineerde reorganisatie als 'going concern', dan wel liquidatie van twee of meer leden van een ondernemingsgroep. Daardoor zou de waarde van de groep als geheel of van die groepsleden (kunnen) worden veiliggesteld of (kunnen) stijgen. Tevens wordt door Werkgroep V en in het kader van de Wetgevingsleidraad Deel III aanbevolen dat een enkele of dezelfde insolventievertegenwoordiger kan worden aangewezen om de coördinatie van meerdere insolventieprocedures van dezelfde groep als geheel te faciliteren.

6.08 In de EU-Verordening (herschikking) is aangedrongen op samenwerking tussen rechtbanken onderling en tussen rechtbanken en curatoren ingeval van insolventieprocedures waarbij dezelfde debiteur en groepsondernemingen zijn betrokken, in het bijzonder bij gebruik van protocollen. Om te voorkomen dat parallelle insolventieprocedures worden geopend en om kennisgeving aan schuldeisers te faciliteren, is het op grond van de EU-Verordening (herschikking) bovendien een vereiste dat de lidstaten een of meerdere insolventieregisters opstellen waarin informatie over insolventieprocedures wordt gepubliceerd. Daarnaast wordt groot belang gehecht aan de internationale beste praktijk als referentiewaarde op het gebied van samenwerking en communicatie, zoals de relevante richtlijnen opgesteld door UNCITRAL, de ALI-III Global Principles en de EU Cross-Border Court-to-Court Cooperation Principles. Grensoverschrijdende insolventieovereenkomsten (protocollen) zijn het meest voorkomende instrument om grensoverschrijdende samenwerking en coördinatie van

meerdere insolventieprocedures in verschillende landen te faciliteren. In de Praktijkgids voor Samenwerking van UNCITRAL (UNCITRAL Practice Guide on Cooperation) komt met name het gebruik van grensoverschrijdende insolventieovereenkomsten aan bod, voortkomend uit de praktijk bij gebrek aan relevante coördinatieregels. In de EU spelen grensoverschrijdende insolventieovereenkomsten een minder actieve rol dan in de 'common law' landen. Het merendeel van de lidstaten van de EU die onder de verordening vallen zijn 'civil law' landen. Hoewel overeenkomsten of protocollen hun weg vinden naar de EU-Verordening (herschikking) en het officiële rechtsinstrument worden voor samenwerking en communicatie in de EU, is dit instrument instrument niet gedefinieerd en geïllustreerd aan de hand van een voorbeeld van eenvoudige generieke overeenkomsten die dienen ter vaststelling van een kader van beginselen voor de behandeling van in meerdere lidstaten aanhangige insolventieprocedures. Een gezamenlijke hoorzitting is een middel tot directe samenwerking, ontwikkeld vanuit de dagelijkse rechtspraktijk. Het voordeel van een dergelijke hoorzitting is dat de doeltreffendheid van lopende procedures ermee wordt bevorderd doordat de rechter in staat wordt gesteld om de complexe problemen van verschillende insolventieprocedures rechtstreeks en tijdig op te lossen en om belanghebbende partijen op hetzelfde tijdstip bijeen te brengen. De EU-Verordening (herschikking) biedt een wettelijke basis voor de coördinatie van hoorzittingen in verschillende lidstaten zonder specifieke regels. De verwachting is daarom dat bij het regelen van het verloop van gezamenlijke hoorzittingen de ALI-III Global Principles en de EU Cross-Border Insolvency Court-to-Court Cooperation Principles in de toekomst grote referentiewaarde zullen hebben. Ondertussen kan de rechter er onder bepaalde omstandigheden voor kiezen af te zien van directe communicatie met een andere buitenlandse rechter. Zoals aangegeven in Global Principle 23 kunnen in dergelijke gevallen tussenpersonen door de rechter worden aangewezen als medium voor indirecte communicatie tussen de rechters. Dit komt overeen met de definitie van passende middelen onder de Modelwet, en is tevens in overeenstemming met de EU-Verordening (herschikking).

6.09 Voor de relatie tussen China, Hong Kong, Macao en Taiwan geldt het volgende. Voor een soevereine staat die een herenigingsproces heeft ondergaan en economische interactie als drijfveer heeft, is de vraag of schuldeisers al dan niet hun vorderingen kunnen innen ingeval van transregionale insolventie een beslissende factor voor het doen van interregionale investeringen. Daarnaast is het essentieel voor de voortgang van het integratieproces dat regionale juridische conflicten worden geharmoniseerd. Door middel van verwijzing naar twee toonaangevende internationale insolventieregimes, de Europese insolventie verordening en de UNCITRAL Modelwet, en afstemming van de merites daarvan op de Chinese context, kunnen daarom 10 aanbevelingen worden gedaan voor een Chinese interregionale grensoverschrijdende insolventieregeling (CICIA).

6.10 Met name het voor de CICIA toonaangevende basisbeginsel (Aanbeveling 1) wordt aanbevolen. Ondanks de klassieke beginselen op het gebied van grensoverschrijdende insolventie, te weten de beginselen van het universalisme en territorialisme, is in de ontwikkeling van de relevante internationale

wetgeving, en met name in de verordening en in de Modelwet, het accent verschoven van de jurisdictiebenadering naar samenwerking en communicatie. Zo worden door concurrentie tussen de jurisdicties veroorzaakte spanningen op een acceptabelere manier weggenomen. Hiermee wordt ook de door de toenemende invloed van de ondernemingsgroepen ingezette trend gevolgd die heeft geleid tot praktische problemen bij het bepalen van één hoofdjurisdictie. Daarom wordt er voor de CICIA een gecoördineerde benadering voorgesteld, waarbij belang wordt gehecht aan samenwerking en communicatie tussen procedures waarbij zowel een enkele als meerdere debiteuren zijn betrokken.

6.11 De belangrijkste doelstelling (Aanbeveling 2) bepaalt de hoofdlijn voor de CICIA. Daarbij wordt erkend dat de juridische grondslag voor de invoering van een verplicht jurisdictiesysteem voor grensoverschrijdende samenwerking in insolventiezaken binnen de EU is gelegen in wederzijds vertrouwen en loyale samenwerking tussen de lidstaten. Opgemerkt moet worden dat het wederzijds vertrouwen in het regionale rechtssysteem in China in een primaire fase verkeert vergeleken met de situatie in de EU. Daarom wordt een evenwichtige aanpak voorgesteld door te opteren voor een op erkenning gebaseerd systeem als hoofdlijn onder de CICIA, en de spanning weg te nemen tussen erkenning en jurisdictie door middel van een functionele regeling voor geschillenbeslechting (Aanbeveling 8).

6.12 Aanbeveling 3 stelt de mogelijke vorm en reikwijdte van de CICIA aan de orde. Als gevolg van de politieke samenstelling van China als "groep" na de hereniging, en het gebrek aan capaciteit van 'zachte' wetgeving om tot een harmonieuze grensoverschrijdende insolventiesamenwerking te komen binnen een land, is het noodzakelijk om afspraken te maken voor juridische samenwerking op Chinees regionaal niveau. In vergelijking met de EU is de regionale juridische samenwerking in China nog steeds gesegmenteerd en bestaat er geen bindend instrument dat gelijkwaardig is aan de EU-wetgeving en dat rechtstreeks kan worden toegepast in de gehele regio. Gezien het parallelle karakter van grensoverschrijdende insolventieprocedures zou het echter de rechtszekerheid en de doeltreffendheid van de rechtbanken in de verschillende rechtsgebieden binnen een land zeer ten goede komen indien naar uniforme regels zou kunnen worden verwezen; dit zou tevens de gelijke bescherming van de rechten van schuldeisers binnen een land bevorderen. Daarom dient er voor China een uniforme en alomvattende regionale samenwerkingsovereenkomst te worden opgesteld.

6.13 Met betrekking tot het toepassingsgebied van de CICIA, dat wordt ingeperkt door de spanningen tussen China en Taiwan, wordt aan Taiwan voorgesteld om een apart samenwerkingsmechanisme op te zetten bij gebrek aan een toereikende rechtsgrondslag. Bovendien is de CICIA, gezien de gemeenschappelijke grondwettelijke grondslag die de drie regio's verbindt, alleen toepasbaar bij interregionale insolventieprocedures, wat inhoudt dat COMI van de debiteur aanwezig moet zijn op het vasteland of in Hong Kong SAR of Macao SAR. Door te verwijzen naar de verordening en de Modelwet is de CICIA daarnaast ook van toepassing op openbare collectieve procedures, ongeacht of deze procedures liquidatie dan wel herstel tot doel hebben, gebaseerd op een

wet die uitsluitend is ontworpen voor insolventiesituaties, waarbij de rechter toezicht en controle uitoefent. Ondertussen dekt de CICIA geen insolventies van natuurlijke personen en insolventieprocedures met betrekking tot financiële instellingen die zijn onderworpen aan gespecialiseerde regels.

6.14 In overeenstemming met de belangrijkste doelstelling worden in Aanbeveling 4 de regels geformuleerd op het gebied van erkenning en voorzieningen op grond van de CICIA. Om ten behoeve van automatische erkenning overeenkomstig het regionale insolventiesamenwerkingsstelsel in de EU een evenwichtige benadering te bewerkstelligen tussen wederzijds vertrouwen (hogere mate van wederzijds respect) en wederkerigheid zoals China die feitelijk kent, wordt voorgesteld om wederzijds respect ('comity') als basis voor erkenning te hanteren. Vanwege de door de basiswet opgelegde beperkingen en problemen bij de harmonisatie van het materieel recht, kunnen de uniforme verwijzingsregels niet worden opgenomen in de CICIA. In plaats daarvan wordt aanbevolen een lijst van minimum voorzieningen op te nemen, met frequente verwijzing naar de Modelwet, teneinde de gevolgen van insolventieprocedures te verduidelijken en te waarborgen. De enige uitzondering bij de erkenning onder de CICIA betreft het openbare orde-verweer.

6.15 Door verwijzing naar de relevante ervaring onder de verordening en de Modelwet, en tevens rekening houdend met de huidige toepassing van de exceptie van openbare orde in de Chinese context, in het bijzonder op het vasteland, wordt een restrictievere benadering aanbevolen (Aanbeveling 5).

6.16 Rechtbanken vervullen een essentiële functie bij het proces van grensoverschrijdende insolventiesamenwerking en –communicatie. Maar hoewel in het kader van de basiswet dezelfde rechtsgrond van kracht is, wordt de samenwerking tussen rechtbanken op het vasteland en in de twee SARs parallel op een verschillende manier uitgevoerd. Het verschil komt voort uit de mate van bereidwilligheid van de rechtbanken, in het bijzonder inzake jurisdicties op basis van 'civil law' en 'common law'. Daarom wordt een evenwichtige oplossing (Aanbeveling 6) voorgesteld die eruit bestaat dat de rechters de belangrijkste rol krijgen als toezichthouders. Zij monitoren de samenwerkings- en communicatieacties van de curatoren. Vanwege de inherente flexibiliteit van grensoverschrijdende insolventieovereenkomsten, veranderen deze geleidelijk van een coördinerend instrument in een medium dat een kader omvat voor zowel coördinatie als een combinatie van coöordinerende instrumenten, en kunnen ze als zodanig ordelijk functioneren. Op grond van de CICIA worden grensoverschrijdende insolventieovereenkomsten aanbevolen als oplossing voor de coördinatie van interregionale insolventieprocedures waarbij één enkele schuldeiser en groepen en ondernemingen bij betrokken zijn. De inhoud van de grensoverschrijdende insolventieovereenkomsten mag geen betrekking hebben op zaken die al eerder zijn behandeld, of waarbij sprake is van opzettelijke nalatigheid op grond van de CICIA. De inhoud dient niet te worden beperkt, tenzij deze strijdig is met lokale dwingende regels. Aanvullende grensoverschrijdende insolventieovereenkomsten zijn op *ad hoc* basis toegestaan.

6.17 Om op regionaal niveau tot een harmonieuze interpretatie te komen, de autonome betekenis van de jurisdictie in China te waarborgen en zo de geschillen inzake jurisdictie op te lossen en tevens een betere oplossing te vinden voor de geschillenregeling die voortkomt uit grensoverschrijdende insolventieovereenkomsten, wordt voor de CICIA voorgesteld om een functionele regeling inzake de beslechting van geschillen in te voeren (Aanbeveling 8). Met inachtneming van de basiswet en de uitgangspunten van de CICIA wordt voorgesteld om een functionele regeling inzake de beslechting van geschillen in te voeren in de vorm van een bijzondere vergadering, te beleggen op basis van interregionale samenwerking en communicatie tussen rechtbanken. Een bijzondere vergadering kan om twee redenen worden belegd. De eerste betreft een uitspraak over het bepaalde krachtens de CICIA en de tweede komt voort uit geschillen betreffende grensoverschrijdende insolventieovereenkomsten. De gevolgen van die twee soorten uitspraken verschillen. Na consensus tussen de betrokken hoogste rechterlijke instanties is de uitspraak van de bijzondere vergadering met betrekking tot specifieke bepalingen van de CICIA bindend voor de zaak in kwestie. Tevens zal na consensus van alle hoogste rechterlijke instanties de uitspraak bindend zijn ten aanzien van de specifieke bepalingen volgens de CICIA. Ingeval van geschillen inzake grensoverschrijdende insolventieovereenkomsten is de functie van de bijzondere vergadering meer die van een gezamenlijk forum waaraan geschillen worden voorgelegd ten behoeve van een definitieve beslissing. Vanwege de door de basiswet opgelegde beperkingen wordt dit geacht op vrijwillige basis te geschieden. Daarom zijn de uitspraken alleen bindend na consensus tussen alle betrokken rechtbanken en hebben ze uitsluitend betrekking op de zaak die aan de bijzondere vergadering is voorgelegd. Verwacht wordt dat de bijzondere vergadering de rechters de gelegenheid biedt om standpunten uit te wisselen en consensus te bereiken. Tevens kan tijdens de bijzondere vergadering integraal worden op rechterlijke wijze worden onderhandeld over rechtsgeschillen en kan zo ook gemeenschapszin en een besef van gemeenschappelijke identiteit ontstaan. Dit kan een geleidelijke toename van het wederzijds begrip tussen het vasteland en de twee SARs stimuleren.

6.18 Om de publiciteit inzake insolventieprocedures te bevorderen wordt voorgesteld om een interregionaal geschillenregister op te zetten (Aanbeveling 9). Dat is mogelijk, gezien de relevante wettelijke basis op grond van de basiswet en de beschikbaarheid van relevante technische bijstand door de verantwoordelijke autoriteiten. Voor de CICIA wordt voorgesteld om de verplichte minimale hoeveelheid informatie te publiceren in de interregionale insolventieregisters, eventueel aan te vullen met informatie overeenkomstig de lokale wetgeving. Voor wat betreft de communicatietaal kan de informatie, behalve in het Chinees, ook in het Engels worden gepubliceerd in Hong Kong SAR of in het Portugees in Macao SAR, maar altijd vergezeld van een Chinese vertaling.

6.19 Gezien het ontbreken van een rechtsgrond en de onduidelijke relatie tussen China en Taiwan, wordt aanbevolen om een aparte regeling op te stellen voor insolventiesamenwerking tussen het vasteland en Taiwan. Gezien de ervaring

met samenwerking tussen China en Taiwan, die hoofdzakelijk plaatsvindt via twee niet-gouvernementele tussenpersonen van beide zijden, alsook het belang van communicatie en samenwerking, wordt voorgesteld om een onafhankelijke tussenpersoon aan te stellen om de obstakels te overwinnen bij het samenwerkingsproces tussen China en Taiwan. De voornaamste taken van een onafhankelijke tussenpersoon zijn om de banden met beide partijen te onderhouden, een praktische manier uit te werken voor de communicatie tussen de betrokken rechtbanken, en de rechtbanken van beide zijden op de hoogte te houden van mogelijke conflicten of problemen bij insolventieprocedures tussen China en Taiwan.

Annex I[1]

Bilateral Legal Arrangements between the Mainland and HKSAR	
1998	Arrangement for Mutual Service of Judicial Documents in Civil and Commercial Proceedings between the Mainland and Hong Kong Courts[2]
1999	Arrangement Concerning Mutual Enforcement of Arbitral Awards[3]
2006	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 Pursuant to Choice of Court Agreements between Parties Concerned[4]
Bilateral Legal Arrangements between the Mainland and Macao SAR	
2001	Arrangement for Mutual Service of Judicial Documents and Exchange of Evidence in Civil and Commercial Proceedings between the Mainland and the Macao SAR Courts[5]
2006	Arrangement Between the Mainland and the Macao Special Administrative Region on the Mutual Recognition and Enforcement of Civil and Commercial Judgments[6]
2007	Arrangement Concerning Mutual Recognition and Enforcement of Arbitral Awards between the Mainland and the Macao Special Administrative Region[7]
Bilateral Legal Arrangements between HKSAR and Macao SAR	
2013	Arrangement Concerning Reciprocal Recognition and Enforcement of Arbitral Award between Hong Kong SAR and Macao SAR
Bilateral Legal Arrangements between the Mainland and Taiwan	
2009	Agreement between Both Sides of the Taiwan Strait on Jointly Fighting against Crimes and Mutual Judicial Assistance

[1] All of the Arrangements between the Mainland and the two SARs are implemented in the form of judicial interpretation in the Mainland.
[2] Supreme Court Judicial Interpretation No. 42 of [1999]
[3] Supreme Court Judicial Interpretation No. 3 of [2000]
[4] The Arrangement is implemented in HKSAR in the form of legislation, the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap. 597), and implemented in the Mainland in the form of judicial interpretation, Supreme Court Judicial Interpretation No. 9 of [2008].
[5] Supreme Court Judicial Interpretation No. 26 of [2001]
[6] Supreme Court Judicial Interpretation No. 2 of [2006]
[7] Supreme Court Judicial Interpretation No. 17 of [2007]

Annex II

(1)	Provisions of the Supreme People's Court on Designating the Administrator during the Trial of Enterprise Bankruptcy Cases (Interpretation No.8 [2007], issued on 12 April 2007)
(2)	Provisions of the Supreme People’s Court on Determination of the Administrator’s Remunerations (Interpretation No.9 [2007], issued on 12 April 2007)
(3)	Provisions of the Supreme People’s Court on Some Issues about the Application of Law for the Enterprise Bankruptcy Cases That have not Been Concluded When the Enterprise Bankruptcy Law of the People’s Republic of China Comes into Effect (Interpretation No. 10 [2007], issued on 25 April 2007
(4)	Official Reply of the Supreme People’s Court on How to Handle a Case Where a Creditor Applies for Bankruptcy Liquidation against a Debtor Whose Relevant Persons’ Whereabouts are Unknown or Whose Asset Conditions are Unclear (Interpretation No.10 [2008], issued on 7 August 2008);
(5)	Opinions of the Supreme People's Court on Several Issues Concerning Correctly Trying Enterprise Bankruptcy Cases to Provide Judicial Protection for Maintaining the Order of Market Economy were published (Interpretation No.36 [2009], issued on 12 June 2009)
(6)	Provisions (I) of the Supreme People's Court on Several Issues concerning the Application of the Enterprise Bankruptcy Law of the People's Republic of China (Interpretation No. 22 [2011], issued on 29 August 2011)
(7)	Notice of the Supreme People's Court on Correctly Applying the Provisions (I) on Several Issues concerning the Application of the Enterprise Bankruptcy Law of the People's Republic of China and Bringing into Full Play the Judicial Functions of People's Courts in the Trial of Enterprise Bankruptcy Cases (Interpretation No. 281 [2011])
(8)	Reply of the Supreme People's Court on Issues concerning Whether to Accept the Lawsuits Filed by Tax Authorities to Confirm Their Creditor's Rights to the Late Fees for Tax Arrears of Bankrupt Enterprises (Interpretation No. 9 [2012], issued on 26 June 2012)
(9)	Notice of the Supreme People's Court on the Summary of Minutes of the Symposium on the Trial of Cases concerning Bankruptcy Reorganization of Listed Companies (Interpretation No. 261 [2012], issued on 29 October 2012)
(10)	Reply of the Supreme People's Court on Whether the Liquidation of Sole Proprietorships May Refer to the Procedure for Bankruptcy Liquidation as Prescribed in the Enterprise Bankruptcy Law (Interpretation No. 16 [2012], issued on 11 December 2012)
(11)	Provisions (II) of the Supreme People's Court on Several Issues concerning the Application of the Enterprise Bankruptcy Law of the People's Republic of China (Interpretation No. 22 [2013], issued on 5 September 2013)

Annex III

Comparative Table Concerning Cross-border Insolvency between the Mainland, SARs and Taiwan

	the Mainland	Hong Kong SAR	Macao SAR	Taiwan	
Main References:	Enterprise Bankruptcy Law (EBL)	(1)case law; the Companies (Winding-up and Miscellaneous Provisions) Ordinance (Cap 32)	(1) Civil Procedure Code of Macao(CPCM) (2) Commercial Code of Macao	Bankruptcy Act of Taiwan (TBA)	Debt Clearance Act (the 2015 Draft)
Jurisdiction	/	unregistered company, including (1) non- Hong Kong company [Cap 622, s2; Cap 32 s326(2)] (2) oversea company *Securities and Futures Commission v MKI Corporation* [1995] 2 HKC 79	exclusive jurisdiction over the lawsuits concerning the bankruptcy or insolvency of legal persons, whose domicile is within Macao [CPCM, Article 20] exclusive jurisdiction is one of the negative conditions to recognize foreign judgments [CPCM, Article 1200-I]	applying the doctrine of *forum non conveniens* without taking into consideration the existing bankruptcy proceeding commenced abroad: Taiwan Taipei District Court Litigation No. 1807 [2010]; Taiwan High Court Appeal from Ruling No.215 [2011]; Taiwan Supreme Court Appeal from Ruling No. 1022 [2011]; Taiwan High Court	the place where to adjudicate the debt clearance proceedings is its head office or principal place of business in Taiwan [the 2015 Draft, Art.7(2)]

				Appeal from Ruling No.286 [2012]; Taiwan Supreme Court Appeal from Ruling No. 529 [2012]	
		wide and unfettered jurisdiction conferred upon the Hong Kong court to wind up any unregistered company in the circumstances mentioned in accordance with the Cap 32 s.327(3): (a) if the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purposes of winding-up its affairs; (b) if the company is unable to pay its debts; (c) if the court is of the opinion that it is just and equitable that the company be wound-up.			
		Three core requirements adopted by the HK courts: (1) there is sufficient connection with Hong Kong, but this does not necessarily have to consist in the presence of assets			

		within the jurisdiction; (2) there is a reasonable possibility that the winding-up order would benefit those applying for it; and (3) the court must be able to exercise jurisdiction over one or more persons interested in the distribution of the company's assets. *Re Zhu Kuan Group Co. Ltd.* [2004] HKCFI 795; HCCW874/2003 (2 August 2004), at 22; *Re Information Security One Ltd.* [2007] HKCFI 848; [2007] 3 HKLRD 780; [2007] 4 HKC 383; HCCW212/2007 (13 August 2007), at 8; *Re Beauty China Holdings Ltd*. [2009] 6 HKC 351, at 23; In *re Yung Kee Holdings Limited* [2012] 6 HKC 246, at 70; *Re Pioneer Iron and Steel* [2013] HKCFI 324, at 27 - the significance of each core requirement will vary from case to case - the jurisdiction cannot be exercised if one of the three			

		core requirements has not been met. - However, under the exceptional circumstance that the connection with Hong Kong is so strong and the benefits of a winding-up order for the creditors of a company are so substantial, the court would be willing to exercise its jurisdiction despite the third core requirement not being satisfied. *Re Pioneer Iron and Steel Group Co. Ltd.* [2013] HKCFI 324, at 28 *Re Pioneer Iron and Steel Group Co. Ltd.* [2013] HKCFI 324, at 58			
Recognition	Criteria for recognition: (1) international treaties; (2) the principle of reciprocity without infringing public policy, including (a) the basic principles of the laws of the People's Republic of China;	Means of recognition: (1) commencement of parallel Hong Kong insolvency proceedings *Re Information Security One Ltd.* [2007] HKCFI 848 no independent legal basis for the Hong Kong courts to open an ancillary proceeding *Re Pioneer Iron and Steel Group Co. Ltd.* [2013] HKCFI 324, at 44 (2) recognition in the process of	Priority of local claims over foreign claims: if a foreign company is declared bankrupt by the court at its place of incorporation, the decision can be recognized but will not be enforced until the local debts have been paid off through the local assets	Territorial Approach in law: If reconciliation or declaration of bankruptcy is rendered in a foreign country, it shall have no binding effect on the assets of the debtor or the bankrupt, which are located in Taiwan	(1) based on the principle of reciprocity if (a) in accordance with the laws of Taiwan, the foreign courts do not have jurisdiction; (b) the interests of the domestic creditors are

	(b) the sovereignty and security of the State or public interests; (c) the legitimate rights and interests of the creditors within the territory of the People's Republic of China [the EBL, Article 5]	the civil action subject to two-stage analysis (a) the effect of the foreign insolvency proceeding is not binding on the creditor's claim in Hong Kong on the footing that the foreign discharge does not form part of the proper law, which governs the contract and gives rise to the claim (b) to fulfill the objective of universal distribution on a comity basis, the Hong Kong court may refuse execution against such assets within Hong Kong *Hong Kong Institute of Education v. Aoki Corporation* [2004] 2 HKC 397 (3)sanction of scheme of arrangement: only the first core requirement needs to be fulfilled in the case of sanctioning a scheme of arrangement, which is, there is a sufficient connection of the scheme with Hong Kong *Re LDK Solar Co. Ltd.* [2014] HKCFI 2234	[Commercial Code of Macao, Article 83]	[TBA, Article 4] Flexible interpretations in practice: (1) only excluding the effect of declaration of bankruptcy on the assets, which are located in Taiwan but it does not deny the effects of all the actions done by foreign courts in foreign insolvency proceedings, especially the effect of appointment of legal agents or statutory representatives for the debtor rendered by the court Taiwan High Court Important Appeal No. 23 [2011] (2) applying Article 49 of the Non-	inappropriately impaired in the foreign proceeding; (c) recognition of the foreign proceeding is on contrary to the public policy or *boni mores* [the 2015 Draft, Art.299] (2) the courts can withdraw the recognition of the foreign debt clearance proceedings: (a) the foreign debt clearance proceeding falls in the ambit of Article 299; (b) the foreign debt clearance proceeding has been terminated or rescinded;

				litigation Law, instead of TBA Article 4, to recognition of foreign insolvency proceedings Taipei District Court Trial on Application No. 514 [2009] (3) the foreign insolvency proceedings are deemed as automatically effective and thus it is not necessary for the Taiwan courts to grant recognition Taipei District Court Trial on Application No. 355 [2012] (4) Article 42 of the HK and Macao Act is regarded as proper legal basis for recognition of Hong Kong insolvency proceedings Taipei District Court	(c) the documents submitted by the liquidator in accordance with Article 298-I and Article 300-I are forged, altered or involving other fraudulent behaviors (d)the liquidators, administrator or debtors seriously violate the statutory obligations [the 2015 Draft, Art.310]

				Trial on Application No. 355 [2012] the corresponding legal basis for recognition of the Mainland insolvency proceedings shall be Article 74 of the Mainland Act	
Cooperation and Communication	/	(1) use of protocol *Re Peregrine Investments Holdings Ltd.* [1998] HKCFI 643; *Greater Beijing First Expressways Ltd.* [2000] HKCFI 755; *Re Kong Wah Holdings Ltd.* [2000] HKCFI 21; *Re Akai Holdings Ltd.* [2004] HKCFI 346; *Re Jinro (HK) International Ltd.* [2003] HKCFI 239 (2) use of video-conference to make communication in the course of cross-border insolvency cooperation *Re Chow Kam Fai David* [2004] HKCA 111			the duty of cooperation between the domestic and foreign liquidators or administrators [the 2015 Draft, Art.317(1)]

Annex IV

Comparative Table between the EC Regulation, EU Regulation (recast) and the Model Law[8]

EC Regulation	EU Regulation (recast)	Model Law
Main References:		
Regulation on insolvency proceedings Council Regulation (EC) 1346/2000, [hereinafter EC Regulation]	Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) [hereinafter EU Regulation (recast)]	UNCITRAL Model Law on Cross-border Insolvency (1997) with Guide to Enactment and Interpretation (2013) [hereinafter the Model Law and Guide and Interpretation]
Forms:		
Regulation: Community legal instrument [*ex* Article 65 TEC, Recital (2)]	Regulation: Union legal instrument [Article 81 TFEU, Recital (3)]	Model Law (soft law): legislative recommendation for States to incorporate into their own national law [Guide and Interpretation, para.19]
general application [ex Article 249 TEC]	general application [Article 288 TFEU]	an open tool to all states [Guide and Interpretation, paras. 21&22]
binding in their entirety; directly applicable in all MSs within EU, except Denmark	binding in their entirety; directly applicable in all MSs within EU, except Denmark	voluntary & flexible: modification to the uniform text is allowed (but intended to limit deviations from the uniform

[8] This table has been published in Gong, Xinyi, Can the Day Understand the Night? Brief Introduction into Problems of the Current Insolvency System in China, 2015 III PRIZE In International Insolvency Studies (silver medal), available at http://iiiglobal.org/iii-prize-in-insolvency.html

[Recital (8) &(33)]	[Recital (8)&(88)]	text to a minimum) [Guide and Interpretation, para.20-22]
Objectives:		
Main References:		
33 Recitals; Virgós/Schmit Report 1996	Recitals	Preamble, Guide and Interpretation, para.1
	(1) proper and close cooperation between the various insolvency practitioners and the courts in all the concurrent proceedings, in particular by exchanging a sufficient amount of information; [Recital (48), (52)]	(a) Cooperation between the courts and other competent authorities of State and foreign States involved in cases of cross-border insolvency;
(1) to provide for legal certainty in cross-border insolvency;	(2) protection of legitimate expectations and the certainty of transactions in cross-border insolvency; [Recital (67)]	(b) Greater legal certainty for trade and investment;

(2) to promote the efficiency of insolvency proceedings, by favoring those solutions which facilitate their administration and improve the *ex ante* planning of transactions;	(3)efficient administration of insolvency proceedings and effective realization of the total assets (a) a single debtor: the dominant role of the main proceedings shall be preserved in the way that insolvency practitioners in the main proceedings are granted with powers to intervene if the secondary proceedings are considered unsupportive for the efficient and effective realization of the total assets [Recital (41), (45)] (b) a group of companies: an integrated solution through the integrated group coordination proceedings on a voluntary basis, in addition to the combined efforts of all the actors involved in the multiple proceedings through compulsory cooperation and communication [Recital (51), (52), (56), (57)]	(c-1) fair and efficient administration of cross-border insolvencies that protects all the interested persons, including the debtor (d) Protection and maximization of the value of the debtor's assets; and
(3) to remove inequalities among Community-based creditors with regard to access and participation in such proceedings	(4) equal treatment of creditors on a coordinated basis with a swift transmission of information [Recital (67), (68)]	(c-2) protection of the interests of all creditors
	(5) promoting the rescue of economically viable but distressed businesses and giving a second chance to entrepreneurs; [Recital (10)]	(e) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment

(4) prevention of forum shopping Recital (4)	(6) prevention of fraudulent or abusive forum shopping [Recital (5)&(30)&(32)]	
Scopes:		
General Scopes of Application:		
a debtor, including a natural person or a legal person, a trader or an individual [Recital (9)]	irrespective of whether the debtor is a natural person or a legal person, a trader or an individual [Recital (9)]	regardless of whether they involve a natural or a legal person as the debtor [Guide and Interpretation, para.50]
Definitions:		
(1) collective proceedings [Recital (10), Article 1(1)] Annex A [Article 2(a)]	(1) collective proceedings [Recital (14), Article 2(1)] exhaustively listed in Annex A [Recital (9), Article 2(4)]	(1) collective proceedings [Article 2(a), Guide and Interpretation, paras.69-71]
(2)based on the debtor's insolvency and not on any other grounds [Virgós/Schmit Report, para. 49(b), Article 1(1)]	(2) for the purpose of rescue, adjustment of debt, reorganization or liquidation, including interim proceedings [Recital (10), (15), (17), Article 1(1)]	(2)for the purpose of reorganization or liquidation, including an interim proceeding [Article 2(a), Guide and Interpretation, paras.77-80] presumption of insolvency in case that the insolvency proceeding is initiated but the debtor is not in fact insolvent [Article 31, Guide and Interpretation, paras.72, 235-236]

(3) entailing the partial or total divestment of a debtor, relating to the winding-up of insolvent companies or other legal persons, and the appointment of a liquidator [Virgós/Schmit Report, para. 49(c),(d); Recital (7), (10), Article 1(1), 2(b), Annex C]	(3) control or supervision by a court, including intervention by the court on appeal by a creditor or other interested parties [Recital (10), Article 1(1)]	(3) control or supervision by a foreign court [Article 2(a)] (a) the level of control or supervision, including: a proceeding in which the debtor retains some measure of control over its assets, albeit under court supervision e.g. debtor in possession indirect control or supervision exercised by an actor, such as an insolvency representative, who is subject to control or supervision by the court [Guide and Interpretation, paras.74] (b) time for control or supervision, including control or supervision by a court at a late stage of the insolvency process e.g. expedited reorganization proceedings [Guide and Interpretation, paras.75-76; See also Legislative Guide, Part two, Ch. IV, paras. 76-94 and Recommendations 160-168]
	(4) based on a law relating to insolvency [Recital (17), Article 1(1)]	(4) pursuant to a law relating to insolvency [Article 2(a), Guide and Interpretation, para.73]
	(5) public collective proceedings [Recital (12), Article 1(1)]	
Exclusion :		

the principle of mutual trust [Recital (22)] as a corollary the waiver by the Member States of the right to apply their internal rules on recognition and enforcement in favor of a simplified mechanism for the recognition and enforcement of judgments handed down in the context of insolvency proceedings [Case C-444/07 *MG Probud Gdynia sp. z o.o.*, ECR I-00417 (*MG Probud*), para.28]	the principle of mutual trust [Recital (69)]	
(1)insurance undertakings	(1) insurance undertakings	(1) insolvencies related to natural persons if so required in accordance with the insolvency law of the enacting State [Guide and Interpretation, para.61]
(2) credit institutions	(2) credit institutions	(2) any types of entities subject to a special insolvency regime (such as banks or insurance companies) [art.1 (2), Guide and Interpretation paras.55-57]
(3) investment undertakings which provide services involving the holdings of funds or securities for third parties, collective investment undertakings [Recital (9), Article 1(2)]	(3) investment firms and other firms, institutions and undertakings to the extent these are covered by Directive 2001/24/EC as amended, and	
	(4) collective investment undertakings [Recital (18), Article 1(2), 2(2)]	

	(5) proceedings which are not based on a law relating to insolvency, including (a) proceedings that are based on general company law not designed exclusively for insolvency situations e.g. UK schemes of arrangement (based on the Companies Act 2006, s 885) (b) certain adjustment of debt proceedings in which debts of a natural person of very low income and very low asset value are written off, provided that this type of proceedings never makes provisions for payment to creditors e.g. UK Debt Relief Orders based on Part 7A of the Insolvency Act 1986 (c. 45) [Recital (16)]	
	(6) no 'confidential' proceedings e.g. French *mandat ad hoc* and conciliation proceedings based on Article L611-13 and L611-4 Commercial Code [Recital (13)]	
Structure:		
33 Recitals; 47 Articles	89 Recitals; 92 Articles	5 Chapters, 32 Articles

3 Annexes Annex A: Insolvency proceedings referred to in Article 2(a) Annex B: Winding up proceedings referred to in Article 2(c) Annex C: Liquidators referred to in Article 2(b)	4 Annexes Annex A: Insolvency proceedings referred to in Article 2(4) Annex B: Insolvency practitioners referred to in Article 2(5) Annex C: Repealed Regulation with list of the successive amendments thereto Annex D: Correlation Table	Guide to Enactment and Interpretation (2013); Legislative Guide on Insolvency Law in 2004; Practice Guide on Cross-border Insolvency Cooperation in 2009; Part III to the Legislative Guide (treatment of enterprise groups) in 2010; Judicial Perspective in 2011; Part IV to the Legislative Guide (Directors' obligations in the period approaching insolvency) in 2013
Interpretation:		
purposive approach: recitals (assistance in interpretation)	purposive approach: recitals (assistance in interpretation)	purposive approach: preamble (assistance in interpretation)
harmonized interpretation by CJEU [ex Article 234 TEC]	harmonized interpretation by CJEU [Art. 267 TFEU, Recital (18) & (24)]	(1)subject to different national implementation and interpretation with taking into consideration its international origin and to the need to promote uniformity in its application and the observance of good faith [Article 8, Guide and Interpretation para.106] (2) harmonized interpretation facilitated by the Case Law on UNCITRAL Texts (CLOUT) information system [Guide and Interpretation para.107]

Explanatory report: Virgós/Schmit Report 1996 [Case C-341/04 *Eurofood IFSC Ltd* [2006] ECR I-03813 (*Eurofood*), Opinion of AG Jacobs, at 2; Case C-396/09 *Interedil Srl (in liquidation) v Fallimento Interedil Srl, Intesa Gestione Crediti SpA* [2011] ECR I-09915 (Interedil), Opinion of AG Kokott, at 63]		Background and explanatory information: Guide and Interpretation
COMI:		
Not defined. The center of main interests should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties. [Recital (13)]	Introduction of formal clarification The center of main interests shall be the place where the debtor conducts the administration of his interests on a regular basis and which is ascertainable by third parties. [Article 3(1)]	Not defined. "Notwithstanding the different purpose of center of main interests under the two instruments, the jurisprudence with respect to interpretation of that concept in the EC Regulation may be relevant to its interpretation in the Model Law." [Guide and Interpretation, para.141]
Presumption (a company or legal person):		
shall be presumed to be the place of the registered office in the absence of proof to the contrary [Article 3(1)]	shall be presumed to be the place of the registered office in the absence of proof to the contrary; shall only apply if the registered office has not been moved within a period of 3 months prior to the request for the opening of insolvency proceedings. [Article 3(1)] The presumption should be rebuttable [Recital (30)]	the debtor's registered office [Article 16(3)] but serves different purposes [Guide and Interpretation, para.141]

Conditions to rebut the presumption:		
/	By codifying the case law handed down by the CJEU (see Case C-396/09 *Interedil Srl (in liquidation) v Fallimento Interedil Srl, Intesa Gestione Crediti SpA* [2011] ECR I-09915 (*Interedil*), para. 53), the main conditions are: (1)central administration located in another Member State, and (2) a comprehensive assessment of all the relevant factors, and (3)in a manner that is ascertainable by third parties [Recital (30)] (4)third parties: special consideration should be given to the creditors and their perception; ascertainable: this may require, in the event of a shift of center of main interest, informing creditors of the new location from which the debtor is carrying out his activities in due course, e.g. by drawing attention to the change of address in commercial correspondence, or making the new location public through other appropriate means. [Recital (28)]	Principal factors, considered as a whole: (a) where the central administration of the debtor takes place, and (b) which is readily ascertainable by creditors. In addition, a non-exhaustive list of relevant factors are provided [Guide and Interpretation, paras.145-147]
Time to Determine COMI:		

the time of application for opening insolvency proceedings [not defined but developed in accordance with the case law, see Case C-1/04, *Susanne Staubitz-Schreiber* [2006] ECR I-00701 (*Staubitz-Schreiber*), para.29; *Interedil*, para.55]	the registered office presumption: three months prior to the time of the request for the opening of insolvency proceedings in order to prevent fraudulent or abusive forum shopping [Recital (31), Article 3(1), para.2]	the date of commencement of the foreign proceeding [Guide and Interpretation, para.141, 149, 159] e.g. inter-circuit split in U.S.A. (1) the date of the filing of the Chapter 15 petition [*Re Kemsley*, 489 B.R. 346 (Bankr. S.D.N.Y. 2013); *Re Millennium Global Emerging Credit*, 458 B.R. 63 (Bankr. S.D.N.Y. 2011); *Re Gerova Fin. Grp., Ltd.*, 482 B.R. 86 (Bankr. S.D.N.Y.2012)] (2) the date of the opening of the foreign proceeding [*re Ran*, 607 F.3d 1017 (5th Cir. 2010); *Re British American Isle of Venice (BVI), Ltd.*, 441 B.R. 713 (Bankr. S. D. Fla. 2010); *Re Fairfield Sentry Ltd.*, 440 B.R. 60, 64 (Bankr. S.D. N.Y. 2010), aff'd, 714 F.3d 127(2d Cir. 2013)] (3) the coordinated approach: the court should take into consideration the period between the commencement of the foreign insolvency proceeding and the filing of the Chapter 15 petition to ensure that a debtor has not manipulated its COMI in bad faith [*Re Fairfield Sentry Ltd.*, 714 F.3d 127(2d Cir. 2013), at 138; see also Adler, Louise De Carl, Managing the Chapter 15 Cross-Border Insolvency Case (A Pocket Guide for Judges), 2nd ed., Federal Judicial Center, 2014, p.22-23]

Establishment:		
Definition:		
any place of operations where the debtor carries out a non-transitory economic activity with human means and goods [Article 2(h)]	any place of operations where the debtor carries out or has carried out in the three months prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets [Article 2(10)]	any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services [Article 2(f)]
The mere presence of assets of the debtor cannot serve as the basis of establishment. [Virgós/Schmit Report, para.70]	The definition of establishment requires the presence of a structure consisting of a minimum level of organization and a degree of stability necessary for the purpose of pursuing an economic activity. The presence alone of assets does not, in principle, meet that definition. [*Interedil*, para.64]	The presence of assets is not qualified as establishment. [Guide and Interpretation, para.32]
Time to determine establishment:		
/	three months prior to the request to open main insolvency proceedings [Article 2(10)]	the date of commencement of the non-main foreign proceedings [Guide and Interpretation, para.160]
Establishment-based Proceedings:		Concurrent Proceedings:
opened in the Member State where the debtor has an establishment [Recital (12)]	opened in the Member State where the debtor has an establishment [Recital (23)]	(1) opened on the basis of presence of assets of the debtor in the enacting State after recognition of a foreign main proceeding [Article 28]

the effects restricted to the assets of the debtor located in the Member State where his establishment is situated [Article 3(2)]	the effects restricted to the assets of the debtor located in the Member State where his establishment is situated [Article 3(2)]	(a) the effects restricted to the assets of the debtor that are located in the State, and [Article 28] (b) the possible extension of effects of a local proceeding to assets located abroad: (i) to the extent necessary to implement cooperation and coordination to other assets of the debtor (ii) those foreign assets must be subject to administration in the enacting State under the law of the enacting State [Article 28, Guide and Interpretation, para.227]
		(2) a concurrent proceeding can also be opened in accordance with the law of the enacting State relating to insolvency and the court involved should seek cooperation and coordination pursuant to Chapter IV of the Model Law [Article 29]
Territorial Proceedings:		
(1) prior to the opening of the main insolvency proceedings [Article 3(4)]	(1) prior to the opening of the main insolvency proceedings [Article 3(4)]	(a) prior to application for recognition of the foreign proceeding concerning the same debtor [Article 29(a)]

(2) the function of protection of local interests [Recital (17)]	(2) the function of protection of local interests [Recital (37)]	(i) any discretionary reliefs granted to the foreign proceedings should be in consistent with the concurrent proceeding in the enacting State Article 29(a)(i) (ii)automatic recognition and reliefs granted to a foreign main proceeding based on Article 20 of the Model Law does not apply if the foreign proceeding is recognized as a foreign main proceeding in this enacting State where a concurrent proceeding has already been opened Article 29(a)(ii)
(3) shall be transferred into secondary proceedings as soon as the main insolvency proceedings are opened [Recital (17), Article 3(4)]	(3) When main insolvency proceedings are opened, the territorial insolvency proceedings shall become secondary insolvency proceedings. [Article 3(4)]	

(4) can only be opened under limited circumstances: (a)where main proceedings cannot be opened under the law of the Member State where the debtor has the center of his main interest; [Article 3(4)(a)] (b) requested by certain specific applicants a creditor who has his domicile, habitual residence or registered office in the Member State within the territory of which the establishment is situated, or whose claim arises from the operation of that establishment [Article 3(4)(b)]	(4) may be opened only under limited circumstances: (a)where main proceedings cannot be opened because of the conditions laid down by the law of the Member State within the territory of which the center of the debtor's main interests is situated; [Article 3(4)(a)] (b) requested by certain specific applicants where the opening of territorial insolvency proceedings is requested by: (i) a creditor whose claim arises from or is in connection with the operation of an establishment situated within the territory of the Member State where the opening of territorial proceedings is requested; or [Article 3(4)(b)(i)] (ii) a public authority which, under the law of the Member State within the territory of which the establishment is situated, has the right to request the opening of insolvency proceedings. [Recital (37), Article 3(4)(b)(ii), see also Case C–112/10, *Zaza Retail* [2011] ECR I-11525(*Zaza Retail*), para.30]	
Secondary Proceedings:		
(1) following the opening of the main insolvency proceedings [Recital (18)]	(1) following the opening of the main insolvency proceedings [Recital (38)]	(b) after recognition or after the petition for recognition of the foreign proceeding [Article 29(b)]

(2) the function of protection of local interests and the auxiliary function [Recital (19)]	(2)the function of protection of local interests and the auxiliary function [Recital (40)]	(i) any discretionary reliefs should be reviewed by the court and should be modified or terminated if inconsistent with the concurrent proceeding in this enacting State [Article 29(b)(i)] (ii) in case that the foreign proceeding is a foreign main proceeding, the stay and suspension in accordance with Article 20(1) should be modified or terminated pursuant to Article 20(2) if inconsistent with the proceeding in this enacting State [Article 29(b)(ii)]
(3)requested by certain specific applicants: (a)the liquidator in the main proceedings; (b)any other person or authority empowered to request the opening of insolvency proceedings under the law of the Member State within the territory of which the opening of secondary proceedings is requested [Article 29]	(3)requested by certain specific applicants: (a) insolvency practitioner in the main proceedings (b) any other person or authority empowered under the national law of that Member State [Recital (38), Article 37(1)]	

(4)must be winding-up proceedings [Article 3(3)]	(4) secondary proceedings can be opened in the Member State of the registered office, provided that main proceedings concerning a legal person or company have been opened in a Member State other than that of its registered office [Recital (24), see also Case C-327/13 *Burgo Group SpA*, 4 September 2014 (*Burgo*), at 39]	
Intervention with the Secondary Insolvency Proceedings (auxiliary function):		Intervention with the local proceedings:
(1) the main liquidator shall be given an early opportunity of submitting proposals on the liquidation or use of the assets in the secondary proceedings [Article 31(3)]	(1) the main insolvency practitioners shall be given an early opportunity to submit proposals on the realization or use of the assets in the secondary insolvency proceedings [Article 41(2)(c)]	(1) no limitations on the jurisdiction of the courts in the enacting State to commence or continue local insolvency proceeding [Guide and Interpretation, para.224] (2) intervention by tailoring the relief to be granted to the foreign main proceeding and cooperating with the foreign court and foreign representative [Guide and Interpretation, para.226, 231] (3) no rigid hierarchy between the concurrent proceedings in order to facilitate cooperation of the court [Guide and Interpretation, para.231]

(2) closure of secondary proceedings: (a) by the liquidator in the main proceedings (b) through a rescue plan, a composition or a comparable measure proposed [Article 34]	(2) closing a secondary proceeding: (a)by the insolvency practitioner in the main insolvency proceedings; (b)with a restructuring plan, a composition or a comparable measure if so permitted under the law of that Member State [Article 47(1)]	
(3) stay of the process of liquidation of secondary proceedings for a certain period stay of secondary proceedings: (a) at the request from the liquidator in the main proceedings, (b) suitable measure have been taken to guarantee the interests of the creditors in the secondary proceedings and of individual classes of creditors (c) up to three months and may be continued or renewed for similar periods (d) terminated at the request of the liquidator in the main proceedings or by the court of its own motion at the request of a creditor or at the request of the liquidator in the secondary proceedings [Article 33]	(3) when a temporary stay of individual enforcement is granted in the main proceedings and for the purpose of preservation of the efficiency of such moratorium, the court can temporarily stay the opening of secondary proceedings (a)at the request of the insolvency practitioner or the debtor in possession (b)provided that suitable measures are in place to protect the interests of local creditors (c)for a period not longer than three months to allow negotiation on a rescue plan between the debtor and the creditors (d)revoked by the court of its own motion or at the request of any creditor [Recital (10), (45), Article 38(3)]	

	(4) an undertaking in order to avoid secondary proceedings: (a) by the insolvency practitioner in main proceedings (b) distribution of the assets to local creditors as if secondary proceedings had been opened; [Recital (42), Article 36(1), Article 38(2)] (c) applicable law: the law of the Member State in which secondary proceedings could have been opened [Article 36(2)] (d) relevant time for determination of the assets: the moment when the undertaking is given [Article 36(2)] (e) in writing and in the official language or one of the official languages of the Member State where secondary proceedings could have been opened [Article 36(3),(4)] (f) approved by the known local creditors [Article 36(5)] (g) binding on the estate [Article 36(6)] See also *Re Collins & Aikman Corp Group*, [2006] B.C.C. 606	

	(5) The insolvency practitioner in the main proceedings may challenge the decision to open secondary proceedings before the courts of the Member State where secondary proceedings have been opened [Article 39] See also *Re Nortel Networks SA*, [2009] B.C.C. 343	
Recognition:		
Automatic recognition: recognized in all the other Member States from the time that it becomes effective in the State of the opening of proceedings [Article 16(1)]	Automatic recognition: recognized in all the other Member States from the time that it becomes effective in the State of the opening of proceedings [Article 19(1)]	Recognition upon request: A foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed. [Article 15(1)]
based on the principle of mutual trust: grounds for non-recognition should be reduced to the minimum necessary; the decision of the first court to open proceedings should be recognized in the other Member States without those Member States having the power to scrutinize the court's decision. [Recital (22)]	based on the principle of mutual trust: grounds for non-recognition should be reduced to the minimum necessary; the decision of the first court to open proceedings should be recognized in the other Member States without those Member States having the power to scrutinize the court's decision; this is also the basis on which any dispute should be resolved where the courts of two Member States both claim competence to open the main insolvency proceedings. [Recital (65)]	adaptive to different legal basis: comity v. reciprocity [Guide and Interpretation, para.214-215]

Effects:		Reliefs:
Main Proceedings:		
with no further formalities, produce the same effects in any other Member State as under this law of the State of the opening of proceedings [Article 17(1)]	with no further formalities, produce the same effects in any other Member State as under this law of the State of the opening of proceedings [Article 20(1)]	automatic reliefs granted (a)Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed; (b)Execution against the debtor's assets is stayed; and (c)The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended. [Article 20(1), Guide and Interpretation, para.176]
Secondary proceedings:		Non-Main Proceedings:
not be challenged in other Member States [Article 17(2)]	not be challenged in other Member States [Article 20(2)]	discretionary reliefs [Article 19, 21]
Public policy exception:		
manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual. [Article 26] Case C-341/04 *Eurofood IFSC Ltd* [2006] ECR I-03813 (*Eurofood*), para. 34	manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual. [Article 33]	manifestly contrary to the public policy of this State [Article 6] shall be understood in a more restrictively manner in matters of international cooperation [Guide an Interpretation, para.103]
Group of companies:		Enterprise group:

Main references:		
/	EU Regulation (recast)	Part III to the Legislative Guide (treatment of enterprise groups) to assist national countries [hereinafter Legislative Guide Part III] Working Group V (insolvency law), UNCITRAL, Facilitating the Cross-border Insolvency of Multinational Enterprise Groups, A /CN.9/WG.V/WP.128 [Working Group V proposal]
/	Definitions of "group of companies" [Article 2(12)]	Definition of "enterprise group" [Legislative Guide Part III, Glossary, para.4(a)]
Cooperation and Communication:		
/	proper cooperation between actors (including insolvency practitioners and courts) involved not incompatible with the rules applicable to them and does not entail any conflict of interests [Article 56(1), 57(1), 58 last paragraph]	Cooperation between courts and insolvency representatives in insolvency proceedings involving multinational enterprise groups may help to facilitate commercial predictability and increase certainty for trade and commerce, as well as fair and efficient administration of proceedings that protects the interests of the parties, maximizes the value of the assets of group members to preserve employment and minimizes costs. [Legislative Guide Part III, Ch.3, para.7]
Contents of Cooperation and Communication:		

/	(1) timely communication of any relevant information concerning the group members subject to insolvency proceedings, provided appropriate arrangements are made to protect confidential information [EU Regulation (recast), Article 56(2)(a); Legislative Guide Part III, Recommendation 250(a)]	
	(2) coordination of the administration and supervision of the affairs of the group members subject to insolvency proceedings [EU Regulation (recast), Article 56(2)(b); Legislative Guide Part III, Recommendation 250(d)]	
	(3) coordination of the proposal and of reorganization plans [EU Regulation (recast), Article 56(2)(c); Legislative Guide Part III, Recommendation 250(e)]	
	(4)allocation of powers or responsibilities between insolvency representatives [EU Regulation (recast), Article 56(2); Legislative Guide Part III, Recommendation 250(c)]	
	(5) by means of agreements or protocols [EU Regulation (recast), Article 56(1); Legislative Guide Part III, Recommendation 250(b)]	
Coordination:		
	group coordination proceedings [Recital (54), Ch.5 Section II]	[Working Group V proposal, Article 2(i)]

/	Rules of the proceedings: (1)at the request of an insolvency practitioner appointed in insolvency proceedings opened in relation to a member of the group, accompanied by required documents [Article 61(1)] (2)the competent court, which can assume its jurisdiction over group coordination proceedings, may be requested before any court having jurisdiction over the insolvency proceedings of a member of the group and: (a) decided by the insolvency practitioner, who filed for the opening of the proceedings, or [Article 61(1)] (b) at least two-thirds of all insolvency practitioners appointed in insolvency proceedings of the members of the group have agreed by joint agreement that a court of another Member State having jurisdiction is the most appropriate court for the opening of group coordination proceedings, that court shall have exclusive jurisdiction. [Article 66(1), (2)] (3) The court seized of the request will make its decision after considering effectiveness of the opening of such proceedings, no financial disadvantage on the creditor and eligibility of the proposed group coordinator [Article 63(1), 68(1)	/

/	Relationship between the participant and non-participants members:	/
	(1) Objections to the inclusion within group coordination proceedings: raised within 30 days of receipt of notice of the request for the opening of group coordination proceedings to the court seized of the request [Article 64(1), (2)] (2) no effect on the member who raised objection [Article 64, 65] (3) subsequent opt-in [Article 69]	
Group Coordinator:		

/	(1) eligibility: in accordance with the law of a Member State, under which they can act as insolvency practitioners [Article 71(1)] (2) exclusion: (a) not be one of the insolvency practitioners appointed to act in respect of any of the group members; and (b) shall have no conflict of interest in respect of the group members, their creditors and the insolvency practitioners appointed in respect of any of the group members. [Article 71(2)] (3) rights and obligations of the coordinator [Article 69(2), 72]	appointment of a single or the same insolvency representative [Part III to the Legislative Guide (treatment of enterprise groups), III, para.43-47; Working Group V proposal, Article 18(1)]
	Relationship between the Insolvency Practitioners and the Group Coordinator:	

<table>
<tr><td>/</td><td>(1) they are required to cooperate with each other
[Article 74(1)]
(2) the insolvency practitioners shall communicate any relevant information to the coordinator
[Article 74(2)]
(3) an insolvency practitioner is not obliged to follow in whole or in part the coordinator's recommendations or the group coordination plan by reporting the reasons to coordinator and other persons or bodies concerned under his national law
[Article 70]
(4) The court shall revoke the appointment of the coordinator of its own motion or at the request of the insolvency practitioner of a participating group member, who is considered to act to the detriment of the creditors of a participating group member or fail to comply with his obligations
[Article 75]</td><td>/</td></tr>
<tr><td colspan="3">Cooperation and Communication:</td></tr>
<tr><td colspan="3">Main References:</td></tr>
</table>

European Communication and Cooperation Guidelines for Cross-Border Insolvency, prepared by INSOL Europe's Academic ("CoCo Guidelines") Wing (2007)	best practices for cooperation in cross-border insolvency cases shall be taken into consideration, (a) relevant guidelines prepared by UNCITRAL (b) Principles and guidelines on communication and cooperation adopted by European organizations eg. "CoCo Guidelines": European Communication and Cooperation Guidelines for Cross-Border Insolvency, prepared by INSOL Europe's Academic Wing (2007). (c) principles and guidelines on communication and cooperation adopted by international organizations active in the area of insolvency law eg.ALI/III, Transnational insolvency: global principles for cooperation in international insolvency cases: report to the ALI, Philadelphia. PA : Executive Office, The American Law Institute, 2012 ; EU JudgeCo Principles and Guidelines, 2015 [Recital (48)]	Chapter V of the Model Law; Practice Guide on Cross-Border Insolvency Cooperation (Practice Guide on Cooperation) to assist national countries
Actors Involved:		

<table>
<tr><td>duty to cooperate and communicate between the liquidator in the main proceeding, and the liquidator in the secondary proceeding
[Article 31]</td><td>(1) duty to cooperate and communicate between insolvency practitioners in the main proceedings and the insolvency practitioners or practitioners in secondary proceedings
[Article 41]</td><td rowspan="2">(1) cooperation and direct communication between the [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State] and foreign courts or foreign representatives
[Article 26]</td></tr>
<tr><td>/</td><td>(2)duty to cooperate and communicate between courts in the main and territorial or secondary insolvency proceedings
[Article 42]</td></tr>
<tr><td>/</td><td>(3) duty to cooperate and communicate between the courts and the insolvency practitioners in the main and territorial or secondary insolvency proceedings
[Article 43]</td><td>(2) cooperation and direct communication between a court of this State and foreign courts or foreign representatives
[Article 25]</td></tr>
<tr><td colspan="3">Forms of Cooperation:</td></tr>
<tr><td rowspan="4">/</td><td colspan="2">(1) communication of information by any means considered appropriate by the court
[EU Regulation (recast), Article 42(3)(b), the Model Law, Article 27(b)]</td></tr>
<tr><td colspan="2">(2) coordination of the administration and supervision of the debtor's assets and affairs
[EU Regulation (recast), Article 42(3)(c), the Model Law, Article 27(c)]</td></tr>
<tr><td colspan="2">(3) appointment of a person or body to act at the direction of the court
[EU Regulation (recast), Article 42(1), the Model Law, Article 27(a)]</td></tr>
<tr><td colspan="2">(4) coordination in the approval of protocols, where necessary/ approval or implementation by courts of agreements concerning the coordination of proceedings
[EU Regulation (recast), Article 42(3)(e), the Model Law, Article 27(d)]</td></tr>
</table>

	(5) coordination of the conduct of hearings/ coordination of concurrent proceedings regarding the same debtor [EU Regulation (recast), Article 42(3)(d), the Model Law, Article 27(e)]	
	(6) appointment of a single insolvency practitioner for several insolvency proceedings concerning the same debtor [Recital (47); Article 42(3)(a)]	/
EU-wide interconnection of insolvency registers:		
/	a system in a decentralized way by interconnecting the individual insolvency registers on the basis of implementing act [Article 25(1)]	/
/	composed of the insolvency registers and the European e-Justice Portal, which shall serve as a central public electronic access point to information in the system [Article 25(1)]	/
/	information mandated to be disclosed [Article 24(2)]	/

Annex V

The Mainland China[1]		
15.07.1955	Statute of the Hague Conference on Private International Law	The Hague
10.06.1958	Convention on the Recognition and Enforcement of Foreign Arbitral Awards	New York
15.11.1965	Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters	The Hague
18.03.1970	Convention on the Taking of Evidence Abroad in Civil or Commercial Matters	The Hague
29.05.1993	Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption	The Hague
Hong Kong SAR[2]		
15.07.1955	Statute of the Hague Conference on Private International Law	The Hague
05.10.1961	Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions	The Hague
05.10.1961	Convention Abolishing the Requirement of Legalisation for Foreign Public Documents	The Hague
15.11.1965	Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters	The Hague
18.03.1970	Convention on the Taking of Evidence Abroad in Civil or Commercial Matters	The Hague
01.06.1970	Convention on the Recognition of Divorces and Legal Separations	The Hague
25.10.1980	Convention on the Civil Aspects of International Child Abduction	The Hague
01.07.1985	Convention on the Law Applicable to Trusts and on Their Recognition	The Hague
29.05.1993	Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption	The Hague
Macao SAR[3]		
01.03.1954	Convention Relating to Civil Procedure	The Hague
15.07.1955	Statute of the Hague Conference on Private International Law[4]	The Hague
24. 10. 1956	Convention on the Law Applicable to Maintenance Obligations towards Children	The Hague
15. 04.1958	Convention on the Recognition and Enforcement of the Decisions Relating to Maintenance Obligations towards Children	The Hague
05. 10. 1961	Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Minors	The Hague

[1] http://www.hcch.net/index_en.php?act=states.details&sid=30
[2] http://www.legislation.gov.hk/interlaw.htm#Private%20International%20Law
[3] http://en.io.gov.mo/Legis/International/1/14.aspx
[4] http://www.hcch.net/index_en.php?act=status.comment&csid=90&disp=resdn

05.10.1961	Convention Abolishing the Requirement of Legalisation for foreign Public Documents	The Hague
15. 11. 1965	Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters	The Hague
18. 03. 1970	Convention on the Taking of Evidence Abroad in Civil or Commercial Matters	The Hague
25.10.1980	Convention on the Civil aspects of International Child Abduction	The Hague
29.05.1993	Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption	The Hague

Annex VI

Legislations Listed in Annex III to the Basic Law of HKSAR	
1	Resolution on the Capital, Calendar, National Anthem and National Flag of the People's Republic of China
2	Resolution on the National Day of the People's Republic of China
3	Declaration of the Government of the People's Republic of China on the Territorial Sea
4	Nationality Law of the People's Republic of China
5	Law of the People’s Republic of China on the National Flag
6	Law of the People’s Republic of China on the National Emblem
7	Regulations of the People's Republic of China Concerning Diplomatic Privileges and Immunities
8	Regulations of the People’s Republic of China concerning Consular Privileges and Immunities
9	Law of the People’s Republic of China on the Territorial Sea and the Contiguous Zone
10	Law of the People’s Republic of China on the Garrisoning of the Hong Kong Special Administrative Region
11	Law of the People’s Republic of China on the Exclusive Economic Zone and the Continental Shelf
12	Law of the People’s Republic of China on the Judicial Immunity from Compulsory Measures concerning the Property of Foreign Central Banks

Legislations listed in Annex III to the Basic Law of Macao SAR	
1	Resolution on the Capital, Calendar, National Anthem and National Flag of the People's Republic of China
2	Resolution on the National Day of the People's Republic of China
3	Nationality Law of the People's Republic of China
4	Law of the People’s Republic of China on the National Flag
5	Law of the People’s Republic of China on the National Emblem
6	Regulations of the People's Republic of China Concerning Diplomatic Privileges and Immunities
7	Regulations of the People’s Republic of China concerning Consular Privileges and Immunities
8	Law of the People’s Republic of China on the Territorial Sea and the Contiguous Zone
9	Law of the People’s Republic of China on the Garrisoning of the Hong Kong Special Administrative Region
10	Law of the People’s Republic of China on the Exclusive Economic Zone and the Continental Shelf
11	Law of the People’s Republic of China on the Judicial Immunity from Compulsory Measures concerning the Property of Foreign Central Banks

Annex VII
List of Recommendations to CICIA

Recommendation 1 -- Guiding Principle

Acknowledging lack of cooperation in matters of cross-border insolvency despite of the increasingly closer economic relationship, the guiding principle that embodies the entire arrangement is designed to promote fair and efficient administration of China's inter-regional cross-border insolvency proceedings in a coordinated manner.

Recommendation 2 – Overriding Objective

Aware of restrictions set by the constitutional arrangements and lack of functioning fundamental principles, the overriding objective of the arrangement is to facilitate recognition of inter-regional cross-border insolvency proceedings.

Recommendation 3 – Form and Scope

(1) *Considering China's complex internal structure and desiring more predictability and more legal certainty at the regional level, an inter-regional cross-border insolvency arrangement (CICIA) is to be established.*

(2) *CICIA is binding on the Mainland and the two SARs altogether. In accordance with CICIA, cross-strait insolvency cooperation between the Mainland and Taiwan is subject to a separate arrangement.*

(3) *CICIA applies only to proceedings where the center of the debtor's main interests (COMI) is located within the Mainland and the two SARs.*

(4) *CICIA shall apply to public collective proceedings, including interim proceedings, in accordance with laws relating to insolvency in which proceedings the assets and affairs of the debtor are under the control or supervision by a court for the purpose of rescue, reorganization or liquidation.*

(5) *CICIA shall not apply to insolvencies concerning natural persons and financial institutions, which are governed by special insolvency regimes in the three regions.*

Recommendation 4 – Recognition and Reliefs

(1) *An insolvency proceeding commenced in one region, that with respect to the debtor concerned, has the relevant international jurisdiction should be recognized as main or non-main insolvency proceeding and given appropriate effect under the circumstances in every other region.*

(2) *The courts of one region within the territory of which the center of the debtor's main interests is situated shall have jurisdiction to open main insolvency proceedings.*

(3) The place of the registered office shall be presumed to be the COMI in the absence of proof to the contrary.

It should be possible to rebut this presumption where the debtor's central administration is located in a region other than that of its registered office, and where a comprehensive assessment of all the relevant factors establishes, in a manner that is ascertainable by third parties, that the debtor's actual center of management and supervision and of the management of its interests is located in that other region.

The relevant date at which COMI shall be determined is the date of commencement of the main insolvency proceedings.

(4) The courts of another region shall have jurisdiction to open a non-main insolvency proceedings against the debtor if it possesses an establishment within the territory of that other region.

(5) Establishment means any place of operations where a debtor carries out a non-transitory economic activity with human means and assets.

The relevant date at which an establishment of the debtor shall be determined is the date of commencement of the non-main insolvency proceedings.

(6) Upon recognition of an insolvency proceeding as a main proceeding:

(a) Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed; but the stay does not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor;

(b) Execution against the debtor's assets is stayed; and

(c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.

The scope, modification or termination of those aforementioned reliefs is subject to the law of the region where recognition and reliefs are sought. Those aforementioned reliefs do not affect the right to request the opening of an insolvency proceeding in the region where recognition and reliefs are sought.

(7) The following interim reliefs may be granted upon request of the insolvency practitioners in the main or non-main proceedings, from the time of filing an application for recognition until the application is decided upon:

(a) Staying execution against the debtor's assets;

(b) Entrusting the administration or realization of all or part of the debtor's assets located in the region to the insolvency practitioners in the main or non-main proceedings, in order to protect and preserve the value of assets

The interim reliefs can be refused to be granted if they would interfere with the administration of a main insolvency proceeding and unless extended, they terminate when the application for recognition is decided upon.

(8) Upon recognition of an insolvency proceeding, whether main or non-main, the court may, at the request of the insolvency practitioners in the main or non-main proceedings, grant any appropriate relief that may be available under the laws of this region where recognition and reliefs are sought.

Recommendation 5 – Public Policy

Any region may refuse to recognize insolvency proceedings opened in another region or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that region's public policy, in particular its fundamental principles or the constitutional rights and liberties of its citizens.

Recommendation 6 – Cooperation and Communication (single debtor and enterprise groups)

(1) An insolvency practitioner shall, in the exercise of its functions and subject to the supervision of the court, cooperate and communicate to the maximum extent possible with the courts or insolvency practitioners in other regions.

(2) Where insolvency proceedings relate to two or more members of a group of companies, an insolvency practitioner appointed in proceedings concerning a member of the group shall cooperate and communicate with the courts and any insolvency practitioner appointed in proceedings concerning another member of the same group to the maximum extent possible.

Recommendation 7 – Cross-border Insolvency Agreements

(1) In the course of cooperation and communication, insolvency practitioners, who are subject to the jurisdiction of their own courts, can cooperate with each other closely to enter into cross-border insolvency agreements, which shall be approved by the courts.

(2) The independence, sovereignty or jurisdiction of the relevant local courts should not be affected by the agreement.

(3) The agreement concluded can cover the following basic contents:
(a) Allocation of responsibilities between the different courts involved and between insolvency practitioners; including limitations on authority to act without the approval of the other courts or insolvency practitioners;
(b) methods of communication, including language, frequency and means;
(c) sharing of information on claims lodged, the verification and disputes concerning claims;
(d) location, use and disposal of assets;

(e) coordination and harmonization of reorganization plans;
(f) costs and fees;
(g) all other elements that can contribute to efficient coordination of inter-regional insolvency proceedings

If the courts or the insolvency practitioners after discussion find something useful to add beyond the aforementioned scope, they shall not be limited as long as it is not inconsistent with the local mandatory rules.

(4) In matters of enterprise groups, the agreement can include:
(a) means of timely communication of any relevant information concerning the group members subject to insolvency proceedings, provided appropriate arrangements are made to protect confidential information;
(b) coordination of the administration and supervision of the affairs of the group members subject to insolvency proceedings;
(c) coordination of the proposal and of reorganization plans;
(d) allocation of powers or responsibilities between insolvency practitioners
(e) costs and fees
(f) all other elements that can contribute to efficient coordination of inter-regional group insolvency proceedings

If the courts or the insolvency practitioners after discussion find something useful to add beyond the aforementioned scope, they shall not be limited as long as it is not inconsistent with the local mandatory rules

(5) Complementary cross-border insolvency agreements shall also be allowed to address some issues upon prompt need on an ad hoc basis.

Recommendation 8 – Functional Dispute Settlement Mechanism

(1) In the course of inter-regional cross-border insolvency proceedings, a court that seeks explanation of the provisions under CICIA shall report to the Supreme Court of that region, which can request a special meeting to be convened.

(2) Explanation given by the special meeting on specific provisions of CICIA serves as proper interpretation on the specific issues arising from the individual case, which deserves due respect of the courts concerned. Upon consensus of the Supreme Courts concerned, the explanation shall have binding effect on that individual case. Upon consensus of all the Supreme Courts, the explanation shall have binding effect on the specific provisions under CICIA.

(3) In the course of implementing cross-border insolvency agreements, the courts in the concurrent proceedings can report to the Supreme Court from the respective regions, which can jointly request a special meeting to be convened and refer the disputes arising from cross-border insolvency agreements to the special meeting.

(4) In matters of the disputes arising from cross-border insolvency agreements, the opinions or part of the opinions come into binding effect to the extent that all the requesting courts involved agree to accept them, which should be expressly written

into the judgments. The opinions are only binding on the individual case referred to the special meeting. If one of the requesting courts disagrees with the opinions or part of the opinions given by the special meeting, those opinions are not binding.

(5) Each court of the highest-level from the three regions can designate one or two in-house judges to participate in the meeting. After discussion, the participating judges will deliver their joint opinions on the case referred to them.

(6) As for Hong Kong, any reference handed down by the special meeting shall not be construed as a direct reference to the courts in Hong Kong SAR except for the disputes concerned or unless the Court of Final Appeal of HKSAR expressly indicates otherwise.

Recommendation 9 - Inter-regional Case Register

(1) Each region should be required to publish relevant information in cross- border insolvency cases in a publicly accessible electronic register.

(2) Once a cross-border insolvency proceeding is commenced in one region, the court shall immediately inform the communication authority in its own region. The communication authority must publish the information concerning opening of insolvency proceedings on its e-portal and is also mandatory to inform its counter-part communication authorities concerned in the other regions. Meanwhile, the e-portal of each region should provide interconnection system that links to the registers in other regions.

(3) The minimum amount of information is required to be published in the inter-regional insolvency registers, including
(a) the date of the opening of insolvency proceedings
(b) the court opening insolvency proceedings and the case reference number, if any;
(c) the debtor's name, registration number, registered office and current correspondence address;
(d) the name, postal address or e-mail address of the insolvency practitioner, if any, appointed in the proceedings
(e) the time limit and place for lodging claims, if any, or a reference to the criteria for calculating that time limit;
Additional information subject to the local laws shall not be precluded.

(4) The official language for the relevant information shall be Chinese. The information can also be published in English in Hong Kong SAR or Portuguese in Macao SAR but shall always be accompanied with Chinese translation.

Recommendation 10 – Independent Intermediaries: Separate Arrangement for Cross-strait Insolvency Cooperation (The Mainland and Taiwan)

(1) The cross-strait insolvency proceedings shall be coordinated in the way of appointment of independent intermediaries from both sides.

(2) To guarantee the qualification as well as impartiality, the criteria to be appointed as an independent intermediary shall be agreed upon by the both sides. The role and competence of the intermediary can be set out in a protocol or an order of the court.

(3) The main duty of the independent intermediaries is to maintain the connection with its counterpart and jointly device a practical means of conducting cooperation and communication between the courts concerned.

(4) Before the appointment of the independent intermediaries, the opinions of the insolvency practitioners should be consulted especially in matters of the way of conducting communication and cooperation. Once appointed, an intermediary should be accountable to the court that appoints him or her and a related protocol can be reached with the approval of the respective courts.

(5) The independent intermediaries from the both sides can hold regular meeting either onsite or via e-technological means so that they can keep the courts from the both sides informed of the possible conflicts or problems in the cross-strait insolvency proceedings.

(6) Considering the difference of professional qualification criteria in the each side, each side recommends some candidates of independent intermediaries for itself, holding a discussion to select someone both sides can trust and then putting those candidates separately in a closed list so that a consensus can be reached in advance to make sure that the qualifications of the independent intermediaries can be accepted by both sides in the process of coordination.

(7) The independent intermediaries should observe the duties in an impartial manner, free from bias, prejudice and any conflicts of interest. If its impartiality is in doubt, the court, after consulting the opinions of the insolvency practitioners of both sides, can dismiss the independent intermediaries appointed by itself or request the counterpart court to dismiss its independent intermediaries with specific reasons upon the request of the independent intermediaries. A new independent intermediary can be selected from the list.

(8) The independent intermediaries will be remunerated from the estate of the insolvency proceedings in which the court appointed him or her.

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Curriculum Vitae

Ms. Xinyi Gong is sponsored by China Scholarship Council to conduct her PhD research in Leiden University. Her research topic is concerning comparative study of cross-border insolvency and her expertise focuses on the insolvency systems of the Greater China Region (the Mainland China, Hong Kong, Macao and Taiwan), the EU Insolvency Regulation and UNCITRAL Model Law. In the course of her PhD research, she has spent half one year at National Taiwan University in order to explore the local legal system. In addition to her research, Ms. Gong also engaged in practicing at the governmental institution and international organizations, including the Department of Justice Hong Kong SAR, the United Nations Commission on International Trade Law (UNCITRAL) as well as the Hague Conference on Private International Law (HCCH), where she learned how the inter-regional and international legal cooperation regimes were drafted, negotiated and obtained consensus.