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## 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*

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[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**

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[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

[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.

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[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

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[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.

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[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]

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[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]

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[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

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[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

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[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.

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[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

[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]

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[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

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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;

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[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

[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]

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[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

[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.*

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[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].

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[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

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[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

[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.

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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

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[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]

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[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

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[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*

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[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

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[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]

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[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]

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[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

[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.

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[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

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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

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[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

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[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]

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[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

[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

[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]

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[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

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[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 17$^{th}$ 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.