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

Gong, X.

Summary

6.01 The idea of China's Inter-regional Cross-border Insolvency Arrangement (CICIA) reflects an ongoing trend concerning harmonization of cross-border insolvency law through internal legislation of regional institutions and also best practices set out in soft law, including guidelines and principles contributed by the international organization (UNCITRAL), non-governmental organizations (III, INSOL etc.) and even private parties active in the area of restructuring and insolvency law. That trend is a response to regional integration and globalization, which make inter-regional and international legal interaction intensify and the need for one jurisdiction to always apply its own law gradually reduced.

6.02 Such harmonization is accompanied with challenges. The first problem is the diversity of cross-border insolvency laws and the lack of clear understanding thereof. For instance, throughout the Asian regions, there appears to be a great deal of reluctance to follow this trend.[1662] The adoption rates of the Model Law in Asia remain very low, which has only been enacted by Japan (2000), Republic of Korea (2006) and Philippines (2010). In addition, most of the cross-border insolvency rules applied in the Asian jurisdictions are conservative. China is such an example. In the Mainland, there is only one article (Article 5 of the EBL) that provides merely recognition criteria of foreign cross-border insolvency proceedings, which are subject to a set of public policy exceptions with no clear standards. Hong Kong's current insolvency laws are based loosely on law from England that dates back to 1929. In 2016, the Hong Kong government is still pondering whether it is appropriate to introduce section 426 of the UK Insolvency Act 1986 into Hong Kong.[1663] The current cross-border insolvency rules of Macao (1999) and Taiwan (1935) are dependent on the principle of territoriality. Both rules have the same goal that creates a ring fence of assets in favor of local creditors.[1664] What is the reason for the common phenomenon of undeveloped cross-border insolvency in Asia? A speech delivered by Chief Justice of Singapore CHAN Sek Keong provided some proper reference. The answer relates to the correlation between law and economy. His Justice mentioned that "ring-fencing of assets of foreign companies for the benefit of local creditors has been a feature of the Singapore insolvency regime since 1967".[1665] At that time, Singapore, as a developing economy, was only a recipient of capital and therefore did not experience the problems of cross-border

[1662] J J Spigelman, International Commercial Litigation: An Asian Perspective, 37 Hong Kong Law Journal 859, 2007, p.859

[1663] Bills Committee on the Companies (Winding Up and Miscellaneous Provisions) (Amendment) Bill 2015, Summary of views of submissions and Government's responses, CB(1)481/15-16(04), 25 January 2016, Government's responses no. 60

[1664] Garcia, Augusto Teixeira, Macao Insolvency Law and Cross-border Insolvency Issues, New Zealand Association for Comparative Law: hors série (Wellington) XIX, 2015, p.341; Gong Xinyi, To Recognize or Not to Recognize? Comparative Study of Lehman Brothers Cases in the Mainland China and Taiwan, International Corporate Rescue, Vol. 10, Issue 4, Chase Cambria Publishing, 2013, p.242

[1665] CHAN Sek Keong, Cross-border Insolvency Issues Affecting Singapore, 23 SAcLJ 413, 2011, p.419

insolvency affecting global companies from those economies that make investment.[1666] Accordingly, the need for a well-established cross-border insolvency system was relatively low.

6.03 The landscape of Asian economy is undergoing changes. According to the World Investment Report, outward investments by multinational enterprises (MNEs) based in developing Asia increased by 29 per cent to $432 billion in 2014.[1667] In South-East Asia, the increase was principally the result of growing outflows from Singapore, to $41 billion in 2014.[1668] In 2015, China remained the third largest investor in the world after the United States and Japan, which has become a major investor in some developed countries, especially through cross-border M&As.[1669] It is apparent that the current Asian cross-border insolvency systems do not reflect how individual nations have experienced the growth of economies. What is the possible consequence then? Given the fact that the assets no longer move in a single direction, insistence on a territorial approach can possibly invite reciprocal treatment by other jurisdictions, which may ultimately affect the assets invested abroad. For instance, Hong Kong is now in the process of reforming its corporate insolvency law. In deciding whether or not to introduce the Model Law into its statutory insolvency legislation, Hong Kong government considered that the attitude of its major trading partners (including the Mainland and Singapore[1670]) in this regard should be closely monitored in advance.[1671] More importantly, such reciprocal attitude may trigger more concerns about economic cooperation within a country or a possible regional economic community, where there are integrated agreements on trade and commerce (such as CEPA and FTAAP[1672]) and assets that can be moved out of the jurisdictions more easily.

6.04 The second problem is some jurisdictions may not have trust relations with those jurisdictions they have to deal with and thus the consideration of the rights and authority of other jurisdictions may vary. (For detailed discussion on this topic, please refer to Part V Comments to Recommendation 2) As result, the

---

[1666] CHAN Sek Keong, Cross-border Insolvency Issues Affecting Singapore, 23 SAcLJ 413, 2011, p.415

[1667] UNCTAD, World Investment Report 2015: Reforming International Investment Governance, 2015, Geneva: United Nations, p.5

[1668] UNCTAD, World Investment Report 2015: Reforming International Investment Governance, 2015, Geneva: United Nations, p.5

[1669] UNCTAD, World Investment Report 2016: Reforming International Investment Governance, 2015, Geneva: United Nations, p.7

[1670] Trade and Industry Department of Hong Kong SAR, Hong Kong's Principal Trading Partners in 2015, available at: https://www.tid.gov.hk/english/trade_relations/mainland/trade.html (Last visited on 14 June 2016)

[1671] Bills Committee on the Companies (Winding Up and Miscellaneous Provisions) (Amendment) Bill 2015, Summary of views of submissions and Government's responses, CB(1)481/15-16(04), 25 January 2016, Government's responses no. 59

[1672] Asia – Pacific Economic Cooperation (APEC) is a regional economic forum established in 1989, which is composed of 21 members. Its recent activity involves discussions on the possible pathways to the Free Trade Area of the Asia-Pacific (FTAAP). In November 2014, APEC Leaders endorsed the "Beijing Roadmap for APEC's Contribution to the Realization of the Free Trade Area of Asia-Pacific (FTAAP)". The roadmap provides for a "Collective Strategic Study on Issues related to the Realization of the FTAAP" to be concluded by the end of 2016.

focus of harmonization is heavily dependent on the level of interaction between the jurisdictions because it requires proper balance between "retention of forum-state regulatory authority and acknowledgment of the equal authority of other states within their own territory".[1673] According to the classic perspective, such harmonization should abide by the principle of universality, which attached importance to concentration of insolvency proceedings within one forum. That principle above all raises important questions regarding the jurisdictional subpart of private international law. As Beale once remarked, "the power of a sovereign to affect the rights of persons, whether by legislation, by executive decree or by the judgment of a court is called jurisdiction."[1674] In order to approach the traditional principle of universality, it entailed that the states needed to compromise their sovereign authority for cooperation in cross-border insolvency. That approach was only partly achieved in the EU. Through its decade-long integration process, the EU has evolved into a single community of laws with the common values and legal principles shared within its members.[1675] As result, the Member States has delegated part of their "sovereign" function of law-making to the regional institutions.[1676] That possibly explains why the Regulation is able to adhere to the principle of universality albeit in a modified manner because it harmonized the inter-regional cross-border insolvency in such a way by removing the need for reference to national rules for purposes of determining the proper jurisdiction, applicable law or recognition.

6.05 In the more globalized societies of today, insolvency proceedings requires cooperation across many different jurisdictions around the world. Nonetheless, without geographic advantages, overlapping time zones, shared culture and shared languages, we no longer live enmeshed in such "thick trust relationships"[1677] as the EU legal system relies on. Against that background, UNCITRAL set up facilitating recognition of foreign insolvency proceedings as the main line of the Model Law. The most important jurisdictional element, COMI, is utilized under the Model Law merely to determine the degree to which a court must recognize a foreign proceeding, whereas COMI helps determine which Member State takes precedence when proceedings have commenced in

---

[1673] Brand, Ronald A., Balancing Sovereignty and Party Autonomy in Private International Law: Regression at the European Court of Justice, University of Pittsburgh School of Law Working Paper Series, 2005, p.9, available at: http://law.bepress.com/pittlwps/art25 (Last visited on 14 June 2016)

[1674] Beale, Joseph H., The Jurisdiction of a Sovereign State, in: Harvard Law Review, Vol. 36, No. 3, 241-262, 1923, p. 241

[1675] Justice policy was incorporated into the regular framework of EU decision-making through the Treaty of Amsterdam (signed in 1997), nearly forty years after the signing of the Treaties of Rome. In 2007, the Treaty of Lisbon abolished the three-pillar structure. From then on, "sovereign" function of law-making in all fields of justice policy, albeit with a few particularities, were eventually delegated to regional institutions under the Union method. See Treaty on the Functioning of the EU, article 2(2), article 4(2)(j)

[1676] Brand, Ronald A., Balancing Sovereignty and Party Autonomy in Private International Law: Regression at the European Court of Justice, University of Pittsburgh School of Law Working Paper Series, 2005, p.2, available at: http://law.bepress.com/pittlwps/art25 (Last visited on 14 June 2016)

[1677] Cook, Karen S., Hardin, Russell, Levi, Margaret, Cooperation without Trust?, Volume IX in the Russell Sage Foundation Series on Trust, 2005, p.196

multiple jurisdictions within the EU.[1678] Moreover, before the Model Law was drafted, UNCITRAL conducted several consultations with judges, practitioners, interested organizations and governments. One of its key findings was that the crucial function in cross-border insolvency cooperation was performed by the judges and practitioners from various jurisdictions, in which assets of the debtor might be found, especially by entering into cross-border insolvency agreements.[1679] That way of cooperation was voluntarily driven by the individual insolvency case itself, which efficiently linked the insolvency proceedings together, and its feasibility has been tested in practice worldwide. Instead of a centralized and concentrated way suggested by the classic principle of universality, the Model Law created an interconnected network structure via cooperation and communication between the courts and the practitioners. That coordinated approach, by which the recast EU Regulation also chose to abide, corresponds to the way the different jurisdictions interact with each other in a flattened globalized world and promote mutual understanding through directly exchange of information and opinions.

6.06 China's inter-regional cross-border insolvency cooperation involves the interplay between an emerging regional legal order and cross-border insolvency. For a sovereign state that has gone through reunification and closer economic interaction, whether or not the creditors can recover their claims in the event of trans-regional insolvency will become a decisive factor for inter-regional investment. Besides, it is also necessary to harmonize regional legal conflicts for the purpose of further integration. After comparing the cross-border insolvency systems in the four regions and referring to two leading international insolvency regimes, the Regulation and the Model Law, the dissertation provides 10 recommendations for China's Inter-regional Cross-border Insolvency Arrangement (CICIA) [1680] by tailoring the merits of relevant international experience into China's context in a balanced manner. First of all, CICIA opts for the coordinated approach as its guiding principle (Recommendation 1). In order to smoothly attain the goal of reunification, the Mainland made commitments that it would partly restrict its sovereign authority to guarantee the high degree of autonomy of the SARs, including the legislative power and the independent judicial power.[1681] Those commitments have been honored and incorporated into the Basic Law with an effective term for 50 years.[1682] To arrange for a centralized cross-border insolvency cooperation structure, as advocated by the principle of universality, it requires the Mainland to further compromise its sovereign authority and the SARs to restrain the high degree of autonomy. That

[1678] Story, Sean E., Cross-border Insolvency: A Comparative Analysis, 32 Ariz. J. Int'l & Comp. L. 431 2015, p. 455

[1679] UNCITRAL/INSOL Colloquium on Cross-Border Insolvency, 17-19 April 1994, Vienna, A/CN.9/398 - Cross-border insolvency: report on UNCITRAL-INSOL Colloquium on Cross-Border Insolvency, paras.12-13

[1680] Please note that the Summary aims at reinforcing the main line of CICIA. Therefore, in the Summary, the 10 recommendations of CICIA may not be discussed strictly in sequence.

[1681] Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, 3(3); Joint Declaration of the Government of the People's Republic of China and the Government of the Portuguese Republic on the question of Macao 2(2)

[1682] Basic Law of Hong Kong SAR, article 5; Basic Law of Macao SAR, article 93

has been unlikely to happen so far. For example, the Mainland and the Hong Kong SAR had difficulty in reaching consensus on rules of jurisdiction when negotiating the bilateral arrangement about reciprocal enforcement of judgments in civil and commercial matters.[1683] In order to avoid the deadlock situation, both sides decided to allow the parties concerned to enter into choice of court agreements instead. More importantly, the legal cooperation between the Mainland and the SARs is established in the way of granting legal assistance based on consensus via the judicial organs in each region,[1684] which serves as a proper legal foundation for the coordinated approach.

6.07 It also needs to be taken into account that the principle of universality lays a great deal of emphasis on the matter of jurisdiction. As Westbrook remarked, choice of forum was the "explicit focus of the universalist rule and choice of law was a result of universalism often implicitly assumed".[1685] For instance, the Regulation adopted *lex fori concursus* as the basic rule of its uniform choice of law system.[1686] It requires that the law of the Member State, in which its court is competent to open insolvency proceedings, shall determine the conditions for the opening, conduct and closure of insolvency proceedings.[1687] Hence, under the Regulation, the outcome of insolvency proceedings essentially depends much more on jurisdiction. In addition, allowing only one single proceeding running worldwide could lead to "fight over who gets to be the COMI in any given bankruptcy". [1688] That's why the Regulation and the Model Law allow the opening of non-main (territorial/secondary) proceedings, which can make the competition less intensive. However, the main insolvency proceedings are ensured to play the dominant role under the Regulation.[1689] Main insolvency proceedings rendered by a competent court of a Member State, once opened, shall be automatically recognized in all other Member States. Such automatic recognition is guaranteed by the principle of mutual trust under the EU Treaties. The problem is the COMI model is a fact-sensitive criterion. It took some time for the CJEU to receive the opportunities to clarify some issues surrounding the use of the COMI concept. However, the manipulability of COMI remains since the facts can be changed[1690] and more importantly, the advantages to become the main proceedings are considerable under the EU regime. That incentivised forum shopping, abusive or not, and resulted in the disputes over jurisdiction. Although the recast Regulation provided suspension periods hoping to counter

[1683] Jiang Baoguo, A Comparative Study on the Recognition and Enforcement of Civil and Commercial Judgments Arrangements between the Mainland, Hong Kong and Macao – with special reference to the Practice of Hong Kong (in Chinese), in: Legal Forum, No .5(Vol .22, Ser .No .113), Sep., 2007, p.71

[1684] Basic Law of Hong Kong SAR, article 95; Basic Law of Macao SAR, article 5

[1685] Westbrook, Jay L., Theory And Pragmatism In Global Insolvencies: Choice of Law and Choice of Forum, 65 Am. Bankr. L.J. 457 1991, p.461

[1686] Moss, Gabriel, Fletcher, Ian F, Isaacs, Stuart (ed.), The EU Regulation on Insolvency Proceedings (3rd ed.), Oxford University Press, 2016, at 4.05

[1687] EC Regulation, Recital (23), Article 4; EU Regulation (recast), Recital (66), Article 7

[1688] Pottow, John A.E., A New Role for Secondary Proceedings in International Bankruptcies, 46 Tex. Int'l L.J., 2011, p.582

[1689] EU Regulation (recast), Recital (48)

[1690] Eidenmüller, Horst, Abuse of Law in the Context of European Insolvency Law, 6 ECFLR 1 2009, p.5

abusive forum shopping,[1691] it has been argued by the Commission that these types of measures are not sufficiently effective to achieve the objective of resolving the issues of abusive forum shopping, reasoning that such a measure could be circumvented by skilled professionals and would not improve legal certainty for creditors because it would replace the current uncertainty relating to the determination of COMI by a new uncertainty relating to the time the COMI shifted.[1692] It seems that the effects of the suspension periods still need to be tested in the course of implementation even though the measure has been finally introduced into the recast Regulation.

6.08 It is acknowledged that mutual trust is essential to a regional legal order. By comparing development of mutual trust in the EU and in China, it is observed that mutual trust is pretty much at the primary stage in China's regional legal system. To foster the trust relationship, it is better to avoid fighting tooth and nail on jurisdictional issues. Besides, the legal foundation for establishment of such a compulsory jurisdiction system for cross-border cooperation in insolvency cases as under the Regulation is still under construction. Therefore, CICIA set out for a balanced approach by choosing the recognition-based system as its overriding objective (Recommendation 2). Considering that each jurisdiction has its territorial judicial authority in China, it is suggested to use comity as the foundation for recognition under CICIA (Recommendation 4). That approach results from a balance between mutual trust (strengthened comity) that functions in the EU and reciprocity that actually operates in China and its underlying requirement is the equal respect of the authority of one jurisdiction for another. As for the effects of recognition, they are not governed by the uniform choice of law rules because of the restricted scope of uniform legislation under the Basic Law regime and the difficulty in harmonization of substantive law in reality. Instead, they are guaranteed by a list of minimum reliefs under CICIA by referring to the experience of the Model Law. In accordance with the limits on the exercise of judicial authority connoted by comity, public policy is the only exception to recognition under CICIA, which needs to be interpreted in a self-restrained manner (Recommendation 5).

6.09 In consistence with the guiding principle based on the coordinated approach adopted by both the Regulation and the Model Law, cooperation and communication is the cornerstone of CICIA (Recommendation 6). The coordinated approach is not established on the basis of solid trust relationship but out of pragmatic necessity. Above all, the courts and the insolvency practitioner play an indispensible role in the insolvency systems. That is also the case in China. In the Mainland, the courts have been granted substantial and procedural power in accordance with the EBL.[1693] The EBL also provides for a set

[1691] EU Regulation (recast), Recital (31), Article 3(1)

[1692] EU Commission, EU Commission Staff Working Document Impact Assessment Accompanying the document - Revision of Regulation (EC) No 1346/2000 on insolvency proceedings, Strasbourg, 12.12.2012, p.35

[1693] Substantial powers mainly include adjudication of the matters affecting the amount and value of the bankruptcy estate, including revocation of preferences and fraudulent transactions (EBL, article 31-33), determining the claims of the parties in relation to their entitlement to the ownership of some of the properties in the bankruptcy estate (EBL, article 58) and approving

of functions of the administrators,[1694] which is accompanied with a couple of judicial interpretations concerning appointment and compensations of administrators. [1695] Considering that Hong Kong SAR is a common law jurisdiction, the dominant role of the courts is self-explanatory. The insolvency practitioners are most of the time liquidators, whose duties are considered onerous, including the functions to "conduct a thorough investigation into the affairs of a company, winding up its business and distribute the remaining assets between parties who hold an interest in the company".[1696] In Macao SAR, any creditor can bring an insolvency proceeding to the court.[1697] Once the insolvency proceedings begin, the court immediately appoints a bankruptcy administrator,[1698] who will help and supervise the debtor both in running his business[1699] as well as managing his other assets.[1700] Since the local insolvency system relies on the courts and the insolvency practitioners to operate smoothly, they are also key actors in the field of cross-border insolvency. One of their most important contributions is the invention of cross-border insolvency agreements (protocol). Faced with the daily necessity of dealing with insolvency cases, the insolvency profession developed the most common means that facilitates cross-border cooperation and communication of multiple insolvency proceedings in different jurisdictions in the absence of widespread adoption of facilitating national or international law.[1701] Due to the inherent flexibility, cross-border

---

their application to take back their ownership (EBL, article 34-39) and approving the application of set off rights (EBL, article 40). Procedural powers mainly include the power to accept the case (EBL, article 10), appoint the administrators (EBL, article 22), to convene the first creditors' meeting (EBL, article 62), to approve the asset realization plan and the distribution (EBL, article 116) and the plan of reorganization (EBL, article 86), to declare the debtor bankrupt (EBL, article 107), to terminate the procedure (EBL, article 108), and to supervise the implementation of the plan of reorganization (EBL, article 91). See also Li Shuguang, Wang Zuofa, The Function of China's Court in Enterprise Bankruptcy and the Future Trend – Observations from the Background of the Four Year Implementation of China's Existing Bankruptcy Law, in: INSOL World, the Quarterly Journal of INSOL International, Fourth Quarter, 2012, p.8-10

[1694] In accordance with article 25 of the EBL, they mainly include:
(1) taking over the property, seals, account books, documents and other data of the debtor;
(2) investigating into the financial position of the debtor and preparing a report on such position;
(3) deciding on matters of internal management of the debtor;
(4) deciding on the day-to-day expenses and other necessary expenditures of the debtor;
(5) deciding, before the first creditors' meeting is held, to continue or suspend the debtor's business;
(6) managing and disposing of the debtor's property;
(7) participating in legal actions, arbitrations or any other legal procedure on behalf of the debtor;
(8) proposing to hold creditors' meetings; and
(9) performing other duties that the people's court deems that he should.

[1695] Provisions of the Supreme People's Court on Designating the Administrator during the Trial of Enterprise Bankruptcy Cases [2007] Judicial Interpretation No. 8; Provisions of the Supreme People's Court on Determination of the Administrator's Remunerations [2007] Judicial Interpretation No.9

[1696] Hickin, John, Role and Status of Liquidators, in: Kwan, Susan, Company Law in Hong Kong (Insolvency), Sweet & Maxwell, 2012, at 2.001

[1697] Macao Civil Procedure Code, article 1082

[1698] Macao Civil Procedure Code, article 1049-1(a),

[1699] Macao Civil Procedure Code, article 1050

[1700] Macao Civil Procedure Code, article 1050-1

[1701] UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation, Ch.II, para.12

insolvency agreements gradually shift from a coordination instrument to a medium, which contains framework of coordination as well as combination of coordinating instruments and facilitates them to function in an orderly manner. Therefore, cross-border insolvency agreements are recommended as a key mechanism that can be utilized by the courts and the insolvency practitioners to coordinate the inter-regional insolvency proceedings involving a single debtor and enterprise groups under CICIA (Recommendation 7). Cooperation and communication is also possible because each region have the same language, i.e. Chinese and the technical assistance on exchange of relevant information provided by the responsible authorities are also available on the basis of the Basic Law. Therefore, it is suggested to include the minimum amount of information mandatorily to be published in the inter-regional insolvency registers under CICIA so as to promote the publicity related to the insolvency proceedings (Recommendation 9).

6.10 Furthermore, it is suggested to establish a functional dispute settlement mechanism under CICIA (Recommendation 8). The main focus of CICIA, which is quite identical to the Model Law, lies on two aspects: recognition and coordination. Both Fletcher and Wessels have previously pointed out that the success of the Model Law is not dependent on the number of States that decide to enact the law, but heavily relies on in what manner countries choose to enact it.[1702] As observed, there are indeed a number of deviations from the Model Law in the Enacting States, most significantly including diverse interpretation of COMI (see Part IV, Section 2.1.2.2, 2.1.3.2), proper understanding of public policy (see Part IV Section 3.3), penetration of reciprocity requirement (see Part V, Comments to Recommendation 4, Section 4.1). As explored and examined in the aforementioned case studies, those deviations pose a great obstacle to the objective of uniformity and predictability as required under the Model Law.[1703] They are partly caused by its flexible nature since the states might not adopt the Model Law uniformly.[1704] They may also be attributed to a lack of efficient institutional support equivalent to that from the CJEU. In compliance with the Basic Law and the guiding principle of CICIA, a functional dispute settlement mechanism is proposed in the form of a special meeting, which is convened on the basis of inter-regional court-to-court cooperation and communication. A special meeting can be initiated for two grounds. One relates to explanation of the related provisions under CICIA. The other arises from disputes concerning the cross-border insolvency agreement. The effects of those two kinds of explanation are different. Upon consensus of the Supreme Courts concerned, explanation given by the special meeting on specific provisions of CICIA shall have binding effect on that individual case. Furthermore, upon consensus of all the Supreme Courts, the explanation shall have binding effect on the specific

[1702] Fletcher, Ian F., Insolvency in Private International Law: National and International Approaches, Oxford, 2005, para.873; Wessels, Bob, Will UNCITRAL Bring Changes to Insolvency Proceedings Outside the USA and Great Britain? It Certainly Will, in: International Corporate Rescue, vol.3, issue 4, 2006, p.200.
[1703] The Model Law, Article 3, 8; See also Dawson, Andrew B., The Problem of Local Methods in Cross-border Insolvencies, 2015, available at: https://www.iiiglobal.org/node/1929 (Last visited on 14 June 2016)
[1704] Guide and Interpretation, para.92

provisions under CICIA. Under this circumstance, the courts are supervisors for the entire arrangement through cooperation and communication, which achieve harmonious interpretation on regional level, in particular safeguard China's own autonomous jurisdiction meaning and resolve the jurisdiction conflicts. In the case involving cross-border insolvency agreements disputes, the function of the special meeting are more akin to a joint forum, to which the disputes are submitted for a final decision. The opinions are only binding upon consensus of all the requesting courts involved and only effective on the individual case referred to the special meeting. As remarked by Rabatel and Deparis based on their observation of concerning appointment of liaison magistrates, "nothing quite compares to a direct exchange, face-to-face, between two people who know each other and meet regularly".[1705] The special meeting is expected to provide the opportunity to the judges to exchange points of view and achieve consensus. Thus, it can further help to generate an awareness of a common identity and community, which may gradually increase the mutual understanding between the Mainland and the two SARs.

6.11 Nonetheless, doubts arise over the feasibility of that functional dispute settlement mechanism. Indeed, there are alternative methods, whereas the functional dispute settlement mechanism proposed under CICIA is a balanced approach between popular academic recommendation and government preference. Some insolvency scholars give serious consideration to the use of arbitration as a supplement to international insolvency cases.[1706] Due to wide adoption of the New York Convention, enforceability of awards is regarded as arbitration's most valuable characteristic,[1707] which is accordingly the "principal attraction for using international arbitration in the context of international insolvency cases".[1708] However, as aforementioned in Part V (para.5.18 & 5.145),

---

[1705] Bernard Rabatel, Olivier Deparis, 'Liaison Magistrates' Their Role in International Judicial Cooperation and Comparative Law, in: Mads Andenas and Duncan Fairgrieve (ed.), Courts and Comparative Law, Oxford University Press, 2015, p.617

[1706] Ehmke, David, and Lewis, Alfred, Navigating Scylla and Charybdis: International Arbitration and National Insolvency, p.23, available at: https://www.iiiglobal.org/node/1932 (Last visited on 14 June 2016); Bufford, Samuel, International Insolvency Law & International Arbitration - A Preliminary Perspective, 23 Journal of Bankruptcy Law & Practice 670 (2014); See also Bufford Urges United Nations to Consider Arbitration in Insolvency Cases, available at: http://news.psu.edu/story/332495/2014/10/29/academics/bufford-urges-united-nations-consider-arbitration-insolvency-cases (Last visited on 14 June 2016); Westbrook, Jay L., International Arbitration and Multinational Insolvency, 29 Penn St. Int'l. Rev. 635 (2011); Gropper, Allan, The Arbitration of Cross-Border Insolvencies, 86 Am. Bankr. L.J. 201 (2012); Clement, Zack A., Position Paper Supporting Greater Use of Arbitration in Connection with Insolvency Matters, available at: https://www.iiiglobal.org/sites/default/files/17_-_position_paper_supporting_greater_use_of_arbitration_in_connection_....pdf (Last visited on 14 June 2016)

[1707] White & Case, 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, p.5, available at: http://www.arbitration.qmul.ac.uk/docs/164761.pdf (Last visited on 14 June 2016)

[1708] Bufford, Samuel, International Insolvency Law & International Arbitration - A Preliminary Perspective, 23 Journal of Bankruptcy Law & Practice 670 (2014), p.670; See also Westbrook, International Arbitration and Multinational Insolvency, 29 Penn St. Int'l. Rev. 635 (2011), p.635; Gropper, Allan L., The Arbitration of Cross-border Insolvencies, 86 Am. Bankr. L.J., 201, 2012, p.203; Kovacs, Robert B, A Transnational Approach to the Arbitrability of Insolvency Proceedings

inter-regional recognition and enforcement of arbitral awards is granted on different basis in China.[1709] According to Hong Kong International Arbitration Center (HKIAC), the Mainland remains the most frequent users of Hong Kong arbitration service.[1710] For instance, there were about 116 (2010), 96 (2011), 93 (2012) and 65 (2013) Mainland-related arbitration cases handled by HKIAC on annual basis.[1711] Nevertheless, from 2008 to 2014, there were only 19 Hong Kong arbitral awards in total, which were accepted for recognition and enforcement by the Mainland courts.[1712] Those associated amounts are considerably uneven, which indicates that enforceability of inter-regional arbitral awards in the Mainland may not be very promising. The other important benefit of arbitration is neutrality.[1713] As aforementioned in the main text of the dissertation (see Part III, Section 1.1.2.2), it is true that there is government interference, in particular local protectionism, on the insolvency proceedings in the Mainland. Considering the impartiality of the judicial systems, arbitration can be used to avoid the local courts. Nevertheless, the law and legal institutions cannot be independent of or altogether immune from politics.[1714] For example, unemployment rate and the revenue are the common concern of most governments all over the world. Accordingly under insolvency regimes, some creditors, such as employees and tax authorities are usually entitled to special priority[1715] in addition to the principle of equal treatment of creditors. Under that circumstance, who should have the proper authority to settle down the disputes arising from the insolvency proceedings without jeopardizing the objectives of national insolvency law? Depending on the nature of the issue, it might be difficult for the states to cede that kind of authority to independent arbitrators who are not bound to adhere to any country's bankruptcy laws.[1716] In addition, arbitration "is a matter of consent, not coercion".[1717] In practice, it is

---

in International Arbitration, Norton Journal of Bankruptcy Law and Practice Sept.-Oct. 2012, p.529

[1709] Arrangement between the Mainland and the Hong Kong SAR on Reciprocal Recognition and Enforcement of Arbitration Awards; Arrangement between the Mainland and the Macao SAR on Reciprocal Recognition and Enforcement of Arbitration Awards

[1710] Annual Statistic Report of HKIAC, available at: http://www.hkiac.org/zh-hans/about-us/statistics (Last visited on 14 June 2016)

[1711] Annual Statistic Report of HKIAC, available at: http://www.hkiac.org/zh-hans/about-us/statistics (Last visited on 14 June 2016)

[1712] Gao Xiaoli, The Development of the Arrangements Made by the Mainland with Hong Kong and Macao for Legal Assistance in Civil an Matters from the Perspective of Mainland People's Courts, in: China Law, Issue 06, 2015, p.80

[1713] Westbrook, International Arbitration and Multinational Insolvency, 29 Penn St. Int'l. Rev. 635 (2011), p. 639; Ehmke, David, and Lewis, Alfred, Navigating Scylla and Charybdis: International Arbitration and National Insolvency (2016), p.23, available at: https://www.iiiglobal.org/node/1932 (Last visited on 14 June 2016)

[1714] Zhang Wenliang, Recognition and Enforcement of Foreign Judgments in China - Rules, Practice and Strategies, Kluwer Law International, 2014, p. 324

[1715] Martin, Nathalie, The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation, in: 28 B.C. Int'l & Comp. L. Rev. 1, 2005, p.33

[1716] Peacock, Lauren L., A Tale of Two Courts: The Novel Cross-border Bankruptcy Trial, in: 23 Am. Bankr. Inst. L. Rev. 543, 2015, p.567

[1717] *In re* Nortel Networks, Inc., No. 09-10138, 2013 WL 1385271, at 10

difficult for the parties concerned to reach an agreement to arbitrate since insolvency proceedings are associated with crucial interests.[1718]

6.12 More importantly, China prefers to resolve the sovereignty-related disputes through negotiation and consultation by parties concerned, rather than submitting them to any third-party settlement procedures. The recent arbitration on the South China Sea issue is such an example, in which Chinese government refused to participate in the arbitration and claimed that it could legally ignore the pending arbitral award.[1719] In matters of inter-regional legal cooperation, if there is any dispute arising from the current arrangements, as aforementioned in Part V Section 8.4.2.3, it should also be settled through negotiations. China's inter-regional cross-border insolvency arrangement is a part of China's regional legal order. CICIA, however, recommends placing the power of balance in the hands of the judiciary. Although the regional legal order emerged upon reunification, it is not purely sovereignty-related. In essence, it requires a balance between two equally important political considerations, i.e. the local prosperity and stability and the sound and sustainable development of regional integration. Nonetheless, the result of a government-led negotiation can probably be influenced by the political power, which might not be deemed as impartial and equal and thus could not be acceptable to the public.[1720] Arbitration is a form of party choice of dispute settlement mechanism. Its party-driven nature requires adaptability of the system and processes in order to meet private needs. For example, confidentiality is one of its outstanding merits.[1721] Therefore, arbitrators in the cross-border insolvency context are under no obligation to take into consideration the development of regional legal order. That reduces the potential to give proper interpretation or guidance on CICIA, which can impede on its implementation. It is the courts on behalf of each region that have the ultimate authority to decide whether or not to recognize the rights and authority of other jurisdictions, which consequently contributes to the growth and progress of China's regional legal order. Hence, it is more appropriate for the courts to play the key role in performing the correctional function to restore the balance in China's inter-regional context.

[1718] *In re* Nortel Networks, Inc., No. 09-10138, 2013 WL 1385271, at *2–5 (Bankr. D. Del. Apr. 3, 2013) (despite numerous meetings and multiple rounds of mediation, Nortel parties "could not agree on a protocol which would govern the allocation process" and they did not agree to arbitrate).

[1719] Vice Foreign Minister Liu Zhenmin Meets with US Media Delegation to Discuss South China Sea Issue (20 May 2016); Wang Yi Talks about South China Sea Issue: Facts will Tell and Justice will Prevail (24 May 2016); Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on May 27 2016; Article by Ambassador Tian Xuejun: China Will Not Fall into the Trap of South China Sea Arbitration; Foreign Ministry Spokesperson Hong Lei's Regular Press Conference on June 8, 2016, all available at: http://www.fmprc.gov.cn/wjb/eng_search.jsp (Last visited on 14 June 2016)

[1720] Puig, Gonzalo Villalta, A Quasi-adjudicative Dispute Settlement Mechanism for CEPA: The Rule of Law in Trade Relations between Mainland China and Hong Kong, in: Chinese Journal of International Law, 2013, Vol. 12(2), p.306

[1721] White & Case and Queen Mary University, 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, 2015, p.7, available at: http://www.arbitration.qmul.ac.uk/docs/164761.pdf (Last visited on 14 June 2016)

6.13 Abiding by the principle of collectivity and seeking an integrated regional legal order, it is intended to establish a uniform and comprehensive inter-regional cooperation arrangement in China (Recommendation 3). Nonetheless, it is lack of a binding constitutional foundation on legal cooperation between the Mainland and Taiwan. Therefore, Taiwan is to be put in a separate cooperative mechanism under CICIA (Recommendation 10). Given the experience of the cross-strait cooperation, which is mainly conducted via two non-governmental intermediaries from each side, as well as the significance of communication and cooperation, independent intermediaries are introduced to overcome the hurdles in the course of cross-strait insolvency cooperation. The main duty of independent intermediaries is to maintain the connection with their counterpart, device a practical means of conducting communication between the courts concerned and keep the courts from the both sides informed of the possible conflicts or problems in the course of cross-strait insolvency proceedings.

6.14 To conclude, CICIA with its 10 recommendations is merely a modest and elementary attempt to address one of the issues arising out of China's inter-regional legal cooperation. It tentatively seeks the balance between the desire for law unification and the reality of legal diversity, levels of integration and conflicts of interests, international standards and characteristics unique to China as well as sovereignty and autonomy within a country. Considering the challenges and difficulties encountered, it is fully acknowledged that it must take time to finally achieve a well-accepted solution. Nonetheless, legal cooperation is not for the conventions, treaties or agreements. It is for the common welfare of the national economy and its citizens. That's why we have to work on something. For each inter-regional cooperation and communication and for each dispute properly resolved, the individual courts make contribution to forming mutual trust and shaping the inter-regional legal order. Trust is not a given. It has to be built bit by bit.