

A Middle Way
--- Tailoring the Model Law and the Regulation into China's Context

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I Why is a Regional Arrangement Needed: China in a “group” context

1.1 A Reply of Supreme People’s Court

In 2011, upon a request for recognition of the winding-up proceeding concerning *Norstar Automotive*, the Beijing High Court referred a question to the Supreme People’s Court in order to make clear whether or not the winding-up order rendered by the Hong Kong High Court can be recognized in the Mainland. The Supreme People’s Court replied,

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

In conclusion, it is lack of legal basis that the Mainland court could recognize the winding-up order rendered by the Hong Kong High Court. The court shall refuse to recognize the winding-up order in dispute.¹

The reply of the Supreme People’s Court reveals the impact of China’s complex political composition on its legal systems. 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 China², Hong Kong SAR, Macao SAR. In accordance with the Basic Law, Hong Kong and Macao, as Special Administrative Region (SAR), enjoy the high degree of executive, legislative autonomy and *independent* judicial power (emphasis added by the author), including that of final adjudication of SAR.³ From then on, Hong Kong and Macao can no longer be treated as “foreign” jurisdictions. Due to the new identity of the two SARs, the regional legal cooperation arrangements have to be stipulated to fill in the gap.⁴ Otherwise, without the appropriate legal basis, as stated in the reply of the Supreme People’s Court, the judgments rendered by the SAR courts cannot be recognized. As for Taiwan, there is still political uncertainty. Nevertheless, the cross-strait relationship is

¹ [2011] Supreme People’s Court Civil Other No. 19

² In this article the Mainland China purely serves as a geographic term to describe the geopolitical area under the jurisdiction of the People's Republic of China (PRC), generally excluding the PRC Special Administrative Regions of Hong Kong and Macao.

³ The Basic Law of HKSAR, art.16, art.17, art.19; the Basic Law of Macao SAR, art.16, art.17, art.19.

⁴ The arrangements concerning recognition and enforcement of civil and judicial judgments: Hong Kong SAR and the Mainland

- 2006 Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements between Parties Concerned

Macao SAR and the Mainland

- 2006 Arrangement Between the Mainland and the Macao Special Administrative Region on the Mutual Recognition and Enforcement of Civil and Commercial Judgments;

undergoing changes due to closer economic cooperation.⁵ The cross-strait legal cooperation was initiated since 2009 when the Mainland and Taiwan entered into the Agreement between Both Sides of the Taiwan Strait on Jointly Fighting against Crimes and Mutual Judicial Assistance. Nevertheless, insolvency has not been included into the regional legal cooperation arrangements among the four regions yet.

There are two regimes that both successfully contribute to the international development of the cross-border insolvency, which are the UNCITRAL Model Law on Cross-border Insolvency (hereinafter the Model Law) and the EU Regulation on insolvency proceedings [Council Regulation (EC) 1346/2000, hereinafter the Regulation]. Although there have been a few multilateral initiatives in dealing with issues arising from cross-border insolvency, either on the international level or on the regional level, most of them failed to gain wide and active acceptance.⁶ Hence, it is of significance to conduct comparative research on the two regimes to discover their respective merits as well as their differences, which will help to find a better solution to China's cross-border insolvency issues. Meanwhile, it is also important to figure out how China's "group" characteristics will influence the way of adopting those two regimes.

1.2 Problems of Entering into International Convention

Prior to the Regulation, efforts had been made to introduce a convention into Europe, which used to be the European Convention on Certain International Aspects of Bankruptcy (i.e. the Istanbul Convention)⁷ and the Convention on Insolvency Proceedings⁸. 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.⁹ In 2014, it is said that the

⁵ 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.

⁶ For instance, some has been replaced by the Regulation. For instance, the Nordic Bankruptcy Convention of 1933. Some refers to the Regulation and shares the similarities, such as the Uniform Insolvency Act of OHADA in Africa, which has proven the status of the Regulation as benchmark for other regional initiatives. See Wessels, Bob, *International Insolvency Law*, Vol.X, Deventer: Kluwer, 2012, para. 10077. As for Southern African Development Community, some has adopted the Model Law route, like South Africa. See Wessels, *International Insolvency Law*, Vol.X, Deventer: Kluwer, 2012, para. 10080. In Latin America, some relevant efforts have been made, for example, through Treaty of Montevideo 1940. However, with limited provisions it was not that successful. See Wood, Philip, *Principles of International Insolvency*, London: Sweet & Maxwell 2nd. ed., 2007, 29-081; see also Fletcher, Ian F., *Insolvency in Private International Law. National and International Approaches*, Oxford Private International Law Series, Oxford University Press 2nd ed. 2005; Araya, Tomas M, and Jacqueline Donaldson, Latest Events on Cross-border Insolvency in Latin America, February 2006 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=874627

⁷ 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, 6.01

⁸ 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.

⁹ 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,

United Nations Commission on International Trade Law (UNCITRAL) is now considering a global insolvency convention.¹⁰ In the course of international cooperation, the consequence of the political reality is that it might involve “four Chinas”. For instance, in the WTO Agreement, the People’s Republic of China, “Hong Kong, China”, “Macao, China” as well as “Chinese Taipei”¹¹ all enjoy full membership of WTO.¹² As a “group” composed of four regions, the landscape of China gets more complicated when entering into the international conventions. 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.¹³ There is a typical example involving cooperation with Hague Conference on Private International Law in the field of the private international law (See Table I below). With respect to the international agreements to which the People's Republic of China is or becomes a party, whether or not the application 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.¹⁴ There are certain conventions that prior to the handover have applied to China and that, pursuant to declarations filed by the United Kingdom or Portugal, had also applied to Hong Kong and Macao. For instance, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter the New York Convention). Upon resumption of sovereignty over Hong Kong on 1 July 1997, the Government of China extended the territorial application of the Convention to Hong Kong, Special Administrative Region of China, subject to the statement originally made by China upon accession to the Convention. On 19 July 2005, China declared that the Convention shall apply to the Macao Special Administrative Region of China, subject to the statement originally made by China upon accession to the Convention.¹⁵ In addition, there are also convention that prior to the reunification have applied to China but not Hong Kong and Macao. For example, United Nations Convention on Contracts for the International Sale of Goods

Isaacs, Stuart (ed.), *The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide* (2nd ed.), Oxford University Press, 2009, pp. 2.

¹⁰ Wessels, Bob, *Towards A Global Insolvency Convention?*, March 17, 2014, posted in Private Law of Leiden Law Blog, <http://leidenlawblog.nl/articles/towards-a-global-insolvency-convention>

¹¹ 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.

¹² 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 Feb. 2014) As for the legal basis, please refer to art. 152 Basic Law of HKSAR and art. 137 Basic Law of Macao SAR.

¹³ art. 153, the Basic Law of HKSAR; art. 138, the Basic Law of Macao SAR

¹⁴ art. 153, the Basic Law of HKSAR; art. 138, the Basic Law of Macao SAR

¹⁵ 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 17 February 2014)

(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.¹⁶ Therefore, it is still uncertain whether or not the effect of the CISG is extended to the two SARs.¹⁷

Table I

The Mainland China ¹⁸		
15.07.1955	Statute of the Hague Conference on Private International Law	The Hague
10.06.1958	Convention on the Recognition and Enforcement of Foreign Arbitral Awards	New York
15.11.1965	Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters	The Hague
18.03.1970	Convention on the Taking of Evidence Abroad in Civil or Commercial Matters	The Hague
29.05.1993	Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption	The Hague
Hong Kong SAR ¹⁹		
15.07.1955	Statute of the Hague Conference on Private International Law	The Hague
05.10.1961	Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions	The Hague
05.10.1961	Convention Abolishing the Requirement of Legalisation for Foreign Public Documents	The Hague
15.11.1965	Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters	The Hague
18.03.1970	Convention on the Taking of Evidence Abroad in Civil or Commercial Matters	The Hague
01.06.1970	Convention on the Recognition of Divorces and Legal Separations	The Hague
25.10.1980	Convention on the Civil Aspects of International Child Abduction	The Hague
01.07.1985	Convention on the Law Applicable to Trusts and on Their Recognition	The Hague
29.05.1993	Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption	The Hague
Macao SAR ²⁰		

¹⁶ See <http://www.cisg.law.pace.edu/cisg/countries/cntries-China.html>

¹⁷ 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>

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

¹⁸ http://www.hcch.net/index_en.php?act=states.details&sid=30

¹⁹ <http://www.legislation.gov.hk/interlaw.htm#Private%20International%20Law>

²⁰ <http://en.io.gov.mo/Legis/International/1/14.aspx>

01.03.1954	Convention Relating to Civil Procedure	The Hague
15.07.1955	Statute of the Hague Conference on Private International Law ²¹	The Hague
24. 10. 1956	Convention on the Law Applicable to Maintenance Obligations towards Children	The Hague
15. 04.1958	Convention on the Recognition and Enforcement of the Decisions Relating to Maintenance Obligations towards Children	The Hague
05. 10. 1961	Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Minors	The Hague
05.10.1961	Convention Abolishing the Requirement of Legalisation for foreign Public Documents	The Hague
15. 11. 1965	Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters	The Hague
18. 03. 1970	Convention on the Taking of Evidence Abroad in Civil or Commercial Matters	The Hague
25.10.1980	Convention on the Civil aspects of International Child Abduction	The Hague
29.05.1993	Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption	The Hague

1.3 Problems of Adopting A Soft Law Instrument

Obviously, legal cooperation in the form of an international convention is not that easy to be accepted by China in a “group” context. However, as a soft law instrument, although the words “State” occur in the Model Law regularly, as explained in the Guide to Enactment, the word “State” refers to the entity that enacts the Law.²² 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. To adopt the UNICTRAL Model Law in China, it means to adopt the Model Law in four independent jurisdictions, which causes the demands of regional cooperation. 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.²³ Although the spirit of a Model Law and the intention of its drafters, is that a State should stay as close as possible to the text of the Model Law to ensure a degree of certainty and predictability, the degree of certainty achieved in relation to harmonization is likely to

²¹ http://www.hcch.net/index_en.php?act=status.comment&csid=90&disp=resdn

²² Para. 56, the Guide to Enactment

²³ Berends, André, The UNCITRAL Model Law on Cross-border Insolvency: A Comprehensive Overview, in: 6 Tul. J. Int'l & Comp. L., pp. 320, 323.

be lower than that resulting from a convention²⁴ since the character of the Model Law, as a soft law instrument, is a recommendation in essence. Nevertheless on a regional level, it is easier to achieve uniformity than on a global level, for instance, the Regulation. However, a regional regime cannot simply be copied and pasted. Even under the circumstances that the 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. Furthermore, more considerate arrangements are made exclusively for the regional cooperation. The New York Convention is such an example. 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.²⁵ Nevertheless, it is noteworthy that 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.²⁶ Therefore, to some extent, it seems that the New York Convention serves as the “model law” *de facto* for the relevant regional cooperation in China. Hence, the content of the Model Law can be taken into consideration for establishing a regional regime in China.

II The Regulation: a Regional Cooperative Option

Europe is also in the process of integration. Against this background, the Regulation is designed particularly for regional cooperation in the matters of the cross-border insolvency. As a regional cooperative instrument, whether or not the Regulation would better suit China in a “group” context?

2.1 Different Stages of Integration

The birth of the Regulation, as stressed by the Council, is stimulated by the proper functioning of the internal market of EU.²⁷ Meanwhile, China’s economic integration is also on the rise but it is noteworthy that the four regions are in a close economic relationship for less than one decade.²⁸ As a Union legal instrument, the Regulation is

²⁴ Wessels, Bob, *International Insolvency Law*, Vol.X, Deventer: Kluwer, 2012, para. 10195; See also para. 22, Guide to Enactment.

²⁵ 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)

²⁶ Art.7 Hong Kong SAR and the Mainland Arrangement; Art.7 Macao SAR and the Mainland Arrangement; Art. 7 Hong Kong SAR and Macao SAR Arrangement

²⁷ Recital 2, the Regulation

²⁸ CEPA was signed in 2004 between the Mainland and two SARs. CEPA is the abbreviation of the Closer Economic Partnership Arrangement. Each CEPA contains a main text, six annexes, and annually signed supplementary agreements. The cooperation covers trade in goods, trade in services and trade and investment facilitation. The most substantial part of the cooperation in trade in goods is that the Mainland will apply zero tariff to the import of those goods of Hong Kong SAR and Macao SAR on 1 January, 2006, while Hong Kong SAR and Macao SAR will continue to apply zero tariff to all imported goods of Mainland origin. The supplementary agreements of CEPA are signed annually by the Mainland with each SAR. The texts of CEPA between the Mainland and HKSAR (in English), please visit <http://www.doj.gov.hk/eng/topical/wto.htm>; the text of CEPA between the Mainland and the Macao (in English), please visit http://www.cepa.gov.mo/cepaweb/front/eng/index_en.htm

established based on the Article 67 TFEU (in Title V “Area of Freedom, Security and Justice”, ex Article 61 EC Treaty) and Article 81 (in Chapter 3 “Judicial Cooperation in Civil Matters”, ex Article 65 EC Treaty). Therefore, it is clear that the main focus of the Insolvency Regulation lies in cross-border judicial cooperation between the Member States, more specifically: recognition of judgments and cooperation between liquidators.²⁹ In China, judicial cooperation between the Mainland and the two SARs is guaranteed based on the Basic Law.³⁰ So far there is legal cooperation in matters of service of judicial documents, exchange of evidence as well as recognition and enforcement of judgments and arbitral awards.³¹ As for the cross-strait judicial cooperation, some general agreement has been reached, including recognition and enforcement of civil and commercial judgments.³² It is observed that the current legal cooperation among the four regions has been done respectively in a mutual way with the Mainland as the inescapable party, which can be described as in the form of “hub and sparks”(see Chart I below). Considering EU’s relevant integration experience, especially the experience of achieving a specialized intra-EU legal framework³³, it can be

ECFA (*the Cross-strait Economic Cooperation Framework Agreement*) was signed in 2010 between the Mainland China and Taiwan. 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. The “early harvest” list of tariff concessions covers 539 Taiwanese products and 267 Mainland Chinese goods. From 1 January 2012, tariffs on 90% of Early Harvest List goods of Taiwan have been reduced to zero. Besides, the Mainland China will also open markets in 11 service sectors such as banking, securities, insurance, hospitals and accounting, while Taiwan agreed to offer wider access in seven areas, including banking. Explanation Concerning the Signing of the Cross-Strait Economic Cooperation Framework Agreement, June 24, 2010,

available at <http://www.mac.gov.tw/ct.asp?xItem=85683&ctNode=5921&mp=3>

²⁹ Wessels, *International Insolvency Law*, Vol.X, Deventer: Kluwer, 2012, para. 10427a; See also Fletcher & Wessels, *Harmonisation of Insolvency Law in Europe*, Reports Netherlands Association for Civil Law, Deventer: Kluwer, 2012, pp. 56

³⁰ Art. 95 Basic Law 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.

Art. 93 Basic Law Macao SAR: 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.

³¹ Hong Kong SAR and the Mainland:

-1998 Arrangement for Mutual Service of Judicial Documents in Civil and Commercial Proceedings between the Mainland and Hong Kong Courts;

-1999 Arrangement Concerning Mutual Enforcement of Arbitral Awards;

-2006 Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements between Parties Concerned

Macao SAR and the Mainland:

-2001 Arrangement for Mutual Service of Judicial Documents and Exchange of Evidence in Civil and Commercial Proceedings between the Mainland and the Macao SAR Courts;

-2006 Arrangement Between the Mainland and the Macao Special Administrative Region on the Mutual Recognition and Enforcement of Civil and Commercial Judgments;

-2007 Arrangement Concerning Mutual Recognition and Enforcement of Arbitral Awards between the Mainland and the Macao Special Administrative Region

Taiwan and the Mainland

-2009 Agreement between Both Sides of the Taiwan Strait on Jointly Fighting against Crimes and Mutual Judicial Assistance

³² Article 1, 10, Agreement between Both Sides of the Taiwan Strait on Jointly Fighting against Crimes and Mutual Judicial Assistance

³³ The Regulation itself experienced the transformation from Convention to Regulation. There was a Preliminary Draft Convention that evolved over the years from 1960 to 1980 (Phase I), which became an

expected that there will be a long march before a comprehensive cross-border legal cooperative regime can finally be established among the four regions.

Chart I



2.2 Mutual Trust v. Reciprocity

Article 16(1) of the Regulation provides automatic and universal (throughout the EU) recognition of insolvency proceedings opened in accordance with the jurisdictional scheme of Article 3³⁴, which stipulates the rules of the allocation of international jurisdiction with respect to insolvency proceedings.³⁵ Such a valuable effect is based on the principle of mutual trust,³⁶ which is derived from the concept of loyalty as mentioned in the article 4(3) of the Treaty of the European Union.³⁷ The principle of mutual trust is deemed as crucial in practice where it plays a decisive role on how to deal with the conflicting or competitive opinions on jurisdiction as held by the courts of the Member States. For example, in the case of *Turner v. Grovit*,³⁸ there was discussion with respect to the legal basis of jurisdiction system under the Brussels Convention (now the “Brussels I” Regulation).³⁹ It is stated that

ultimate failure. In 1995 the Convention on Insolvency Proceedings was signed by 12 states (Phase II). By April 1996, fourteen Member States had signed the EU Convention and only the United Kingdom had not yet done so due to the mad-cow disease. In May 2000, the text of the Regulation was adopted since both the formal and practical imperatives for the orderly governance of cross-border insolvency proceedings among the Member States of the European Union remained inescapable. See Fletcher, *Insolvency in Private International Law. National and International Approaches*, Oxford Private International Law Series, Oxford University Press 2nd ed. 2005, 7.02; See also Moss, Gabriel, Fletcher, Ian F, Isaacs, Stuart (ed.), *The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide* (2nd ed.), Oxford University Press, 2009, pp. 1-16.

³⁴ Moss, Fletcher, Isaacs (ed.), *The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide* (2nd ed.), Oxford University Press, 2009, pp. 103.

³⁵ 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.

³⁶ Recital 22, the Regulation

³⁷ article 4(3): 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 Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardize the attainment of the Union’s objectives.

See also Wessels, *International Insolvency Law*, Vol.X, Deventer: Kluwer, 2012, para. 10551

³⁸ *Gregory Paul Turner v Felix Fareed Ismail Grovit and Others*, Case C-159/02

³⁹ Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, now the “Brussels I”, Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters)

24. At the outset, it must be borne in mind that the Convention is necessarily based on the trust which the Contracting States accord to one another's legal systems and judicial institutions. 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 judgments (Case C-116/02 *Gasser* [2003] ECR I-0000, paragraph 72).

...

26. Similarly, otherwise than in a small number of exceptional cases listed in the first paragraph of Article 28 of the Convention, which are limited to the stage of recognition or enforcement and relate only to certain rules of special or exclusive jurisdiction that are not relevant here, the Convention does not permit the jurisdiction of a court to be reviewed by a court in another Contracting State (see, to that effect, *Overseas Union Insurance and Others*, paragraph 24).

Later in the case of *Re Rover France SAS*,⁴⁰ it involved an English holding company, having eight subsidiaries registered in various European countries. Rover France SAS is one of the subsidiaries, which was registered in France. The main proceeding was opened in UK. However, the French public prosecutor of Nanterre requested the court to refuse recognition of the main proceeding in UK on the basis that it amounted to a manifest breach of public policy. Instead, he sought to open the main proceedings in Nanterre.⁴¹ The Nanterre Court decided that the English court was satisfied that the presumption that Rover France SAS was situated in France without any formality. Referring to recital 22, the Court indicated that

Recognition of judgments delivered by the courts of the Member States should be based on the principle of mutual trust. To that end, grounds for non-recognition should be reduced to the minimum necessary.⁴²

According to the opinions of CJEU as well as the *Rover* judgment, it seems that the intra-EU compulsory system of jurisdiction based on the principle of mutual trust entails that a court may not refuse to recognize the foreign judgment on the ground of *forum non conveniens*.⁴³ A court may not refuse to accept the jurisdiction accorded to it under the Regulation on the grounds that, in the court's opinion, it would be more appropriate for the case to be dealt with in proceedings opened in another Member State.⁴⁴

One scholar has stated that the Model Law reflected the principle of comity, containing procedural guidelines for nations to follow in these proceedings with hope that adopting nations will be "consistent in their practical application".⁴⁵ However, comity is one of the possibilities as listed in the Guide and Interpretation of the Model law:

⁴⁰ *Re Rover France SAS* [2005] EWHC 874 (Ch).

⁴¹ Samad, Mahmud, *Court Applications Under the Companies Acts*, Bloomsbury Professional, 2013, pp.1251-1252

⁴² Commercial Court Nanterre 19 May 2005, see Mélin, *Commentaire Gazette du Palais* 7 July 2005, n° 188 (*Gazette des procédures collectives* 2005/2, p.6); *Recueil Dalloz* 2005, 1787

⁴³ Wessels, *International Insolvency Law*, Vol.X, Deventer: Kluwer, 2012, para.10551.

⁴⁴ See Virgós, Miguel and Garcimartín, Francisco, *The European Insolvency Regulation: Law and Practice*, Kluwer Law International, 2004, nr. 67

⁴⁵ Berkering, Kevin J, *United States Corporate Insolvency: The Impact of Chapter 15 on Comity and the New Legal Environment*, 14 *L & Bus. Rev. Am.* 2008, pp.281, 282

- (1) application of the doctrine of comity by courts in common-law jurisdictions; (2) issuance for equivalent purposes of enabling orders (exequatur) in civil-law jurisdictions;
- (3) enforcement of foreign insolvency orders relying on legislation for enforcement of foreign judgements; and
- (4) techniques such as letters rogatory for transmitting requests for judicial assistance.⁴⁶

There are enacting States, in particular the United States⁴⁷ and the United Kingdom,⁴⁸ followed the comity approach without introduction of the reciprocity into their cross-border insolvency systems. Meanwhile, as a concept arising from sovereignty, reciprocity, although rejected as an approach during the negotiations of the Model Law, has been adopted *de facto* or *de jure* by some countries in the process of implementing the Model Law.⁴⁹ In accordance with the Section 437 of the Insolvency Act of the British Virgin Island,

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

The similar provision can be found in the Cross-border Insolvency Act (42/2000) of South Africa, which is kept in line with the Model Law since 28 November 2003. Section 2(2) (a) provides that this Act applies in respect of any State designated by the Minister by notice in the Gazette. Section 2(2) (b) continues 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.

It is anticipated that only those countries that provide reciprocity would be designated for the purpose of the Model Law's operation.⁵⁰ On May 29 2009 Mauritius enacted the Insolvency Act 2009, which has adopted the Model Law. However, in accordance with article 4 of the Insolvency Act that 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.⁵¹ In Mexico, a special section of the Commercial Insolvency Law incorporates almost all provisions of the Model Law.⁵² As stipulated under the article 280 of the Commercial Insolvency Law,

⁴⁶ para.7, the Guide and Interpretation

⁴⁷ US Committee on the Judiciary, "Bankruptcy Abuse Prevention and Consumer Protection Act of 2006: Report of the Committee of the Judiciary House of Representatives to Accompany S. 256" (HR Rep. No 109-31) (Washington, DC, United States Government Printing Office 2005) ("House Report")

⁴⁸ 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.173.

⁴⁹ Those countries include Argentina (Draft), Belgium, British Virgin Islands, Canada, Mexico, Romania and South Africa. See Wessels, International Insolvency Law, Vol.X, Deventer: Kluwer, 2012, para. 10385; see also Look Chan Ho (ed.), Cross-border Insolvency, Global Law and Business, 2012, pp. 8.

⁵⁰ 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.

⁵¹ 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.

⁵² Perezalonso, Pablo, in: Look Chan Ho (ed.), A Commentary on the UNCITRAL Model Law (3rd ed.), Global Law and Business, 2012, p. 315.

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.⁵³

It is obvious that the Mexico cross-border insolvency legislation is also in the spirits of reciprocity. So is the Cross-border Insolvency Law of Romania, which includes a reciprocity requirement as regards the recognition of a foreign proceeding.⁵⁴ Some scholars are concerned that the reciprocal approach caused doubts to arise that it might be possible actually to lead to insufficient enactment of the Model Law on a global level.⁵⁵

Recognition of foreign insolvency proceedings is based on the principle reciprocity as provided pursuant to the Enterprise Bankruptcy Law of P.R.C. (the EBL).⁵⁶ In fact, before the 2007 EBL came into effect, there were already two cases that sought recognition of the insolvency proceedings based on the bilateral treaty.⁵⁷ The first case involved an application from Italy, which is B&T Ceramic Group s.r.l. versus E.N.Group s.p.a.⁵⁸ The Foshan Court formally and explicitly recognized the validity of the bankruptcy judgment rendered by the Italian Court based on Sino-Italy Mutual Civil

⁵³ Perezalonso, Pablo, Mexico, in: Look Chan Ho (ed.), A Commentary on the UNCITRAL Model Law (3rd ed.), Global Law and Business, 2012, p. 317

⁵⁴ Lefter, Alexandru, Pachi, Laurentiu, Romania, Look Chan Ho (ed.), A Commentary on the UNCITRAL Model Law (3rd ed.), Global Law and Business, 2012, p. 379

⁵⁵ Tung, Frederic, Skepticism About Universalism: International Bankruptcy and International Relations, U.C. Berkeley Law and Economics Working Paper Series, Working Paper Series 2001-7 (2001a); Hay, Peter, On Comity, Reciprocity and Public Policy in U.S. and German Judgments Recognition Practice, in: Private Law in the International Arena (Festschrift Kurt Siehr), T.M.C. Asser Institute, 2004, pp.237; 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, 145ff.

⁵⁶ Article 5(2) EBL: 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.

⁵⁷ From 1987 till now, China has signed over 30 mutual civil and commercial judicial assistance treaties or agreements. These countries which signed the civil and commercial judicial assistance treaties with China are (in chronological order) France, Poland, Belgium, Mongolia, Romania, Italy, Spain, Russia, Turkey, Ukraine, Cuba, Belarus, Kazakhstan, Bulgaria, Thailand, Egypt, Greece, Cyprus, Hungary, Morocco, Kirghizstan, Tajikistan, Singapore, Uzbekistan, Viet Nam, Laos, Tunisia, Lithuania, Argentina, Republic of Korea, Democratic People's Republic of Korea, United Arab Emirates, Kuwait, Peru, Brazil, Algeria. Information collected from the database Chinalawinfo (website: <http://www.pkulaw.cn.ezproxy.leidenuniv.nl:2048>). The scope of those treaties covers generally all kinds of civil and commercial cases but some of them exclude recognition of insolvency proceedings, for instance Peru, Tunisia and Spain. In addition, some of them only apply to recognition of arbitral awards, such as Korea, Singapore and Belgium. See Han Hu, Study of China's Rules and Practice in Matters of Recognition and Enforcement of Foreign Judgments (in Chinese), available at http://article.chinalawinfo.com/Article_Detail.asp?ArticleID=23700)

⁵⁸ Yao, Hongping, Liu, Ziping, Analysis of the Application of the B&T Ceramic Group s.r.l. for Recognition and Enforcement of the Italian Court Judgment (in Chinese), <http://www.civillaw.com.cn/article/default.asp?id=13604>, visiting on 26/08/2010.

Judicial Assistance Treaty.⁵⁹ The second application was filed by a French liquidator, Montier Antoine, on 1 April 2005 to Guangzhou Intermediate People's Court for recognition of insolvency of Pellis Corium (a French company) ordered by the French court in 1998. The Guangzhou Intermediate People's Court in accordance with article 268 of the CPL⁶⁰ and the bilateral treaty recognized the effect of the bankruptcy proceeding.⁶¹ It seems that the treaties, if applicable, serve as concrete foundation for the court to recognize foreign insolvency proceedings.

What will happen if there is no mutual civil and commercial judicial assistance treaty? The foreign judgment will probably not be recognized. The principle of reciprocity is an ambiguous concept in China, which has neither been defined under the legislation nor properly interpreted by the Supreme People's Court. In *Hua An Funds v. Lehman Brothers International Europe* (LBIE) case, the judge declined to recognize the effect of the UK proceeding on the basis of lack of the relevant international treaty between UK and China. With respect to reciprocity, the judge held that till now no relevant recognition had been given to China by the UK court and thus the effect of the UK insolvency proceeding could not be recognized on a reciprocal basis, either.⁶² This approach has been summarized as "substance reciprocity" or "reciprocity in recognition" by Forsyth J in *Re Sefel Geophysical Ltd*,⁶³ which occurs when a domestic court will recognize a foreign judgment or order only if the foreign court would recognize a domestic judgment or order on comparable grounds.⁶⁴ Based on the

⁵⁹ The Chinese proceeding involved a third party, a Hong Kong company. On May 2, 1999, E.N.Group s.p.a. agreed to sell the share it held of the Nasseti Ettore company which was located in China to a Hong Kong company. On July 21, 1999, the agreement was approved by the local government and then the Hong Kong company, replacing E.N.Group s.p.a., became the shareholder of Nasseti Ettore. B&T Ceramic Group argued that E.N.Group s.p.a. had no rights to do that. Therefore, the court dismissed the enforcement request because the court held that the third party (the Hong Kong company) involved, which should be solved in another lawsuit.

⁶⁰ Article 268 of the CPL(1991): In the case of an application or request for recognition and enforcement of a legally effective judgment or written order of a foreign court, the people's court shall, after examining it in accordance with the international treaties concluded or acceded to by the People's Republic of China or with the principle of reciprocity and arriving at the conclusion that it does not contradict the basic principles of the law of the People's Republic of China nor violates State sovereignty, security and social and public interest of the country, recognize the validity of the judgment or written order, and, if required, issue a writ of execution to enforce it in accordance with the relevant provisions of this Law; if the application or request contradicts the basic principles of the law of the People's Republic of China or violates State sovereignty, security and social and public interest of the country, the people's court shall not recognize and enforce it.

⁶¹ Wang, Meiyang, Lian, Changren, *The Recognition and Enforcement of the Foreign Judgments: The Recognition of a French Bankruptcy Case* (in Chinese), <http://www.ccmt.org.cn/shownews.php?id=8413> (visiting on 26/08/2010).

⁶² See Zhang Fengxiang, *The Needs for Improvement of Relevant Laws Arising from the Financial Derivative Products Cooperative Disputes between Hua An Funds and Lehman Brothers International Europe* (in Chinese), in: *Frontier of Financial Law*, 2011, p.33-45. The dispute was settled down in the way of mediation. Unlike judgments, in China, the results of mediation are not necessary to be disclosed. Nevertheless, in his article the judge provided quite detailed information and analysis on that case because as judge who made decision on that case, he found it necessary to disclose some information as reference for improvement of the legislation involved.

⁶³ In *re Sefel Geophysical Ltd* (1988) 70 CBR (NS) 97, 54 DLR (4th) 117 (Alta QB) [26], where Forsyth J said: If our bankruptcy proceedings are respected and deferred to, . . . I am of the opinion that claims of foreign states should be respected in our proceedings as long as they are of a type that accords with general Canadian concepts of fairness and decency in state imposed burdens.

⁶⁴ 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.148.

substance reciprocity, it seems that a successful recognition application shall depend on whether one state is willing to take the first step to grant the recognition, which indeed undermines the predictability and thus jeopardize cooperation in matters of cross-border insolvency. Some foreign courts realized this problem and took the initiative. For example, in 2006 Berlin High Court recognized a money judgment rendered by a Chinese court in accordance with the article 328 of German Code of Civil Procedure (Zivilprozessordnung) on a reciprocal basis.⁶⁵ The German court indicated that China and Germany so far did not enter into any bilateral treaties concerning recognition and enforcement in the civil and commercial matters. Neither of them granted recognition to judgments rendered by the counterpart court on the reciprocal basis before. On the contrary, there have been some precedents of refusal due to lack of a reciprocal basis.⁶⁶ Nevertheless, the court considered that without international treaties one side should probably start to grant recognition and thus solve the reciprocity deadlock. Once that obstacle was removed by Germany at first, China would probably follow.⁶⁷

2.3 The Problems with COMI

The rules of jurisdiction play a crucial role under the Regulation, especially the opening of main proceedings. The main proceedings can be opened by the courts of the Member State where the centre of main interest (COMI) of the debtor is located.⁶⁸ The main proceeding will automatically recognized in all the other Member States from the time that it becomes effective in the State of the opening of proceedings.⁶⁹ Once the main proceeding is opened, the entire cross-border insolvency case will be dealt with in that Member State in accordance with that State's insolvency law.⁷⁰ It is obvious that COMI is decisive for the functioning of the Regulation. However, the Regulation does not contain a definition of COMI. The vagueness of COMI is blamed for encouraging abusive COMI-relocation. For example, in an empirical research conducted based on 104 cases collected all over EU from 2002 to 2009, the Member State courts whose decisions form the basis of this study rebutted the presumption in the vast majority (more than 80 per cent) of the cases. This evidence supports the view that when a conflict arises the registered office presumption is, in practice, rather weak, and courts tend to adopt a real seat approach. In decisions about opening main proceedings, the location of the registered office did not tend to be decisive and was normally defeated by other connecting factors pointing out to the jurisdiction where the debtor did not have its registered office.⁷¹

⁶⁵ Kammergericht-Berlin-Aktenzeichen: 20 SCH 13/04, Beschluss von 18.05.2006. Leitsatz: 1. Eine rechtskräftige Entscheidung eines Volksgerichts (in China) kann gemäß §328 ZPO anerkannt werden. Available at: <http://www.juraforum.de/urteile/kammergericht-berlin/kammergericht-berlin-beschluss-vom-18-05-2006-az-20-sch-1304> (visited at 18/07/2013)

⁶⁶ For instance, in 2001, a German company applied for recognition and enforcement of a judgment involving a finance lease contract dispute between the German company and a Chinese company, which was rendered by the court in Frankfurt. In matters of recognition, the Beijing Second Intermediate People's Court employed the same reasoning as in the aforementioned decision and refused to grant recognition. [2003] First Instance of Beijing Second Intermediate People's Court Civil Mediation No. 00002

⁶⁷ Kammergericht-Berlin-Aktenzeichen: 20 SCH 13/04, Beschluss von 18.05.2006, para. 2(a)

⁶⁸ Article 3(1), the Regulation

⁶⁹ Recital 22, Article 16 (1), the Regulation

⁷⁰ Recital 22, the Regulation

⁷¹ Mevorach, Jurisdiction in Insolvency, A Study of European Courts' Decisions, in: Journal of Private International Law, vol. 6, no. 2, 2010, p. 344.

Forum shopping cannot be regarded as abusive or illegitimate per se.⁷² As protected by the freedom of establishment,⁷³ the companies are allowed to freely relocate its registered seats within EU. It is also driven by diverse national insolvency systems of each Member State, which the debtor can take advantage of. Hence, the question is how to set the restrictions according to the principle of proportionality.⁷⁴ In *Staubitz-Schreiber*,⁷⁵ the CJEU illustrated that

The answer to be given to the national court must therefore be that Article 3(1) of the Regulation must be interpreted as meaning that the court of the Member State within the territory of which the center of the debtor's main interests is situated at the time when the debtor lodges the request to open insolvency proceedings retains jurisdiction to open those proceedings if the debtor moves the center of his main interests to the territory of another Member State after lodging the request but before the proceedings are opened.⁷⁶

Later in *Interedil*, the CJEU referred to the decision of *Staubitz-Schreiber*, indicating that

The Court has held that, where the center of a debtor's main interests is transferred after the lodging of a request to open insolvency proceedings, but before the proceedings are opened, the courts of the Member State within the territory of which the center of main interests was situated at the time when the request was lodged retain jurisdiction to rule on those proceedings (Case C-1/04 *Staubitz-Schreiber* [2006] ECR I-701, paragraph 29). It must be inferred from this that, in principle, it is the location of the debtor's main center of interests at the date on which the request to open insolvency proceedings was lodged that is relevant for the purpose of determining the court having jurisdiction.⁷⁷

It can thus be concluded that case law has determined that the relevant date at which the location of a company's COMI is assessed is the date of filing an application to open insolvency proceedings. To keep the clear time point in mind, it will be easier for the companies to shift their COMI prior to this date in order to bring insolvency proceedings in a jurisdiction where there is more favorable insolvency or restructuring regimes available. Nevertheless, that is against the will of the Regulation. It is stated under the Recital 4 of the Regulation that

It is necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favorable legal position (forum shopping).

That's why in the proposal of EU Parliament's amendment to the Regulation a minimum time period of three months prior to the opening of insolvency proceedings or

⁷² Moss, Fletcher, Isaacs, (ed.), *The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide* (2nd ed.), Oxford University Press, 2009, para. 8.101

⁷³ Article 49, TFEU

⁷⁴ VALE Építési kft, CJEU C-378/10, 7/12/2012, at 30; Ulf Kazimierz Radziejewski v. Kronofogdemyndigheten i Stockholm, C-461/11, 08/11/2012, at 30

⁷⁵ *Susanne Staubitz-Schreiber*, 17 Jan. 2006, C-1/04

⁷⁶ *Id.*, at 29.

⁷⁷ *Interedil Srl (in liquidation) v Fallimento Interedil Srl, Intesa Gestione Crediti SpA*, 20 Oct. 2011, C-396/09, at 55

provisional proceedings is required in order to reduce the possibility of forum shopping.⁸⁴

III A Middle Way

3.1 General Principle

3.1.1 Universalism v. Territorialism

A regional legal cooperative framework cannot be established without any guiding legal principles. In the world of international insolvency law, there is a struggle between the ideal and the reality over a hundred years, i.e. universalism and territorialism.⁸⁵ Universalism has been and still is well acknowledged as the fundamental principle of cross-border insolvency law.⁸⁶ It reflects the principle that a person (a debtor) owns the undivided entirety of property⁸⁷ although each country has its own insolvency system and the differences are often dramatic. From the economic perspective, it is also easy to explain since debt collection inherently involves transaction costs.⁸⁸ Bankruptcy systems are designed to reduce these collection costs through collective action.⁸⁹ 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.⁹⁰

In an ideal picture painted by the universalists in its purest form, there would have a single insolvency regime that collects, administers and then distributes all the debtor's assets wherever these assets may be situated throughout the world.⁹¹ 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, which governs the proper liquidation or reorganization of insolvent entities and meanwhile is 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.⁹²

⁸⁴ Amendment 27, 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))

⁸⁵ Lowell, John, *Conflict of Laws as Applied to Assignments for Creditors*, 1 HARV. L. REV. 259, 264 (1888). Cited from LoPucki, Lynn M., *Global and out of Control?*, 79 Am. Bankr. L.J. 79 (2005)

⁸⁶ 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

⁸⁷ Wessels, *International Insolvency Law*, Vol.X, Deventer: Kluwer, 2012, 10018

⁸⁸ Bufford, Samuel L., *United States International Insolvency Law 2008 – 2009*, New York: Oxford University Press, 2009, pp. 4.

⁸⁹ Jackson, Thomas H., *The Logic and Limits of Bankruptcy Law*, Cambridge, Harvard University Press, 1986, pp.5

⁹⁰ Larouche, Pierre, Cserne, Péter(ed.), *National Legal Systems and Globalization, New Role, Continuing Relevance*, T.M.C. Asser Press, Springer, 2013, 12.

⁹¹ Jay Lawrence Westbrook, *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 AM.J.COMP.LAW (1993), 575-576.

⁹² McCormack, Gerard, *Universalism in Insolvency Proceedings and the Common Law*, in: *Oxford Journal of Legal Studies*, Vol. 32, No. 2(2012), 347.

3.1.2 Development in Practice

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.⁹³ 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.⁹⁴ 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 codified United States notions of comity and cooperation with foreign courts in bankruptcy matters. The model is referred to as "modified universalism".⁹⁵ Modified universalism shares the view that there should be a single main case for an international business in its home country, governed for the most part by 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.⁹⁶

In pursuit of approaching universality in a round-way form, a system of parallel jurisdictions has been invented, each of which can open an independent insolvency proceeding. What is the link between them to realize the goal of "a single forum"? Some specialized terminology has been developed. The dominant case in the "home country" is called the "main" case or proceeding. A case in any other country is called a "secondary" or "non-main" case or proceeding.⁹⁷ The EU Regulation is regarded as the typical and influential modified (coordinated) universalism model,⁹⁸ which clearly explains how the parallel main and non-main proceedings function. The EU Regulation on Insolvency Proceedings (EIR) is a EU legal instrument directly applicable to the member states of EU with the exception of Denmark. The most important mechanism incorporated in the EIR is the universal effect of main proceedings throughout the 27 EU member states. Once a main proceeding is opened, it shall be granted automatic recognition in other Member States without the need for an exequatur or of prior publication.⁹⁹ However, the possibility of opening of non-main (territorial/secondary) proceedings, was regarded as deviation from the universalist principle that the EIR "is

⁹³ US Bankruptcy Code, s362.

⁹⁴ US Bankruptcy Code, s105

⁹⁵ American Law Institute, Transnational Insolvency Project, International Statement of United States Bankruptcy Law, published by Executive Office, American Law Institute, 2003, 73-74

⁹⁶ McCormack, Gerard, Universalism in Insolvency Proceedings and the Common Law, in: Oxford Journal of Legal Studies, Vol. 32, No. 2(2012), 329.

⁹⁷ Bufford, United States International Insolvency Law 2008 – 2009, New York: Oxford University Press, 2009, pp. 3

⁹⁸ Wessels, International Insolvency Law, Vol.X, Deventer: Kluwer, 2012, pp.10939

⁹⁹ article 16, EIR; the Virgós/Schmit Report (1996) no.19 (c)

essentially a territorial system with universalist pretensions”.¹⁰⁰ In accordance with article 3(2) of the Regulation, the secondary proceedings could be opened without reference to the main proceedings. Moreover, it is stated under the article 4 and article 28 of the Regulation that the law applicable to the non-main proceedings shall be *lex fori*, which entails that the Regulation provided for assets within the scope of secondary proceedings to be disposed of in accordance with the law of the forum state. They must only be liquidation proceedings, which might have negative impact on the rescue culture. In the case of Bank Handlowy,¹⁰¹ one of the most important questions to be answered is whether protective proceedings preclude winding-up secondary proceedings. The CJEU rules that neither Article 27, nor Article 3(3) makes any distinction according to the purpose of the main proceedings, and that therefore secondary proceedings may always be opened.¹⁰² The CJEU indicated that

As observed by the referring court, the fact remains that the opening of secondary proceedings, which, under Article 3(3) of the Regulation, must be winding-up proceedings, risks running counter to the purpose served by main proceedings, which are of a protective nature.¹⁰³

The traditional discussion between the pros and cons of universality and territoriality usually leads to a “struggle over jurisdiction”.¹⁰⁴ It seems that by employing the parallel main and non-main proceedings, the Regulation does not end the conflicts. The Model Law does not determine jurisdiction. Pursuant to the key objectives of the Model Law, the recognition of proceedings via simplified procedures is given the priority. Accordingly, a foreign proceeding shall be recognized as a foreign “main” or as a foreign “non-main” proceeding, which will be subject to different reliefs.¹⁰⁵ The Model Law is deemed as an international regime encompassed elements of both “universality” and “territoriality”.¹⁰⁶ Wessels highlighted some major ingredients of the Model Law that reflect both universality and territoriality¹⁰⁷ and it is remarked that the Model Law should not be labeled as “universality”.¹⁰⁸ As the international regime adopted by around 20 jurisdictions all over the world, the Model Law lays the emphasis on access,

¹⁰⁰ Tung, Fredrick, “Is International Bankruptcy Possible” (2001) 23 Michigan J Intl L 31, 77.

¹⁰¹ The French Court opened insolvency proceedings in respect of a Polish company, the COMI of which was situated in France. The *sauegarde* 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 under Polish law. Thereafter, the French Court approved a rescue plan for Polish company, pursuant to which debts would be paid off in installments over a 10 year period. Having originally maintained 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, once the French Court approved the rescue plan, the Polish company argued that the secondary proceedings should be discontinued as the main proceedings had closed. In *Bank Handlowy w Warszawie SA v. Christianapol sp. z o.o.* (Case C-116/11); See also Cooke, Charlotte, *Bank Handlowy w Warszawie SA v. Christianapol sp. z o.o.* (Case C-116/11), International Corporate Rescue, vol.10, issue 5.

¹⁰² In *Bank Handlowy w Warszawie SA v. Christianapol sp. z o.o.* (Case C-116/11), para. 55, 56

¹⁰³ In *Bank Handlowy w Warszawie SA v. Christianapol sp. z o.o.* (Case C-116/11), para. 59

¹⁰⁴ Wessels, International Insolvency Law, Vol.X, Deventer: Kluwer, 2012, 27

¹⁰⁵ Article 17 (2), Model Law.

¹⁰⁶ Flashen, Evan D. and Silverman, Ronald J., Cross-border Insolvency Cooperation Protocols, in: 33 Texas International Law Journal (1998), 587; Gerber, Elizabeth J., Not all politics is local: the New Chapter 15 to govern cross-border insolvencies, in: 71 Fordham Law Review (2003), 2098

¹⁰⁷ Wessels, International Insolvency Law, Vol.X, Deventer: Kluwer, 2012, 298-299.

¹⁰⁸ Wessels, International Insolvency Law, Vol.X, Deventer: Kluwer, 2012,156

recognition, relief, cooperation and coordination. Jurisdiction no longer plays a determining factor under that regime. Regardless of universalism or territorialism, both the EIR and the Model Law introduced the provisions concerning cooperation and communication between the courts and representatives of the parallel proceedings into the respective regime.¹⁰⁹

3.1.3 The Cooperative Approach

From pure universalism to modified universality, from ancillary proceedings with extra-territorial jurisdiction to parallel proceedings with main and non-main jurisdiction, the way to approach universalism is undergoing changes. It also should be noted that descriptions or norms are not always univocal.¹¹⁰ For example, Westbrook now replaces “universal” and “unitary” by “a single insolvency law” and “a single forum”.¹¹¹ The same thing happened to LoPucki’s theory of “cooperative territorialism”. He designed the regime that every state can administrate the bankruptcy asset located within its jurisdiction and meanwhile courts and representatives should cooperate and communicate.¹¹² Cooperation and communication between liquidators is also stipulated under article 31 of the EIR, which is based on the model of modified universalism. In addition, LoPucki’s theory also involves some universalism factors such as the supported coordination between estates. To identify whether or not it is main or non-main is just one way to approach universalism as close as possible. However, it doesn’t mean it equals to universalism. From the experience of the Model Law, an instrument used to guide around 20 states from civil-law as well as common-law jurisdictions all over the world, there are different paths involving both the elements of universalism and territorialism.

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.¹¹³ Both the Regulation and the Model Law provide special provisions with respect to cooperation.¹¹⁴ A more recent model is *Global Principles for Cooperation in International Insolvency Cases* (Global Principles)¹¹⁵ 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 Guidelines have already been used in many cross-border cases, recently in

¹⁰⁹ article 31, EIR; Chapter IV, the Model Law

¹¹⁰ Buxbaum, Hannah, Rethinking International Insolvency: The Neglected Choice-of-Law Rules and Theory, in: 36 *Stanford Journal of International Law* 2000, 26

¹¹¹ Westbrook, A Global Solution to Multinational Default, in 98 *Michigan Law Review* (2000), 2296

¹¹² LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 *CORNELL L. REV.* (1999), 750

¹¹³ See Balz, M, “The European Union Convention on Insolvency Proceedings” (1996) 70 *Am Bankr LJ* 485, 531.

¹¹⁴ Article 31, the Regulation; Chapter IV, V, the Model Law

¹¹⁵ The Report is based on a global research and survey and aims at a worldwide acceptance of the ALI-NAFTA Principles.

such cases as *Nortel Networks* and *Lehman Brothers*, involving some 70 insolvency proceedings in 17 countries all over the world.¹¹⁶

Regardless of the boundary set up by universalism and territorialism, the regional cross-border insolvency regime will be established on the ground of the intermediate principles, which also corresponding to the current integration reality in China. For instance, as further explained below the principle of comity will be chosen as legal basis of recognition among the four regions in China. Guided by the spirits of cooperation, a more functional approach will tentatively be adopted to deal with the jurisdiction problems.

3.2 Comity as Legal Principle for Recognition

To establish a regional cross-border insolvency cooperative framework, what will be the first problem that has to be solved, jurisdiction or recognition? I opt for recognition. Jurisdiction is a matter of sovereignty. Under the EU regional regime, the priority has been given to jurisdiction because the cooperation, though based on the principle of mutual trust, is still committed among the Member “States” in EU. In China there is struggle between the “one country” policy and the independent jurisdiction of each region. The “Recognition First” approach, which has been adopted under the Model Law, is more politically neutral and workable for legal cooperation within a country. In addition, the main objective of a regional cross-border insolvency cooperative framework is to seek for a more efficient solution that can better avoid the dissipation of assets that may result from time-consuming procedures or considerations. Moreover, without recognition, the relevant reliefs cannot be granted, which is a more meaningful content that contributes to successful cooperation. To enable timely actions, the disputes over the jurisdiction issues can be settled down at a later stage if necessary. The type of recognition will be divided into the main proceeding and the non-main proceeding.

A court is not obliged to grant recognition of insolvency proceedings opened in other jurisdictions since it entails that the foreign laws will have an extraterritorial reach within the ambit of its own territory. Nevertheless, we do not live in a world where people do not talk to each other. The dual impact of globalization and technological innovation has changed international commerce forever. Transactions involving multinational businesses can be carried out in mere seconds, regardless of the geographical location of the parties to the transaction.¹¹⁷ Countries have to recognize that it is necessary to rely on other countries to achieve domestic goals and conversely, to assist other countries that are seeking similar “regulatory expectations.”¹¹⁸

3.2.1 Balance between Mutual Trust and Reciprocity

¹¹⁶ Wessels and Fletcher, *The Long March towards Attaining a Global Approach to Cross-Border Insolvency Cases in a Globalizing World*, 2013

<http://bobwessels.nl/Tp/wp-content/uploads/2014/01/2013-08-25-The-Long-March.pdf>

¹¹⁷ Buckel, Elizabeth, *Curbing Comity: The Increasingly Expansive Public Policy Exception of Chapter 15*, 44 *Geo. J. Int'l L.* 1281, 2013, ft.1.

¹¹⁸ *Laker Airways Ltd v Sabena, Belgian World Airlines* 731 F2d 909 (DC Cir 1984) 937.

To achieve cooperation in that regard, there are different options available. One is the principle of mutual trust under the EU Regulation. In retrospect to EU's integration experience, from the Treaty of Paris to the Treaty of Lisbon, it is clear that mutual trust can simply not be established overnight.¹¹⁹ Moreover, the relationship between China and the two SARs cannot be deemed as a Union, a supranational organization and member states but a Central People's Government and local administrative regions, which shall enjoy a high degree of autonomy and come directly under the Central People's Government.¹²⁰ In pursuit of resumption of sovereignty, the Central Government, based on the "one country, two systems" policy, restraints its power and promises to keep the way of life as it is in both regions within 50 years in accordance with the Basic Law.¹²¹ However, in a country with two systems, conflicts are something inevitable. For instance, after reunification, there are several occasions, which incurred the interpretation of the Basic Law. Each of them might challenge the smooth implementation of the Basic Law. In 1999 there was dispute involving the right of mainland-born children to stay in HKSAR and resulted in a series of related cases.¹²² The second one related to the constitutional development of Hong Kong, specifically the provisions in the Basic Law on the method for the selection of the Chief Executive and the method for the formation of the Legislative Council after 2007.¹²³ The third occasion related to the length of office of the Chief Executive of Hong Kong.¹²⁴ In addition, in a case between an American company against the Democratic Republic of the Congo (DR Congo), it raised the problem related to the application of the doctrine of state immunity.¹²⁵ It seems that mutual trust is still under construction in China, which might still be too high to be reached at this moment.

The principle of reciprocity is applied right now in the Mainland. It is provided under the article 5 of the EBL that in addition to international treaties, the principle of reciprocity serves as one of the conditions to grant recognition to foreign insolvency proceedings. In Taiwan, the latest draft of Taiwan Bankruptcy Act, it is stated that the Taiwan court shall dismiss the application of recognition if the foreign court that opened the insolvency proceeding does not recognize the Taiwan insolvency

¹¹⁹ Chalmers, Damian, Davies, Gareth & Monti, Giorgio, *European Union Law* (2nd ed.), Cambridge University Press, 2010, pp.1-48.

¹²⁰ The Basic Law of HKSAR, art.12; the Basic Law of Macao SAR, art.12.

¹²¹ The Basic Law of HKSAR, Chapter I General Principles, art.5; the Basic Law of Macao SAR, Chapter I General Principles, art. 5

¹²² *Ng Ka Ling & Others v Director of Immigration* (1999) 2 HKCFAR 4 and *Chan Kam Nga & Others v Director of Immigration* (1999) 2 HKCFAR 82

¹²³ The Basic Law does not have clear provisions spelling out the procedures for amending the relevant provisions. See *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

¹²⁴ In March 2005, the State Council accepted the resignation of the second-term Chief Executive in the middle of his five-year term. A question arose as to whether the term of office of his successor should be a full five-year term, or the remainder of the original five-year term (i.e. two years). See *Basic Law-the Source of Hong Kong's Progress and Development*, in:

15 Anniversary Reunification, p.87,

http://www.basiclaw.gov.hk/en/publications/book/15anniversary_reunification_ch2_3.pdf

¹²⁵ On 26 August 2011, the SCNPC confirmed, inter alia, that Hong Kong should grant absolute state immunity to DR Congo. See Tam, Maria Wai-chu (editor-in-chief), *Basic Law-the Source of Hong Kong's Progress and Development*, in: 15 Anniversary Reunification, 2012, p.87-88, http://www.basiclaw.gov.hk/en/publications/book/15anniversary_reunification_ch2_3.pdf

proceedings,¹²⁶ which has been summarized by Westbrook as negative reciprocity.¹²⁷ Nevertheless, it might not be appropriate to apply the same approach to each other within a region where the integration is undergoing as those applied to the foreign insolvency proceedings. The principle of reciprocity could result in a stalemate or retaliatory action concerning recognition and thus goes against the purposes of closer cooperation. In fact, comity is also the approach currently adopted by the Hong Kong court. In the case of *Hong Kong Institute of Education v. Aoki Corporation* [2004] 2 HKLRD 760, the court held that

The attitude of comity in relation to foreign insolvency (or similar) proceedings is one which English and Hong Kong Courts have espoused.¹²⁸

Moreover, It has been said that “in the absence of reciprocity, only international agreements may achieve cooperation”.¹²⁹ As aforementioned, on the regional level, there are already mutual arrangements in matters of recognition of civil or commercial judgments between the Mainland China and the other three regions.¹³⁰ If the principle of reciprocity is adopted to deal with regional legal cooperation in China, it can be deemed as a step backward in that regard. In a region where the socio-economic cooperation is getting closer, people, products and problems gradually move freely cross the border and out of reach of their own jurisdiction. To achieve the expectation that the local interests can be protected once located in some other neighboring jurisdiction, every region has to often rely on each other in the way of cooperation. Thus, comity, which is a principle, softer than mutual trust but stronger than reciprocity, can serve as the proper legal basis that encourages the local courts to act all times to increase regional legal ties in order to advance the comprehensive and enhanced legal cooperation among the four regions in China.

3.2.2 Uncertainty of Comity

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”.¹³¹ Comity is also a “complex and

¹²⁶ article 299, Taiwan Debt Clearance Act (latest draft), published online by the Judicial Yuan on Feb. 14 2014

¹²⁷ Westbrook, Jay Lawrence, Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum (1991) 65 Am Bankr LJ 457, 468.

¹²⁸ *Hong Kong Institute of Education v. Aoki Corporation* [2004] 2 HKLRD 760, para.125

¹²⁹ Omar, Paul J., *International Insolvency Review 2002*, United Kingdom: Ashgate Publishing, Aldershot, pp. 173-200.

¹³⁰ 2006 Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements between Parties Concerned; 2006 Arrangement Between the Mainland and the Macao Special Administrative Region on the Mutual Recognition and Enforcement of Civil and Commercial Judgments; 2009 Agreement between Both Sides of the Taiwan Strait on Jointly Fighting against Crimes and Mutual Judicial Assistance

¹³¹ Cane, Peter, and Conaghan, Joanne, *The New Oxford Companion to Law* (online version), Oxford University Press, 2008, www.oxfordreference.com

elusive” concept,¹³² which courts have attempted to define for more than a century but have never formed a workable definition.¹³³ A tentative explanation was described by Judge Gray of the US Supreme Court in *Hilton v Guyot* 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.¹³⁴

However, in the end, the Supreme Court, basing its decision on reciprocity, refused to grant comity on the grounds that France refuses conclusory effect to judgments granted by the United States and other foreign countries absent a governing treaty between said nations.¹³⁵ Nevertheless, In the process of adopting the Model Law in U.S., it is stated in the Report of the US Committee on the Judiciary House of Representatives,

Reciprocity was specially suggested as a requirement for recognition on more than one occasion in the negotiations that resulted in the Model Law. It was rejected by overwhelming consensus each time. The United States was one of the leading countries opposing the inclusion of a reciprocity requirement.

The question is if comity is a general principle allied to common sense and a desire to make things work, can it simply be put aside because it lacks a precise definition? Probably not. On the contrary, the uncertainty of the comity has been well acknowledged, as the court in *Re Johnson* said:

... comity is, and ever must be, uncertain; that it must necessarily depend on a variety of circumstances which cannot be reduced to any certain rule¹³⁶

Later in *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, the D.C. Circuit summarized that comity in a brief word is a complex and elusive concept since comity varies according to the factual circumstances surrounding each claim for its recognition, the absolute boundaries of the duties it imposes are inherently uncertain. The court stressed that

However, the central precept of comity teaches that, when possible, the decisions of foreign tribunals should be given effect in domestic courts, since recognition fosters international cooperation and encourages reciprocity, thereby promoting predictability and stability through satisfaction of mutual expectations. The interests of both forums are advanced - the foreign court because its laws and policies have been vindicated; the domestic country because international cooperation and ties have been strengthened. The rule of law is also encouraged, which benefits all nations.¹³⁷

¹³² *Laker Airways Ltd v Sabena, Belgian World Airlines* 731 F2d 909 (DC Cir 1984), 937, cited from 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.

¹³³ Janis, Mark W., International Law (6th ed.), 2012, pp.373

¹³⁴ *Hilton v Guyot* 159 US 113 (1895), 163-164

¹³⁵ Beckering, Kevin J., United States Cross-border Corporate Insolvency: the Impact of Chapter 15 on Comity and the New Legal Environment, in: 14 Law & Bus. Rev. Am. 281 2008, pp. 286

¹³⁶ *Re Johnson* [1903] 1Ch 821, 829-30, cited from 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, ft.31.

¹³⁷ *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (1984)

Obviously, the uncertainty does not prevent comity from being a workable principle. Moreover, comity found its way into the Chapter 15 of the Bankruptcy Code in the end.¹³⁸ However, comity cannot be applied without any limitation. If comity “would be contrary or prejudicial to the interest of the nation called upon to give it effect,”¹³⁹ it should be withheld and recognition denied,¹⁴⁰ which can be regarded as defense mechanisms to solve its inherent uncertainty problems.

3.2.3 Protective Mechanisms

To enhance its feasibility, there are protective mechanisms available, which can help to reduce the side effects caused by the ambiguity of comity. One is public policy and the other is discretionary grant of relief as provided under the Model Law.

Public Policy

In all the aforementioned mutual legal arrangement in matters of recognition and enforcement of civil and commercial judgments signed between China and the three regions, public policy is incorporated as one of the negative recognition conditions, in which insolvency cases are excluded.¹⁴¹ Hence, the mutual legal arrangements do not provide the specialized concept of public policy in the context of insolvency. What are the key elements that should be taken into consideration concerning public policy in matters of cross-border insolvency?

As explained in the Virgós-Schmit Report, public policy under the Regulation covered fundamental principles of both substance and procedure. Public policy may thus protect participants or persons concerned by the proceedings against failures to observe due process, which in particular relates to the equality of arms principle, including the adequate opportunity to be heard and the rights of participation in the proceedings.¹⁴² In accordance with the Model Law, lack of due process and notice is also held to be manifestly contrary to public policy in practice. In *re Silvec* the modified an automatic stay after an Italian debtor did not give a U.S. creditor notice of Italian insolvency proceedings, holding that fundamental public policy under U.S. law is that parties in a legal proceeding are entitled to due process and notice. Denying those rights, therefore, is manifestly contrary to that policy. The court noted that there were no procedures in Italy that would allow for the protection of the creditor's rights of notice and opportunity to be heard.¹⁴³ In addition, privacy rights shall also be taken into

¹³⁸ 11 U.S.C. §§ 1507 and 1509

¹³⁹ *Cunard S.S. Co. v. Salen Reefer Servs. AB*, 773 F.2d 452, 457 (2d Cir. 1985)

¹⁴⁰ Buckel, Elizabeth, *Curbing Comity: The Increasingly Expansive Public Policy Exception of Chapter 15*, 44 *Geo. J. Int'l L.*, 2013, pp. 1285

¹⁴¹ Article 9, para. II, 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 11(6), Arrangement between the Mainland and the Macao Special Administrative Region on the Mutual Recognition and Enforcement of Civil and Commercial Judgments; Article 10, Agreement between Both Sides of the Taiwan Strait on Jointly Fighting against Crimes and Mutual Judicial Assistance

¹⁴² Virgós-Schmit Report, para. 206

¹⁴³ *In re Silvec SRL*, WL 3651250 (E.D. Okla. Aug. 18, 2011), para.7.

consideration. In *re Toft*,¹⁴⁴ it involved a request applied by the foreign representative in a Germany Insolvency proceeding to get access to the debtor's e-mail accounts under Chapter 15, which were stored on servers in the United States.¹⁴⁵ While German law permitted such mail interception,¹⁴⁶ the ex parte interception of electronic communications is illegal under two U.S. statutes.¹⁴⁷ The Court held that the relief sought would be manifestly contrary to public policy because “the relief sought would directly compromise privacy rights subject to a comprehensive scheme of statutory protection, available to aliens, built on constitutional safeguards incorporated in the Fourth Amendment as well as the constitutions of many [s]tates.”¹⁴⁸

With respect to protection of local interests, it seems that the public policy exception is applied more extensively under the Model Law than under the Regulation. As incorporated into the systematic context of the Regulation, the public policy exception shall also be guided by the principle of universality (recital 11) and of equal treatment of creditors (recital 21), which are opposed to any unnecessary fragmentation of insolvency proceedings based on a non-recognition of foreign insolvency proceedings.¹⁴⁹ Therefore, Article 26 sets a high threshold by providing that a state may refuse to recognize insolvency proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State’s public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.¹⁵⁰ There are only a few cases where the public policy exception was raised successfully.¹⁵¹ For instance, the adequate protection of employees in insolvency proceedings is an important issue. In the case of *Re Rover France SAS*, it involved an English holding company, having eight subsidiaries registered in various European countries. Rover France SAS is one of the subsidiaries, which was registered in France. The main proceeding was opened in UK. However, the French public prosecutor of Nanterre requested the court to refuse recognition of the main proceeding in UK on the basis that it amounted to a manifest breach of public policy as the company carried on business in France, its customers and employees were in France and it complied with all French civil law, employment law and tax and accounting rules. For the interpretation of public policy, the court also referred to *Bamberski v Krombach* (Case C-7/98 [2000] E.C.R.I – 1935; [2001] Q.B. 709 and held: where Article 10 provides that the effects of main insolvency proceedings on employment contracts are determined by the law of the Member State, the court noted that the administrators put in place measures to ensure that employees would be treated no differently than they would have been in a French winding-up. Where employees’ interests and dealers’ interests would be adequately protected there was no basis to refuse recognition pursuant to Article 26.¹⁵² It seems

¹⁴⁴ In *re Toft*, 453 B.R. 186 (S.D.N.Y. 2011).

¹⁴⁵ In *re Toft*, 453 B.R. 186 (S.D.N.Y. 2011), para. 188-189.

¹⁴⁶ In *re Toft*, 453 B.R. 186 (S.D.N.Y. 2011), para. 197-198.

¹⁴⁷ The two Statutes referred to the Wiretap Act, 18 U.S.C. § 2511 (2012) and the Privacy Act, 18 U.S.C. § 2701 (2012). See In *re Toft*, 453 B.R. at 196-197.

¹⁴⁸ In *re Toft*, 453 B.R. 186 (S.D.N.Y. 2011), para. 198.

¹⁴⁹ Hess, Burkhard, Oberhammer, Paul, Pfeiffer Thomas, External Evaluation of Regulation No.1346/2000/EC on Insolvency Proceedings, JUST/2011/JCIV/PR/0049/A4, pp.392

¹⁵⁰ Moss, Fletcher, Isaacs(ed.), The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide (2nd ed.), Oxford University Press, 2009, para.5.86

¹⁵¹ Hess, Burkhard, Oberhammer, Paul, Pfeiffer Thomas, External Evaluation of Regulation No.1346/2000/EC on Insolvency Proceedings, JUST/2011/JCIV/PR/0049/A4, pp.119-120

¹⁵² Wessels, International Insolvency Law, Vol.X, Deventer: Kluwer, 2012, para. 10821.

that the public policy has been applied in a narrow and strict manner. On the other hand, the Model Law does not adopt the principle of universality and is not based on the universalism approach to transnational bankruptcies, which is “one law, one court.”¹⁵³ Therefore, it is less likely that a single bankruptcy proceeding in the debtor's “home country” where a single court applies the bankruptcy law of its country and makes a unified worldwide distribution to creditors through liquidation or reorganization as envisaged by the universalist.¹⁵⁴ For instance, in *re Qimonda AG*, the U.S. court held that policies that promote technological innovation merely in order to protect the U.S. patent licensees can be deemed as the fundamental public policy.¹⁵⁵ In *re Vitro*, the court expanded the public policy exception to include the protection of third party claims in a bankruptcy case.¹⁵⁶

A regional cooperative framework is designed for the sake of fostering cooperation and providing legal certainty for trade and investment. That objective cannot be reached if public policy exception is invoked in an expansive way. Therefore, it is better to follow the EU approach in that regard. The terminology “manifestly contrary to” shall be incorporated into China’s cross-border insolvency cooperative regime, indicating that it should be reviewed, with caution, not in an abstract manner, but on the basis of an assessment of all facts and the concrete circumstances of the case.¹⁵⁷

Discretionary Relief

To grant recognition or not is to press a yes or no button. The public policy exception exactly interferes with that process. The Model Law provides an alternative to achieve the balance between the local policy and cooperation, which is the discretionary relief.¹⁵⁸ It seems to be a more acceptable approach because a direct and overall rejection to the request for recognition from the neighboring court can be technically avoided. Instead, the courts are equipped with more flexible mechanisms that they may tailor to the case at hand based on any conditions they considers appropriate.¹⁵⁹

In Hong Kong, according to s. 198 of the Companies Ordinance, where a company is being wound up by the court, the court may on the application of the liquidator by order direct that all or any part of the property of whatsoever description belonging to the company or held by trustees on its behalf shall vest in the liquidator by his official name, and thereupon the property to which the order relates shall vest accordingly, and the liquidator may, after giving such indemnity, if any, as the court may direct, bring or defend in his official name any action or other legal proceeding which relates to that property or which it is necessary to bring or defend for the purpose of effectually winding up the company and recovering its property. This applies irrespective of whether the company is a Hong Kong or non-Hong Kong company.¹⁶⁰ The court has a

¹⁵³ Tung, *Is International Bankruptcy Possible?* 23 Mich. J. Int'l L. 31, 40 (2001)

¹⁵⁴ Westbrook, *Universalism and Choice of Law*, 23 Penn. St. Int'l L. Rev. 625, 625-26 (2005)

¹⁵⁵ In *re Qimonda AG*, 462 B.R. (Bankr. E.D. Va. 2011), para.185

¹⁵⁶ In *re Vitro*, *S.A.B. de C.V.*, 473 B.R. 117 (Bankr. N.D. Tex. 2012), at 1070

¹⁵⁷ Vigros-Schmit Report, para. 204; See also Virgós and Garcimartín, *The European Insolvency Regulation: Law and Practice*, Kluwer Law International, 2004, pp.404.

¹⁵⁸ para. 176, the Guide and Interpretation.

¹⁵⁹ para.191, the Guide and Interpretation.

¹⁶⁰ Kwan, Susan, *Company Law in Hong Kong – Insolvency*, Sweet & Maxwell, 2012, ft.207.

discretion and may refuse or limit its vesting order.¹⁶¹ The Mainland, Macao SAR and Taiwan provide no specific rules regarding the reliefs in assistance with a foreign insolvency proceeding. For instance, in the Mainland since the EBL does not provide the relevant rules, the assets can only be enforced through the regimes of civil litigation and civil execution under the Civil Procedure Law (CPL).¹⁶² The problem is that it is required to grant more comprehensive reliefs during the insolvency proceeding than those under the ordinary civil proceeding in order to protect the assets of the debtor and the interests of the creditors. For example, in accordance with the CPL, some provisional reliefs are available. Pursuant to the article 100 of the CPL, in the cases where the execution of a judgment may become impossible or difficult because of the acts of either party or for other reasons, the people's court may, at the application of the other party, order the adoption of measures for property preservation, order the party concerned to do something or prohibit it from doing something. Moreover, in the absence of such application, the people's court may of itself, when necessary, order the adoption of measures for property preservation. However, there is no equivalent provision as that under the Model Law, which entrusts the administration or realization of all or part of the debtor's local assets to the foreign representative.¹⁶³ As opposed to the "individual" type of relief that may be granted before the commencement of insolvency proceedings under rules of civil procedure, such a special mechanism is usually available only in collective insolvency proceedings on purpose of protection and preservation of the value of assets.¹⁶⁴ Hence, the stay of the execution and entrusting the assets to the representative is the major types of proceeding that can be put into the category of provisional relief. With respect to the relief upon recognition, in accordance with the article 311 of the draft of the Taiwan Bankruptcy Act, application can be filed for enforcement of the foreign insolvency proceeding upon the permission handed down by the court based on the article 299 but the way of enforcement has not been explained. The Model Law has listed the types of relief that can be granted upon recognition under the article 21. In addition to the reliefs related to the stay of proceeding or assets of the debtor, it also stipulates the investigation provision, including examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs and etc.

Under China's regime the recognition is based on the principle of comity not on the basis of the principle of mutual trust adopted by the Regulation. Thus the effect of the main proceeding might not be able to produce the same strong effects automatically in any other regions as that under the law of the region of the opening of proceedings. Instead, the approach under the Model Law can be referred to. The types of discretionary relief, regardless of main or non-main, it shall be classified as provisional relief and relief upon recognition. Once recognized as the main proceeding, the reliefs to be granted to the main proceeding shall not be discretionary. Those reliefs include stay of commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities; stay of execution against

¹⁶¹ Kwan, *Company Law in Hong Kong – Insolvency*, Sweet & Maxwell, 2012, 12.044.

¹⁶² Wang Weiguo, *National Report for the People's Republic of China*, in: Faber, Dennis, Vermunt, Niels, Kilborn, Jason & Richter, Tomáš (ed.), *Commencement of Insolvency Proceedings*, Oxford University Press, 2012, pp. 173.

¹⁶³ Article 19 (1)(b), the Model Law

¹⁶⁴ para. 171, the Guide and Interpretation of the Model Law

the debtor's assets; and suspension of the right to transfer, encumber or dispose of any assets of the debtor.¹⁶⁵

3.3 Functional Jurisdiction Solution

3.3.1 Jurisdiction: an unavoidable issue

If states are not likely to surrender their sovereignty in resolving entities within their jurisdictions,¹⁶⁶ the Mainland, SARs and Taiwan, each of whom has independent legislation system, are unlikely to give up its jurisdiction over insolvency proceedings, either. In the Mainland China, the principle of state sovereignty is one of the negative recognition conditions as stipulated under the article 5 of the EBL, which relates to jurisdiction. There is a model case published in Gazette of Supreme People's Court.¹⁶⁷ That case involved a contract dispute between a Hong Kong law firm and a company registered in the Mainland, which was a subsidiary 100% held by a company registered in Bermuda. The defendant raised the jurisdiction objection because prior to the petition to the Mainland court, the law firm (the applicant) has already brought the lawsuit against the defendant and its parent company before the Hong Kong court. The defendant contended that the place of registration of the applicant was in the Mainland, based on which the Mainland court can exercise its jurisdiction.

Exercising jurisdiction in the civil proceeding reflects the state sovereignty. ... Parallel proceedings are not ruled out in China's judicial practice. With respect to the same case, if the court has jurisdiction in accordance with China's legislation or international treaties, regardless of whether the proceeding has been opened or brought up before the court in other states or regions, China's jurisdiction should not be interfered.

According to the contract, Hong Kong is *lex loci solutionis* and thus also an appropriate forum. To resolve the conflicts of jurisdiction between the Mainland and Hong Kong, it is required to maintain the jurisdiction of the Mainland court as well as to enhance the mutual assistance and cooperation. As for the contract dispute, if it is accepted by the Hong Kong court, the applicant will have to bring the lawsuit all over again before the Mainland court. Otherwise the judgment cannot be enforced because the defendant is not registered in Hong Kong ... Therefore, the court cannot dismiss the application on the ground of *forum non conveniens*.

Similar to UK, Hong Kong also exercises broad jurisdiction over insolvency cases. The Hong Kong court has the authority to wind up any unregistered company, including foreign incorporated company.¹⁶⁸ In theory there is possibility that the Hong Kong court can also recognize the foreign proceeding in the way of opening the Hong Kong insolvency proceeding as ancillary proceedings to the foreign insolvency proceeding. In reality, it is not. In *Re Pioneer*, a company (Pioneer Iron and Steel) was incorporated in the BVI in 2003. In June 2010, resolutions were passed by the shareholder and directors to place the company into liquidation and liquidators were appointed in the BVI (the BVI liquidators). On 3 August 2010, the BVI liquidators presented a petition to the Hong

¹⁶⁵ Article 20 (1), the Model Law

¹⁶⁶ IMF Resolution of Cross-border Banks, Legal, Monetary & Capital Markets Departments, Resolution of Cross-border Banks – A Proposed Framework for Enhanced Coordination, available at <https://www.imf.org/external/np/pp/eng/2010/061110.pdf>

¹⁶⁷ [2003] Xiamen Intermediate People's Court of Fujian Province Economic First Instance No. 146, in: Gazette of Supreme People's Court Vol.7, 2004, pp.32-34

¹⁶⁸ S327, HK Companies Ordinance

Kong court for the winding up of the company in Hong Kong in order to be able to avail themselves of the investigatory powers of a Hong Kong liquidator. In January 2013. The Hong Kong Court considered, amongst other matters, its jurisdiction to wind-up unregistered companies under sections 326 and 327 of the Companies Ordinance.¹⁶⁹ With respect to opening of ancillary proceeding to assist the liquidation in the company's state of incorporation, the Hong Kong court held

The three core requirements had been satisfied¹⁷⁰ there was no independent basis for the Court to proceed to order an ancillary liquidation...¹⁷¹

In particular, the court stated that

Hong Kong has not enacted an equivalent to section 426 of the Insolvency Act 1986 and is not a signatory to the UNCITRAL Model Law on Cross-Border Insolvency, which would have enabled orders to be made for the purpose of assisting liquidators of unregistered companies investigate in Hong Kong matters.¹⁷²

Hence, once the Hong Kong court assumes its jurisdiction over winding-up of an unregistered company, the parallel Hong Kong proceedings are not in the ancillary nature.

Macao exercises exclusive jurisdiction over the lawsuits concerning the bankruptcy or insolvency of legal persons, whose domicile is within Macao.¹⁷³ In accordance with Commercial Code of Macao, the domicile of commercial enterprises shall be definite, which shall be registered in accordance with the Commercial Registration Code of Macao. With respect to affirmative requirements for recognition of civil judgments from outside Macao, it is stated in accordance with the Article 1200-I (3),

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

If the "home" jurisdiction of the bankruptcy proceeding is in Macao, the foreign insolvency proceedings will not be able to seek recognition before the Macao court.

In Taiwan, the local assets are ring-fenced under the current Taiwan Bankruptcy Act, which stipulates:

¹⁶⁹ Simon D. Powell, Eleanor Sin Chee Lam, Hong Kong Jurisdiction Relating to Cross-border Insolvency Issues Becomes Increasingly Clear, April 22, 2013, <http://www.lexology.com> (latest visited on 5 June 2013).

¹⁷⁰ The three core requirements refer to: (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. *Yung Kee Holdings* [2012] 6 HKC 246, at 70 and *Re Beauty China Holdings Ltd* [2009] 6 HKC 351 at 23.

¹⁷¹ [2013] HKCFI 324, para.44.

¹⁷² *Ibid.*

¹⁷³ Art.20, CPCM

If reconciliation or declaration of bankruptcy is rendered in a foreign country, it shall have no binding effect on the assets of the debtor or the bankrupt, which are located in Taiwan.¹⁷⁴

In addition, pursuant to the article 299 (1) of the latest draft of Taiwan Bankruptcy Act, published by the Judicial Yuan on Feb. 14 2014, the court shall dismiss the application of recognition of the foreign proceedings, if

in accordance with the law of Taiwan, the foreign courts do not have jurisdiction.

In accordance with the article 319 of the draft, the rules of the Chapter VI (Recognition of Foreign Insolvency Proceedings) shall apply *mutatis mutandis* to the Mainland, Hong Kong and Macao and the negative condition concerning jurisdiction thus can be applied to the three regions as well once the draft is passed.

3.3.2 Coherent Interpretation of COMI without a Definition

COMI has been defined neither under the Regulation nor the Model Law. Instead, it is designed in the form of a presumption, which is rebuttable. COMI under the Regulation and the Model Law share the same origin, which derives from the European Union Convention on Insolvency Proceedings. In Europe, there are two historic approaches. The place of registration prevailed in the common law system. According to this approach, if there were to be proceedings in more than one country, the main proceedings would take place in the jurisdiction of the place of registration, and proceedings in other jurisdictions would be ancillary to the main proceeding.¹⁷⁵ On the other hand, the real seat theory of jurisdiction inspired by the civil law prevails in Europe,¹⁷⁶ which is most likely the idea behind the "center of main interests" concept. The article 3 of the Regulation provides the presumption that the place of the registered office shall be the center of its main interests in the absence of proof to the contrary, which can be deemed as the balance between common law and civil law. That's why it is not difficult to understand that a consensus on its definition is hard to be reached from the beginning.

Without a definition available, how to properly understand COMI? Relevant efforts have been made through non-binding guidance under both regimes. Pursuant to para.75 of Virgós-Schmit Report, which was prepared for the European Convention that is surpassed by the EC Regulation, the concept of "center of main interests" must be interpreted as the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties. ... Where companies and legal persons are concerned, the Convention presumes, unless proved to be the contrary, that the debtor's center of main interests is the place of his registered office.

¹⁷⁴ article 4,TBA. In the process of translation, the author has made some technical modification in wording of this article. In the original Chinese version of article 4 TBA, it is stated China instead of Taiwan. Please note that the act was enacted in 1935, i.e. before establishment of P.R.C. Nowadays, it might cause misunderstanding if China is being utilized here. In order to make clear the effective geographic extent of this article, the context is thus translated into Taiwan.

¹⁷⁵ In *re English Scottish and Australian Chartered Bank*, [1893] 3 Ch. 385, 394 (U.K.); cited Moss, Group Insolvency – Choice of Forum and Law: the European Experience under the Influence of English Pragmatism, 32 Brook. J. Int'l L. 1005 2006-2007, pp.1008, ft. 17.

¹⁷⁶ Moss, Fletcher, Isaacs(ed.), *The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide* (2nd ed.), Oxford University Press, 2009, para. 3.12

This place normally corresponds to the debtor's head office. In accordance with Recital 13 of the Regulation, the 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties. The Virgós-Schmit Report and the Recitals of the Regulation, though not legally binding, play an active role in pursuit of COMI in judicial practice¹⁷⁷ and have been incorporated into the Guide and Interpretation of the Model Law to assist in interpreting COMI.¹⁷⁸ In addition, UNCITRAL has also issued specialized documents in order to help to determine COMI. For example, Interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to center of main interests (COMI)¹⁷⁹ and Centre of Main Interests in the Context of an Enterprise Group.¹⁸⁰

Nevertheless, the question of where a COMI is located will always be a question of fact.¹⁸¹ 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. Here the difference between the Regulation and the Model Law emerges. In the US, where the Model Law was enacted as Chapter 15 of the Federal Bankruptcy Code, it is stated in *Re Tri-Continental Exchange Ltd.* that

"Congress chose to substitute "evidence" for "proof" and otherwise to adopt the Model Law provision word-for-word. The explanation was that the substitution conformed to United States terminology and made clear that the burden of proof of "center of main interests" is on the foreign representative who is applying for recognition of a foreign proceeding as a main proceeding. This comports with the concept of a rebuttable presumption for purposes of Federal Rule of Evidence 301. FED.R.EVID. 301"¹⁸²

The Model Law was introduced into UK via the Schedule 1 to the Cross-Border Insolvency Regulation 2006 (CBIR), which enacted almost verbatim the Model Law. In the *Re Stanford* case,¹⁸³ by referring to Judge Liffand's opinion in *Re Bear Stearns*,¹⁸⁴ Lewison J, the judge of the High Court of Justice of UK, also pointed out that

except where there is no contrary evidence the registered office does not have any special evidentiary value. This change in language of the enactment, as it seems to me, may well explain why the jurisprudence of the American courts has diverged from that of the ECJ¹⁸⁵

¹⁷⁷*Eurofood IFSC Ltd*, 2 May 2006, Case C-341/04; *re SPhinX Ltd* (2006) 351 B.R.103; *Tricontinental Exchange Ltd* (2006) B.R. 627; *Bear Stearns High Grade Structured Strategies Master Fund Ltd* (2008) 389 B.R. 325; *Basis Yield Alpha Fund* (2008) 381 B.R.37; *Re Ernst & Young* (2008) 383 B.R. 773; *Re Innua Canada Ltd* (2009) WL 1025090; *Re Lennox Holdings Ltd* [2009] BCC 155; *Interedil Srl (in liquidation) v Fallimento Interedil Srl, Intesa Gestione Crediti SpA*, 20 Oct. 2011, C-396/09

¹⁷⁸ Para.82-84, the Guide and Interpretation

¹⁷⁹ A/CN.9/WG.V/WP.112

¹⁸⁰ A/CN.9/WG.V/WP.114

¹⁸¹ Smart, Philip, *Cross-border Insolvency*, 2nd ed., London: Butterworth, 1998, pp.162

¹⁸² In *Re Tri-Continental Exchange Ltd* 349 BR 629, 635

¹⁸³ *Re Stanford International Bank* [2010] EWHC Civ 137; [2011] Ch 33 In *Re Stanford* case, there are parallel insolvency proceedings concerning the group in the U.S.A and in Antigua and Barbuda, where the key entity (Stanford International Bank Ltd) is registered. Due to disagreement between the American Receiver and the Antiguan Liquidators, they both applied for recognition under the CBIR in UK in order to control the local assets.

¹⁸⁴ In *Re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd* 374 BR 122

¹⁸⁵ *Re Stanford International Bank* [2009] EWHC 1441 (Ch), at 65

Bearing the difference in mind, Lewison J followed the decision of the ECJ in *Eurofood* and to apply the ascertainability test in determining COMI.¹⁸⁶ The US Receiver submitted that Lewison J should have applied the head office functions test he had recognised in *Re Lennox Holdings Ltd* and not the objective and ascertainable test he applied in this case. They submit that though there are obvious similarities between UNCITRAL and the EC Regulation both in the definitions and the rebuttable presumptions there are differences too. They rely on the fact that the definition of foreign main proceeding in UNCITRAL is wider than that of 'insolvency proceedings' in the EC Regulation in that the former comprehends at least some types of receivership but the latter does not. They suggest that the EC Regulation is based on mutual trust between Member States, as indicated in recital 22, but UNCITRAL does not. They point out that there is nothing in UNCITRAL comparable to recital 13¹⁸⁷ of the EC Regulation.¹⁸⁸

The Chancellor agreed with Lewison J's opinion. Further, the Chancellor indicated that

The COMI test was first adopted in the European Convention on Insolvency Proceedings. In that context it was plain from the Virgós-Schmit Report para 75, quoted in paragraph 36 above, that the appropriate test depended on ascertainability by those who dealt with the debtor so that they should know which law would govern the debtor's insolvency. There can be little doubt but that recital 13 of the EC Regulation was intended to reflect that rationale. The derivation of COMI in Uncitral and the various guides to its interpretation in that context show that it was intended that it should bear at least a similar meaning. Thus both the UN Session paper and the Uncitral Guide, both quoted in paragraph 37 above, expressly refer to the corresponding use of the phrase in the EC Convention.

The same expression used in different documents may bear different meanings because of their respective contexts. I can see nothing in the respective contexts of Uncitral and the EC Regulation to require different meanings to be given to the phrase COMI.¹⁸⁹

As States that both enacted the Model Law,¹⁹⁰ the literal distinction of COMI under the legislations of the USA and UK is visible. The flexibility inherent in the Model Law, as a soft law mechanism, allows the enacting State to make adjustments to its uniform text, including the content of the COMI presumption. If the contents of the COMI presumption under the Model Law can be modified, can the understanding of the phrase COMI be guaranteed to be the same? Probably not. For example, in 2009, the Superior Court of Quebec reached conclusions opposite to the UK decision on *Stanford*.¹⁹¹ The Quebec court recognized the US Receiver as the "foreign representative", holding that the center of interest is in Houston, which is indisputable.¹⁹² Later the Quebec Court of Appeal

¹⁸⁶ *Re Lennox Holdings Ltd* [2009] BCC 155, at 9, 11.

¹⁸⁷ Recital (13), the Regulation: The 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.

¹⁸⁸ *Re Stanford International Bank* [2010]EWCA Civ 137; [2011] Ch 33, at 50

¹⁸⁹ *Re Stanford International Bank* [2010]EWCA Civ 137; [2011] Ch 33, at 53, 54

¹⁹⁰ The Model Law was introduced into UK via the Schedule 1 to the Cross-Border Insolvency Regulation 2006 (CBIR). The US enacted the Model Law as Chapter 15 of the Federal Bankruptcy Code.

¹⁹¹ *Stanford International Bank Ltd.* (Syndic de), 2009 QCCS 4109

¹⁹² *Id.* at 36, "L'importance du centre névralgique de Houston est incontestable. Et le plus équitable est que le Tribunal reconnaisse comme *foreign proceeding* le *receivership* et comme représentant étranger le US Receiver Janvey." (in French)

dismissed the appeal of the Antiguan Liquidators because “the Court is of the view that petitioners’ efforts to have this conclusion set aside shows no reasonable chance of success.”¹⁹³

In EU, the specialized term under the Regulation, as a Union legal instrument, should be interpreted in a uniform way according to the EU law. In practice, there used to be diverse standards applied by different courts when determining the location of a company’s center of main interests.¹⁹⁴ For instance, the “head office function”, where activities such as making strategic, executive and administrative decisions regarding accounting, IT, corporate marketing, branding etc. are performed,¹⁹⁵ has been followed by some European courts, e.g. in the cases of *Collins & Aikman Corporation Group*¹⁹⁶ as well as *Daisytek*.¹⁹⁷ In *King v. Crown Energy Trading AG*,¹⁹⁸ the judge utilized the “central administration” and the “principal place of business” to determine the COMI.¹⁹⁹ However, the CJEU handed down three important cases that set the tone of COMI in Europe. The first one is *Eurofood* case.²⁰⁰ Although the decision of *Eurofood* could be understood to equate COMI with the registered office,²⁰⁶ it set up the benchmark of interpreting COMI in the EU context, which is

The concept of the center of main interests is peculiar to the Regulation. Therefore, it has an autonomous meaning and must therefore be interpreted in a uniform way, independently of national legislation.²⁰⁷

¹⁹³ *Stanford International Bank Ltd.* (Dans l’affaire de la liquidation de), 2009 QCCA 2475, at 31

¹⁹⁴ Marshall, Jennifer (ed.), *European Cross-border Insolvency Looseleaf*, Allen & Overy, Sweet & Maxwell, Latest Release: December 19, 2013, at 1.8.225

¹⁹⁵ Gabriel Moss and Tom Smith, *Commentary on Council Regulation 1346/2000 on Insolvency Proceedings*, in: Moss Fletcher, Isaacs (ed.), para. 8.81

¹⁹⁶ *Collins & Aikman Corporation Group*, Unreported, Ch D, July 15, 2005. See Wessels, *International Jurisdiction and Groups of Companies*, in: *Comparative and International Insolvency Law Central Themes and Thoughts*, 2010, p. 18; See also Marshall, *European Cross-border Insolvency Looseleaf*, at 2.4.2315

¹⁹⁷ *Re Daisytek, ISA Ltd* [2003], B.C.C. 562 Ch. See also Moss, Gariel, *Head Office Function as a Decisive Factor to Determine International Jurisdiction*, in: *Comparative and International Insolvency Law Central Themes and Thoughts*, 2010, p. 36

¹⁹⁸ *King v. Crown Energy Trading AG* [2003] E.W.H.C. 163 (Comm)

¹⁹⁹ *King v. Crown Energy Trading AG* [2003] E.W.H.C. 163 (Comm), at 12-14. the judge held that administration is clearly an aspect of the conduct of business. That aspect has something of the “back office” about it. ... In a small organisation there may be a considerable blurring of functions because the same person will often discharge a variety of roles. The larger the organisation, the easier it should be to discern a division of responsibilities. The location of the company secretary’s office in a major organisation might provide a good clue: a clue which seems to be absent in the present case. However, without attempting to be exhaustively precise, I think that in this case a simple listing of those with important responsibilities in Crown Resources will be enough to show where the central administration is to be found. It also seems to me that the same approach shows where one may find the company’s principal place of business. ... there can be a considerable overlap between what constitutes the central administration of a company and the carrying on of its principal business.

²⁰⁰ *Eurofood IFSC Ltd*, 2 May 2006, Case C-341/04 *Eurofood* is an Irish subsidiary wholly owned by an Italian company, Parmalat. The Italian court also opened an insolvency proceeding against *Eurofood* in Italy, determining that the COMI of it was in Italy. Later the Irish court also opened the insolvency proceeding against *Eurofood*, ruling that the COMI of it was in Ireland where it was registered.

²⁰⁶ G McCormack, *Jurisdictional Competition and Forum Shopping in Insolvency Proceedings*, in: 68 *Cambridge Law Journal* 169, 2009, 189.

²⁰⁷ *Eurofood IFSC Ltd*, 2 May 2006, Case C-341/04, at 31; Followed by *Interedil Srl (in liquidation) v Fallimento Interedil Srl, Intesa Gestione Crediti SpA*, 20 Oct. 2011, C-396/09, at 43, 44

Later in the *Interedil Srl* (“*Interedil*”) case,²⁰⁹ the CJEU provided further guidance on determining the COMI of a company. In 2001, *Interedil* transferred its registered office from Italy to UK. In 2002, the company ceased all activity and was removed from the UK register. One year later, *Intesa Gestione Crediti SpA* filed insolvency proceedings against *Interedil* in Italy. *Interedil* challenged the jurisdiction of the Italian court on the ground that only the UK courts would have jurisdiction following the company’s transfer to the UK. The CJEU was requested to provide guidance on how the COMI under Articles 2 and 3 was to be interpreted. The CJEU indicated that

a debtor company’s main center of interests must be determined by attaching greater importance to the place of the company’s central administration, as may be established by objective factors which are ascertainable by third parties....

Based on the Eurofood decision,²¹⁰ the court further clarified that the third parties is “in particular the company’s creditors”.²¹¹ To rebut the presumption, a company’s central administration shall not be in the same place as its registered office. Moreover, it cannot be rebutted

unless a comprehensive assessment of all the relevant factors makes it possible to establish, in a manner that is ascertainable by third parties, that the company’s actual centre of management and supervision and of the management of its interests is located in that other Member State.²¹²

Following *Interedil*’s decision, the CJEU rendered another judgment involving similar issues in the *Rastelli* case.²¹³ The Commercial Court of Marseille (Tribunal de commerce de Marseille) opened a main proceeding of Médiasucre, the registered office of which is located in France. The liquidator of Médiasucre filed the application in order to put Rastelli, an Italian registered company, together into the liquidation proceeding because the property of the two companies were intermixed. The request was approved by the French Court of Appeal (Cour d’appel d’Aix-en-Provence), holding that the liquidator’s application was not intended to open insolvency proceedings against Rastelli but to join it to the judicial liquidation already opened against Médiasucre.²¹⁴ The Cour de cassation decided to stay the proceedings and to refer to the Court of Justice for the preliminary ruling on the questions of the effectiveness of national substantive consolidation rules in the case of cross-border insolvency and the possibility of joining one company into another company’s main proceeding because of intermix of companies property. With respect to the matter of COMI, the CJEU held that

²⁰⁹ *Interedil Srl (in liquidation) v Fallimento Interedil Srl, Intesa Gestione Crediti SpA*, 20 Oct. 2011, C-396/09

²¹⁰ *Interedil*, at 49, With reference to that recital, the Court also stated, at paragraph 33 of *Eurofood IFSC*, that the centre of a debtor’s main interests must be identified by reference to criteria that are both objective and ascertainable by third parties, in order to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open the main insolvency proceedings. That requirement for objectivity and that possibility of ascertainment by third parties may be considered to be met where the material factors taken into account for the purpose of establishing the place in which the debtor company conducts the administration of its interests on a regular basis have been made public or, at the very least, made sufficiently accessible to enable third parties, that is to say in particular the company’s creditors, to be aware of them.

²¹¹ *Interedil*, at 49

²¹² *Interedil*, at 53

²¹³ *Rastelli Davide e C. Snc v. Jean-Charles Hidoux*, 15 Dec. 2011, Case C191/10

²¹⁴ *Id.*, at 11

That presumption may be rebutted where, from the viewpoint of third parties, the place in which a company's central administration is located is not the same as that of its registered office. In that event, the simple presumption laid down by the European Union legislature in favor of the registered office of that company can be rebutted if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect.²¹⁵

From *Eurofood* to *Interdil* 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 the central administration is not located in the state of incorporation. It is observed that the CJEU plays a key role in safeguarding the autonomous meaning of COMI. The influence of its contribution has been adopted into the proposal with respect to the amendment to the Regulation prepared by the EU Commission as well as the EU Parliament.

It is stated under the current Recital 13 of the Regulation that

The 'center of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.

It is suggested by the EU Commission to insert 13(a) into the former Recital 13

(13a) The 'centre of main interests' of a company or other legal person should be presumed to be at the place of its registered office. It should be possible to rebut this presumption if the company's central administration is located in another Member State than its registered office and a comprehensive assessment of all the relevant factors establishes, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests is located in that other Member State. By contrast, it should not be possible to rebut the presumption where the bodies responsible for the management and supervision of a company are in the same place as its registered office and the management decisions are taken there in a manner ascertainable by third parties.²¹⁶

Further, it is proposed by the EU Parliament that Recital (13a) shall be amended as

(13a) The 'centre of main interests' of a company or other legal person should be presumed to be at the place of its registered office. It should be possible to rebut this presumption, in particular if the company's central administration is located in another Member State than its registered office and a comprehensive assessment of all the relevant factors establishes, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests is located in that other Member State.²¹⁷

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. Once adopted, they will influence the interpretation of COMI in a

²¹⁵ Id, at 35; *Eurofood IFSC*, at 34, and *Interdil*, at 51.

²¹⁶ Amendment 6, COM(2012)0744 – C7-0413/2012 – 2012/0360(COD)

²¹⁷ Id

more direct way. In fact, the authoritative interpretation on COMI rendered by the CJEU also has its impact on the Model Law. In 2013, recognizing that some uncertainty with respect to the interpretation of certain provisions of the Model Law on Cross-Border Insolvency has emerged in the jurisprudence arising from its application in practice, the Working Group V of UNCITRAL issued additional guidance through revision of the Guide to Enactment of the Model Law on Cross-Border Insolvency with respect to the interpretation and application of selected aspects of the Model Law to facilitate uniform interpretation,²¹⁸ in which it has been repeatedly stressed that

Notwithstanding the different purpose of center of main interests under the two instruments, the jurisprudence with respect to interpretation of that concept in the EC Regulation may be relevant to its interpretation in the Model Law.²¹⁹

With respect to the decisive factors, which should be taken into consideration in determining COMI, it is stated under the Guide and Interpretation that

In most cases, the following principal factors, considered as a whole, will tend to indicate whether the location in which the foreign proceeding has commenced is the debtor's center of main interests. The factors are the location: (a) where the **central administration** of the debtor takes place, and (b) which is readily **ascertainable by creditors**.²²⁰

... In all cases, however, the endeavour is an **holistic** one, designed to determine that the location of the foreign proceeding in fact corresponds to the actual location of the debtor's centre of main interests, as readily **ascertainable by creditors**.²²⁴ (bold and italics added by the author)

By referring to the phrases marked with bold and italics, the similarity of interpreting COMI between the Model Law and the Regulation is self-explanatory. Why do the identical terms serving different purposes under different regimes end up with the identical interpretation? It is partly because of the nature of the Model Law, which is merely a recommendation and countries are free to enact it as they wish.²²⁵ It will be left to the enacting States to decide whether or not to adopt it. The other reason is that the Regulation is established on a viable government structure that can supervise and unify the interpretation of the EU legislation. The Model Law is not. Without the equivalent institutional arrangement like the CJEU, it seems to be unlikely that the interpretation of COMI under the Model Law can achieve the same degree of uniformity as that under the Regulation.

3.3.3 Institutional Arrangements

Considering the indefinable nature of COMI, the institutional arrangement is to be sought in order to resolve the possible jurisdiction conflicts under the regional cross-border insolvency regime. Is it possible to introduce into China a trans-regional judicial institute, like the CJEU? The answer might be negative. Nothing comes from nothing.

²¹⁸ A /RES/68/107 A-B

²¹⁹ the Guide and Interpretation, para.82, 141

²²⁰ the Guide and Interpretation, para.145

²²⁴ the Guide and Interpretation, para.146

²²⁵ Berends, André, The UNCITRAL Model Law on Cross-border Insolvency: A Comprehensive Overview, in: 6 Tul. J. Int'l & Comp. L., p.319

The CJEU rooted in the strong European tradition. Early in the Middle Ages, there was universal canon law on hearing appeals from local ecclesiastical courts, which was considered to be above the national law but separate from national law. Such a parallel system between canon law and national laws shares great similarity with the European Union law system. In particular, the ecclesiastical courts did not interact with national courts as does the Court of Justice, but they did contribute to the creation of a *ius commune* which, as a legal phenomenon, may be compared to the law made by the Court of Justice, taking into consideration the important differences between then and now.²²⁶ From the rise of Qin Dynasty (221 B.C.) till the fall of Qing Dynasty (1912), China is a country under the centralized governance of emperors for thousand years, who held the utmost power of legislation, execution as well as the power of final adjudication.²²⁷ Therefore, China does not have an equivalent supranational arrangement for dispute resolution but got used to the top-down way. In addition, it is lack of legal foundation to establish a court that can function like the CJEU since 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. A trans-regional court will certainly interfere with the independence of the courts in the SARs and thus break the rule.

There are some scholars who recommend the arbitration solutions.²²⁸ In West, arbitration is regarded as “private justice has developed its own legitimacy independent from state recognition”.²²⁹ However, private justice does not prevail in China. Instead, it has been pointed out that the unique court control system in China over the arbitrators’ jurisdiction, which is different from international standards.²³⁰ First of all, in accordance with the article 20 of Arbitration Law of the P.R.C., a party can challenge the validity of the arbitration agreement either before the arbitration commission or before the people's court for a ruling. Moreover, if one party requests the arbitration commission to make a decision and the other party applies to the people's court for a ruling, the priority was given to the ruling rendered by the people’s court. In 2005, the Supreme People’s Court issued judicial interpretation with respect to this provision, which is the article 13 of the Interpretation of the Supreme People's Court concerning Some Issues on Application of the Arbitration Law of the People's Republic of China,²³¹

Where, after an arbitration institution makes a decision on the effectiveness of an agreement for arbitration, a party concerned applies to the people's court for confirming the agreement for arbitration as effective or applies for revoking the arbitration institution's decision, the application shall not be accepted by the people's court.

²²⁶ Tamm, Ditlev, The History of the Court of Justice of the European Union Since Its Origin, in: The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law, T. M. C. Asser Press, 2013, p.11

²²⁷ Li Jianhong, The Theory of Monarchy (in Chinese), China: Social Science Academic Press, 2009, at 17.

²²⁸ 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.

²²⁹ Oppetit, Bruno, Théorie de l'arbitrage (1st ed.), Presses universitaires de France, 1998, p.21: Dès lors, les formes de justice privé acquièrent par elles-mêmes une légitimité indépendante de toute reconnaissance étatique.

²³⁰ Fan Kun, Arbitration in China – A Legal and Cultural Analysis, Oxford and Portland, Oregon, 2013, p.60

²³¹ Interpretation No. 7 [2006] of the Supreme People’s Court

In other words, if the application is submitted to the court before the arbitration institution makes a decision, the court can accept the application and decide whether or not the arbitration agreement is effective. Secondly, in accordance with the article 16 of the Arbitration Law, a designated arbitration commission should be included into arbitration clauses. It is stipulated under the article 18 that if an arbitration agreement contains no such provisions concerning the arbitration commission, the arbitration agreement shall be deemed as null and void. Therefore, only institutional arbitration is accepted in China and ad hoc arbitration is excluded from China's Arbitration Law. Therefore, if the arbitration approach was accepted, a specialized arbitration tribunal in dealing with the cross-border insolvency disputes would have to be established. It does not fit in China's court-control tradition or the reality that in accordance with the EBL, the courts are the sole authority, which is vested with a broad set of powers, both procedurally and substantively, in dealing with insolvency cases.²³² Furthermore, to submit the disputes concerning COMI to an arbitral tribunal entails that some authority other than the court is given the power to determine where COMI is. That raises the problem of arbitrability. Arbitrability has been defined in a number of ways, although there is no internationally accepted definition as to what matters are arbitrable.²³³ Thus it is left to the national law to decide if the dispute can be submitted to arbitration. The attitudes among the four regions towards jurisdiction concerning the insolvency proceedings have been demonstrated in the earlier context. The chance is quite slight that the four regions would like to confer the power of jurisdiction to an arbitration tribunal in matters of COMI and it is unlikely that such a consent on that matter can be obtained.

In pursuit of a regional legal framework concerning cross-border insolvency, it must strike a balance, not only taking into consideration different insolvency systems, different interests of the parties concerned, but also relevant matters involving politics, economics, culture, traditions and the like. Like EU, China is also undergoing integration. In all those economic arrangements between the Mainland and SARs, the basic framework of the dispute settlement mechanisms has been established and what's more, they are similar to each other. There are Institutional Arrangements that are incorporated into the main texts, which mainly include a Joint Steering Committee (JSC) comprising senior representatives or officials designated by the two sides.²³⁴ The key functions of both Joint Steering Committees are:

- interpreting the provisions of the economic arrangement;
- resolving disputes that may arise during the implementation of the economic arrangement through consultation;
- monitoring and evaluating the implementation of the economic arrangement.²³⁵

The Steering Committee shall meet at least once a year²³⁶ and shall make its decisions by consensus.²³⁷ Liaison Offices shall be set up under the Steering Committee.²³⁸ In

²³² Shuguang Li, Zuofa Wang, 'The Function of China's Court in Enterprise Bankruptcy and the Future Trend - Observations from the Four Year Implementation of China's Existing Bankruptcy Law', (2012) The Quarterly Journal of INSOL International at 8-13.

²³³ Tweeddale, Andrew and Keren, Arbitration of Commercial Disputes, Oxford University Press, 2005, p. 107.

²³⁴ article 19(1), CEPA HK; article 19(1), CEPA Macao; article 11(1), ECFA

²³⁵ article 19(3), CEPA HK; article 19(3), CEPA Macao; article 11(1), ECFA

addition, working groups may be set up as the need arises.²³⁹ The JSC is a kind of hybrid inter-governmental authority with executive, legislative and judicial-like responsibilities over and above the competences of a conventional dispute settlement body.²⁴⁰ Its functions are to supervise, interpret and even amend CEPA as well as to resolve disputes under CEPA. However, it is a mechanism without rules of working procedure.²⁴¹ The way of resolving any problems arising from the interpretation or implementation of the “CEPA” is through consultation in the spirit of friendship and cooperation.²⁴² It resembles good offices, conciliation or mediation under the WTO DSU²⁴³ and has been characterized by relative lack of legalism.²⁴⁴ Meanwhile, in the process of legal cooperation, if there is any dispute arising from the mutual legal arrangements in China, it will also be settled down through negotiation. For instance, between the Mainland and Hong Kong SAR,

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.²⁴⁵

Between the Mainland and Macao SAR,

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.²⁴⁶

Negotiations can probably be influenced by the imbalance of power between the polities of the Mainland and SARs. In addition, different from a judicial judgment or an arbitral award, negotiation does not require reasoning but stresses merely the results, the process of which might not be transparent and cannot serve as “precedent” guiding the courts to deal with the future disputes. Moreover, legal conflicts arising from cross-border insolvency are legal disputes, which should be tackled in an adjudicative way. It

²³⁶ article 19(4), CEPA HK; article 19(4), CEPA Macao

²³⁷ article 19(5), CEPA HK; article 19(5), CEPA Macao

²³⁸ article 19(2), CEPA HK: The Liaison offices shall be set up respectively in the Ministry of Commerce of the Central People's Government and the Commerce, Industry and Technology Bureau of the Hong Kong Special Administrative Region Government.

article 19(2), CEPA Macao: The liaison offices shall be set up respectively in the Ministry of Commerce of the Central People's Government and the Office of the Secretary for Economy and Finance of Macao Special Administrative Region Government.

²³⁹ article 19(2), CEPA HK; article 19(2), CEPA Macao; article 11(2), ECFA

²⁴⁰ 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.287

²⁴¹ Wei, Dan, China's Regional Trade Agreements: Implications and Comments, 6(1) Manchester JIEL (2009), p.112.

²⁴² article 19(5), CEPA HK; article 19(5), CEPA Macao

²⁴³ WTO, DSU, art. 5

²⁴⁴ Snyder, Francis, China, Regional Trade Agreements and WTO Law, in: Journal of World Trade 43, no. 1 (2009), p. 40

²⁴⁵ Article 18, 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

²⁴⁶ Article 22, Arrangement between the Mainland and the Macao Special Administrative Region on the Mutual Recognition and Enforcement of Civil and Commercial Judgments

has been acknowledged that at this moment it unlikely to establish a permanent court with a purely legal competence in a political construction in China equivalent to that has been done under the European Coal and Steel Community (ECSC) founded in 1952. Maybe it is possible to build up a bridge across the separate economic and legal arrangement in China by referring to the Institutional Arrangement under the economic cooperative framework and the political interference can be minimized by means of replacing the negotiation with adjudicative mechanisms.

I propose that a Joint Steering Committee can be established in accordance with the Basic Law. It is stated under the Art. 95, Basic Law 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.

and Art. 93 Basic Law Macao SAR

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.

The Joint Steering Committee (JSC) is composed of the competent authorities, which are the Supreme People's Court from the Mainland side, the Department of Justice (DoJ) of HKSAR and the Secretariat for Administration and Justice of Macao SAR, who have already represented their own regions to enter into aforementioned regional legal cooperation arrangements. The JSC mainly has two functions. One is to organize a special meeting. The special meeting shall be attended by the judges of the highest-level court from the three regions. A close list of those judges shall be discussed in advance in order to guarantee the quality and impartiality of the candidates and the member of the JSC from each region can choose one candidate from its own region. To take a step further, the way of resolving the disputes arising from the regional cross-border insolvency, is not negotiation. After discussion, the special meeting will give consultant opinions upon the request of a court once there are questions of jurisdiction in the cross-border insolvency based on a comprehensive assessment of relevant factors. Without interfering with the independent judicial power granted to the SARs by the Basic Law,²⁴⁷ the consultant opinions of the special meeting is not binding but serve as the proper interpretation on the specific jurisdictional issues, which deserves the due respect of the courts concerned.

The other function of the JSC is to formulate the ways of coordination, which is of particular significance to cross-border reorganization and enterprise group. The use of

²⁴⁷ Article 2, the Basic Law of HKSAR: 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.

Article 2, the Basic Law of Macao SAR: 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. (bold and italics added by the author)

court-to-court protocol prevails in matters of cross-border insolvency coordination. The court-to-court protocol is developed from the practice of cross-border insolvency.²⁴⁸ The first attempt of guidelines for cross-border insolvency was taken by the International Bar Association, which issued a Cross-border Insolvency Concordat in 1995.²⁴⁹ The most recent achievement in that regard is the ALI/III Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases (the Global Principles), which was built further on the ALI's Principles of Cooperation among the member-states of the North American Free Trade Association²⁵⁰ and was reported by Prof. Ian Fletcher and Prof. Bob Wessels in 2012. Incorporated into the Global Principles as Section III, the Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (Court-to-Court Guidelines) provide procedural suggestions for increasing communications between courts and between insolvency administrators in cross-border insolvency cases.²⁵¹ In particular, it is stipulated under the Guideline 10 of the Court-to-Court Guidelines that a court may conduct a joint hearing with another court. It is also clearly stated under the UNCITRAL Model Law that joint hearings can significantly promote the efficiency of parallel insolvency proceedings involving members of a multinational enterprise group by bringing relevant parties in interest together at the same time to share information and discuss and resolve outstanding issues or potential conflicts, thus avoiding protracted negotiations and resulting time delays.²⁵² In China, it is lack of specific rules to enable that kind of communication and coordination. It is not until in 2012 that the Civil Procedure Law of P.R.C. expressly permits a witness to testify by video-link with the court's permission, if the witness is unable to appear in court on "justifiable grounds" (Zheng Dang Li You), including ill-health, distance, or natural disaster.²⁵³ Thus it is quite difficult that the liquidators and administrators can persuade the courts to accept a simultaneous hearing with the courts in the other regions at this moment. Moreover, in practice, the legal assistance is not conducted directly between the courts but via 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

²⁴⁸ *In re Maxwell Comm. Corp.*, 170 B.R. 800 (Bankr. S.D.N.Y. 1994) and [1992] B.C.L.C. 465; *Re Olympia & York Developments Ltd. v. Royal Trust Co.*, (1993), 20 C.B.R. (3d) 165; *In Re Nakash*, 190 B.R. 763 (Bankr. S.D.N.Y. 1996); *In re Commodore Int'l Ltd.*, 231 B.R. 175 (Bankr. S.D.N.Y. 1997). Affirmed 253 B.R. 336 (S.D.N.Y. 2000), affirmed 262 F. 3d96 (2nd Cir. 2001)

²⁴⁹ The Concordat is available at the website of the IBA.

http://www.ibanet.org/LPD/Insolvency_Section/Insolvency_Section/Default.aspx

²⁵⁰ These Principles were evolved in the context of the ALI's Transnational Insolvency Project, conducted between 1995 and 2000, for which the Reporter was Professor Jay L. Westbrook, University of Texas at Austin, Texas, USA.

²⁵¹ Wessels and Fletcher, *The Long March towards Attaining a Global Approach to Cross-Border Insolvency Cases in a Globalizing World*, August 2013, <http://bobwessels.nl/wp/wp-content/uploads/2014/01/2013-08-25-The-Long-March.pdf>

²⁵² UNCITRAL Legislative Guide on Insolvency Law, Part Three: Treatment of enterprise groups in insolvency (2010), para. 38

²⁵³ Art. 73 of the Civil Procedure Law of P.R.C., Since its introduction in 2012, this provision has been applied by courts in several cases to examine key witnesses living outside the province in which proceedings have been commenced. 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

Law Bureau of Macao.²⁵⁴ They serve as regular institutional channels between the courts of each side. To achieve the court-to-court communication in a coordinated way, the JSC can stipulate some procedural guidelines for cooperation between the court and the authoritative “intermediaries”. The prerequisite should be in conformity with the Basic Law, the independent decision of each court should be well guaranteed and without influence from any other court.²⁵⁵ Although in practice there have been precedents of “joint jurisdiction”,²⁵⁶ it is a cooperative model involving joint disposition of assets.²⁵⁷ It is in essence a substantive consolidation, which accomplishes the merger of the estates of the respective entities, so that a single insolvency estate is formed with a common pool of assets.²⁵⁸ Considering the jurisdictional concerns held by the each region, it might be too ambitious to reach that kind of agreement. Emphasis of coordination shall be laid on appropriate procedural matters, such as the possibility of simultaneously hearing the proceedings in the other courts, applicability of the modern technologies in the process of exchange of information,²⁵⁹ requirements of the form of submission of documents and evidence and the methods of transmission etc. 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.²⁶⁰ 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, which is the common official language in the three regions, so as to facilitate convenient and efficient communication.

²⁵⁴ Those aforementioned offices have already been established under the respective systems, which are specialized at communication and coordinating the relevant legal affairs between the Mainland and the two SARs. For more information, please visit China Law Unit of the Legal Policy Division of the DoJ of Hong Kong <http://www.doj.gov.hk/eng/about/lpd.html>

International Laws Affairs Division of Law Reform and International Law Bureau of Macao http://www.dsrdi.ccrj.gov.mo/en/zzjg_show.asp?#1

²⁵⁵ Article 2, the Basic Law of HKSAR: 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.

Article 2, the Basic Law of Macao SAR: 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. (bold and italics added by the author)

²⁵⁶ In *re Everfresh Beverages Inc.* [1996] O.J. No. 105; In *re AIOC Resources AG*, United States Bankruptcy Court for Southern District Court of New York (Chief Judge Tina L. Brozman), Case Nos. 96 B 41895 and 96 B 41896, (April 3, 1998) Available at <http://www.iiiglobal.org/component/downloads/viewdownload/573/1775.html>

²⁵⁷ In *re AIOC Resources AG*, at III/A

²⁵⁸ Bufford, Samuel L., 86 AMBKRLJ 685, p.715

²⁵⁹ For instance, it can be stipulated by the SJC that the aforementioned authoritative channels can help to establish a register system in regard to the opening of insolvency proceedings within each region and put them into the online case register system.

²⁶⁰ Article 9, the Basic Law of HKSAR: 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.

Article 9, the Basic Law of Macao SAR: 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.

3.3.4 Role of Intermediaries in the Cross-strait Insolvency Coordination

As aforementioned, the legal cooperation between the Mainland and the two SARs is based on the constitutional arrangement, i.e. the Basic Law.²⁶¹ The legal basis does not exist between the Mainland and Taiwan. Both the cross-strait economic arrangement (e.g. ECFA) and legal arrangement²⁶² were signed via the intermediaries, which are the Association for Relations across the Taiwan Straits (hereinafter the ARATS) from the Mainland side and the Straits Exchange Foundation (hereinafter the SEF) from the Taiwan side. Both of them are private institutes but in fact deal with public affairs and undertake some of the government functions. 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.”²⁶³

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.²⁶⁴ Under ECFA, the Joint Steering Committee is replaced with a Cross-Straits Economic Cooperation Committee, which consists of representatives designated by the two Parties, i.e. ARATS and SEF²⁶⁵ and undertakes the similar function.²⁶⁶ There is also difference in the Institutional Arrangements between the CEPA and the ECFA. Without establishment of Liaisons Offices, the matters related to ECFA shall be communicated through contact persons designated by the competent authorities of the two Parties.²⁶⁷ It can be observed that the direct official contact has been avoided due to the political uncertainty.

Considering the lack of legal basis as well as the unstable cross-strait cooperative relationship²⁶⁸, it seems to be too optimistic to expect the judicial authorities participate

²⁶¹ Art. 95 Basic Law 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.

Art. 93 Basic Law Macao SAR: 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.

²⁶² The legal cooperation arrangement, the Agreement, were signed by the SEF and the ARATS, including 1993 the Agreement on Verification of Application of the Notarized Certificates, 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. directly to each other or via local notary as well as 2009 Agreement between Both Sides of the Taiwan Strait on Jointly Fighting against Crimes and Mutual Judicial Assistance.

²⁶³Please visit: <http://www.sef.org.tw/ct.asp?xItem=48843&CtNode=3987&mp=300>

²⁶⁴Please visit: <http://www.arats.com.cn>

²⁶⁵ article 11(2), ECFA

²⁶⁶ article 11(1), ECFA

²⁶⁷ article 11(4), ECFA

²⁶⁸ After cross-strait government shook hands on 11 Feb. 2014, it is reported that since March 18th, dozens of activists, mostly students broke in the debating chamber of the Legislative Yuan, Taiwan's parliament, in Taipei. They resisted attempts by the police to evict them overnight and continued to occupy the chamber until their demand was met. In particular, they wanted Mr. Ma to come to the chamber himself to apologize for the way in which his party pushed an agreement on opening up services

in the JSC. Without the precedents of direct cross-strait contact on a government level, the functional jurisdiction solution between the Mainland and Taiwan has to be achieved in a different way. The Global Principle 23 can probably be referred to because it is stated 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.²⁶⁹

If there is dispute arising out of cross-strait insolvency, the courts from the each side can appoint the intermediaries to facilitate the communication and cooperation. To guarantee the qualification as well as impartiality, the criteria to be appointed as an intermediary shall be agreed upon by the both sides. Once appointed, the intermediaries have to behave in accordance with the order made by the court that appointed him or her. A model of protocol can also be formulated between the both sides in dealing with the role of intermediaries in the cross-strait insolvency coordination. Once there are conflicts concerning the COMI, the intermediaries should diligently report the issues and development back to the respective court and maintain the connection with all the parties concerned. If both sides appoint its own intermediaries, regular meeting or special meeting can be convened between the intermediaries. They can also assist enter into a protocol with approval of the competent court, in which the communication mechanism and be stipulated upon consensus.

IV Conclusion

In pursuit of a regional legal framework concerning cross-border insolvency, it must strike a balance, not only taking into consideration different insolvency systems, different interests of the parties concerned, but also relevant matters involving politics, economics, culture, traditions and the like. China's peculiar political regimes result in "four Chinas" in the course of international cooperation. After China resumed its sovereignty over Hong Kong and Macao, the state-to-state arrangements, such as Conventions, are no long applicable to the regional cooperation in China. Cross-border insolvency has not been included into the current regional legal cooperation system and the respective cross-border insolvency system are still under development. With a comparative study between the Model Law and the EU Regulation, both of which successfully contribute to the international development of the cross-border insolvency, a middle way has to be discovered to tailor those international standards into China's context. In an era that the business goes global, it is cooperation that matters, instead of struggling between universality and territoriality. Although China is also in the process of integration, mutual trust is still under construction among the four regions in China. Comity, softer than mutual trust but stronger than reciprocity, can serve as the proper legal basis for legal cooperation among the four regions in China. Protective

trade with China through parliament and the legislation passed to institutionalize parliament's right to scrutinize the services agreement item by item, which is part of the effort to implement ECFA. The occupation lasted for 5 days. Banyan, Students in the House, in: the Economist, 20. Mar. 2014.

²⁶⁹ The Global Principle, the Comment to Global Principle 23

mechanisms, including public policy and discretionary grant of relief, can help to solve the inherent uncertainty of comity.

In the regional cooperation context COMI should bear its autonomous meaning and be interpreted in a coherent way, which can be better achieved by the institution arrangements. It has been acknowledged that at this moment it is unlikely to establish a permanent court with a purely legal competence in China, which is equivalent to the CJEU. Meanwhile, arbitration is not a preferred form of dispute settlement mechanism in China. Maybe it is possible to build up a bridge across the separate economic and legal arrangement in China by referring to the Institutional Arrangement under the economic cooperative framework between the Mainland and the two SARs and the political interference can be minimized by means of replacing the negotiation with adjudicative mechanisms. It is a more acceptable approach based on the existing legal cooperation regimes and experienced authoritative channels. Considering the semi-governmental cooperative manner between the Mainland and Taiwan and lack of the binding legal basis, the cross-strait insolvency cooperation will be conducted via the intermediaries.