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The cooperation mechanism and legal harmonisation: analysing the past, present and future of mutual recognition and assistance in insolvency proceedings across Mainland China and Hong Kong, with insights from EU insolvency regulations

Emily Lee

Faculty of Law, The University of Hong Kong, Pokfulam, Hong Kong

ABSTRACT

This article examines the potential and challenges of the 'Cooperation Mechanism', a scheme introduced jointly by the Supreme People's Court in China and the Government of the Hong Kong Special Administrative Region on 14 May 2021, for enhancing mutual recognition and assistance in insolvency proceedings. This article contends that the Cooperation Mechanism does not in itself constitute a formal mechanism for mutual recognition. To assess the impact of the Cooperation Mechanism, this article traces and analyses court decisions on recognition and assistance made before the implementation of the Cooperation Mechanism, and places them in contrast to those pursuant to or influenced by the Cooperation Mechanism. Additionally, it highlights a similar practice between Europe's Brussels Convention of 1968 and two arrangements between Hong Kong and China prior to the Cooperation Mechanism, namely the 2006 Arrangement and the 2019 Arrangement, in carving out bankruptcy and insolvency proceedings, notwithstanding some technical differences.

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KEYWORDS Cooperation Mechanism; recognition and assistance; judicial cooperation; conflict of laws; Hong Kong-China cross-border insolvency; private international law

Introduction

On 14 May 2021, the Secretary for Justice in Hong Kong Special Administrative Region (HKSAR), Ms Teresa Cheng, SC, and Vice-president of the Supreme

CONTACT Emily Lee  eelelaw@hku.hk  The University of Hong Kong, 10/F, Cheng Yu Tung Tower, Centennial Campus, Pokfulam, Hong Kong

People's Court (SPC) of the People's Republic of China,¹ Mr Yang Wanming, signed the *Record of Meeting of the Supreme People's Court and the Government of the Hong Kong Special Administrative Region on Mutual Recognition of and Assistance to Bankruptcy (Insolvency) Proceedings between the Courts of the Mainland and of the Hong Kong Special Administrative Region* (hereinafter 'the Record of Meeting'),² to facilitate mutual recognition of and assistance in insolvency proceedings between the courts in Hong Kong³ and the designated courts in China.⁴ Alongside the Record of Meeting, additional guidance was issued by the SPC and the HKSAR government, respectively. On the Hong Kong side, the HKSAR government issued *Procedures for a Mainland Administrator's Application to the Hong Kong SAR Court for Recognition and Assistance Practical Guide* (hereinafter 'the Practical Guide').⁵ On the Chinese side, the SPC issued its trial opinion on *Taking Forward a Pilot Measure in Relation to the Recognition of and Assistance to Bankruptcy (Insolvency) Proceedings in the Hong Kong Special Administrative Region*⁶ (hereinafter 'the 2021 SPC Opinion'). For the purpose of this article, the Record of Meeting, the Practical Guide and the 2021 SPC Opinion are collectively referred to as the 'Cooperation Mechanism'.

The Cooperation Mechanism is poised to provide a procedure for mutual recognition of insolvency processes and office holders⁷ by the High Court of Hong Kong and the Intermediate People's Courts in Shenzhen, Shanghai and Xiamen. The 2021 SPC Opinion is the main body of the Cooperation Mechanism and prefaced by the Record of Meeting. In fact, the 2021 SPC Opinion is the final product after rounds of consultation between the SPC and the HKSAR government. The article will thus focus specifically on the 2021 SPC

¹The Government of the Hong Kong Special Administrative Region, *HKSAR and Mainland Sign Record of Meeting Concerning Mutual Recognition of and Assistance to Insolvency Proceedings*, Press Releases, <www.info.gov.hk/gia/general/202105/14/P2021051400219.htm>.

²Courtesy translation of the Record of Meeting is available from: Record of Meeting of the Supreme People's Court and the Government of the Hong Kong Special Administrative Region (doj.gov.hk) <www.doj.gov.hk/en/mainland_and_macao/pdf/RRECCJ_RoM_en.pdf>.

³For terminology, 'Hong Kong', 'Hong Kong (Special Administrative Region)' and 'the HKSAR' are used interchangeably, as Hong Kong is a special administrative region (SAR) subordinated to China.

⁴In this article, the terms 'China', 'mainland China' and 'the Mainland' are used interchangeably to refer to the People's Republic of China.

⁵Hong Kong Department of Justice, *Procedures for a Mainland Administrator's Application to the Hong Kong SAR Court for Recognition and Assistance*, <www.doj.gov.hk/en/mainland_and_macao/pdf/RRECCJ_practical_guide_en.pdf>

⁶Courtesy translation of the 2021 SPC Opinion is available from: <www.doj.gov.hk/en/mainland_and_macao/pdf/RRECCJ_opinion_en_tc.pdf>.

⁷The definition of office holder is not provided in the CWUMPO in Hong Kong, nor is it in the EBL in China. However, the term 'office-holder' means 'the administrator, the administrative receiver, the liquidator or the provisional liquidator, as the case may be' in accordance with article 234 of the Insolvency Act 1986 in the United Kingdom. Presumably, the term 'foreign (insolvency) officeholders' is used as an umbrella term borrowed from the Insolvency Act to refer to private insolvency practitioners serving in different capacities as seen in article 234 of the Insolvency Act 1986.

Opinion which contains 24 articles (i.e. legislative provisions) detailing the application requirements for recognition and assistance between the courts of Hong Kong and those in China (hereinafter 'mutual recognition and assistance'). Although article 95 of the Basic Law in Hong Kong provides the legal basis for cross-border judicial cooperation between the courts in Hong Kong and those in China, it does not provide any specific detail.⁸ In contrast, the Cooperation Mechanism is primed to provide a practical guide, which is better equipped than article 95 of the Basic Law to help attain mutual assistance and cooperation by the judicial organs of Hong Kong and China.

Requests for recognition and assistance can come from either side, Hong Kong or China. The statutory format requires the issuance of a letter of request by the court of one side to reach the court of the other side. For requests made from Hong Kong for recognition in China, the Hong Kong court may appoint, for example, provisional liquidators over the debtor company for the purpose of seeking recognition from the Shenzhen Bankruptcy Court.⁹ It is noted that the Shenzhen Bankruptcy Court was established in 2019 and is now part of the Shenzhen Intermediate People's Court.¹⁰ Likewise, in terms of requests made from China for recognition in Hong Kong, a letter of request sent by the Chinese court would allow the China-appointed administrator to apply to the Hong Kong court for (a) recognition of the winding up of the company in the Mainland, and (b) recognition of the administrator's appointment and status and various powers, including investigative powers, to assist the administrator in doing the various things in Hong Kong that he/she believes necessary to progress the winding up of the company.¹¹ The role of an administrator in China is equivalent to a liquidator in Hong Kong. But unlike Hong Kong, the administrator in China may be a firm rather than individuals.¹² Furthermore, administrators in China can also make requests for facilitating reorganisation in Hong Kong,¹³ suggesting that the potential impact of the

⁸Xianchu Zhang and Philip Smart, 'Development of Regional Conflict of Laws: On the Arrangement of Mutual Recognition and Enforcement of Judgments in Civil and Commercial Matters Between Mainland China and Hong Kong SAR' (2006) 36 H. K. L. J. 560.

⁹Re Ando Credit Limited [2020] HKCFI 2775, [2020] HKEC 3540.

¹⁰ibid para 3.

¹¹Re Liquidator of Shenzhen Everich Supply Chain Co Ltd [2020] HKCFI 965, [2020] HKEC 1188. The significance of this case is that Hong Kong courts have granted requests from civil jurisdictions such as China. Furthermore, in re Joint and Several Liquidators of CEFC Shanghai International Group Ltd [2020] HKCFI 167, Justice Harris of the Hong Kong High Court spearheaded the recognition of Mainland liquidators in Hong Kong.

¹²Provisions of the Supreme People's Court on Designating the Administrator during the Trial of Enterprise Bankruptcy Cases, art. 2, 6–8.

¹³Re HNA Group Co Limited [2021] HKCFI 2897. In this case, the Hong Kong Court recognised for the first time reorganisation proceedings that commenced under the Mainland Enterprise Bankruptcy Law (EBL).

Cooperation Mechanism is far reaching, covering not only insolvent liquidation but also insolvent restructuring.

The article undertakes the original task of tracing and analysing cases over the past two decades, or longer, that bear on recognition and assistance involving both Hong Kong and China. The research aims to bring a broad perspective and provide a systemic account of the Cooperation Mechanism, including its comparison with previous arrangements, especially those signed in 2006 and 2019 respectively, also by the SPC and the HKSAR, for the purpose of recognition on civil and commercial matters (with the exception of personal bankruptcy and corporate insolvency). Distinct from previous arrangements made between Hong Kong and China to facilitate judicial cooperation in service of judicial documents, matrimonial and family cases, civil and commercial matters, arbitral awards, and so on,¹⁴ the Cooperation Mechanism focuses specifically on insolvency proceedings, especially those concerning matters of cross-border insolvencies between Hong Kong and China (HK-China CBIs). But like previous arrangements, the Cooperation Mechanism undertakes an important role to further implement article 95 of the Basic Law of Hong Kong. Considering this, the launch of the Cooperation Mechanism is very timely, as the year 2022 marks the 25th anniversary of the Basic Law of Hong Kong. Yet the Cooperation Mechanism does not have just symbolic value. Its practical implications are due to China's expansive economic power and the close economic relationship between Hong Kong and China which is reinforced by the *Mainland-Hong Kong Closer Economic Partnership Arrangement* (CEPA). Coincidentally or not, the Cooperation Mechanism was launched in the wake of a global economic recession caused by the onslaught of COVID-19. The COVID-19 financial crisis has led to an exponential growth in the number and scale of transnational corporate insolvency and restructuring. The Cooperation Mechanism will therefore serve a very practical purpose given that the number of corporate insolvency liquidation or restructuring cases heard by the Chinese and Hong Kong courts has skyrocketed.¹⁵ Quite often, these cases involve legal issues ranging from applications for recognition and assistance to other reliefs sought by foreign insolvency office holders. These issues will be further explored in Part IV of this article, which contains case studies to shed light on the status quo of recognition and assistance after the implementation of the Cooperation Mechanism commenced on 14 May 2021.

¹⁴Hong Kong Department of Justice, *Arrangements with the Mainland*, <www.doj.gov.hk/en/mainland_and_macao/arrangements_with_the_mainland.html>.

¹⁵Recent cases concerning Hong Kong-China CBIs in which recognition and assistance have been sought include, among others, (1) *Nuoxi Capital Ltd v Peking University Founder Group Co Ltd* [2021] HKCFI 3817, [2021] HKEC 5793, (2) *Re CEFC Shanghai International Group Ltd (Mainland liquidation)* [2020] 1 HKLRD 676, [2020] HKCFI 167, [2020] HKEC 89, and (3) *Re Liquidator of Shenzhen Everich Supply Chain Co Ltd* [2020] HKCFI 965, [2020] HKEC 1188.

This article distinguishes itself from others that expound on the topic of mutual judicial recognition and assistance, as it aspires to offer a comprehensive analysis of the political and economic ties between Hong Kong and China, on top of the legal issues surrounding HK-China CBIs that concern not only the courts in China and Hong Kong but also those in a third jurisdiction where the debtor company's place of incorporation or centre of main interest (COMI) is located. From the historical and institutional perspectives, this article compares the Cooperation Mechanism with previous arrangements, referring especially to those signed in 2006 and 2019, respectively, also by the SPC in China and the HKSAR government, with respect to recognition of judgments on civil and commercial matters which closely relate to but nonetheless exclude HK-China CBIs. Using a doctrinal method designed to assess the impact of the Cooperation Mechanism more accurately, the author traces and assembles cases that commenced in Hong Kong and China respectively, which are then grouped separately into two parts (Parts III and IV) for nuanced discussion, depending on whether the court decisions on recognition and assistance were made before or after the implementation of the Cooperation Mechanism. Finally, although the SPC in China will ultimately make the decision, if any, the article raises the question of whether the Cooperation Mechanism can be extended to other courts in China outside the pilot areas, and explains why the Hong Kong courts will be less likely to be affected by this issue than their Chinese counterparts in terms of approving requests on recognition and assistance pursuant to their respective insolvency laws. Going forward, this article stresses the importance of instituting a formal mechanism tailored to recognition and assistance in insolvency proceedings, exploring ways in which a formal mechanism can be established to inspire trust and instil stability in the respective insolvency regimes in Hong Kong and China.

The structure of this article is as follows. The article comprises six parts. Following the introduction, Part I provides the background for judicial cooperation between the courts in Hong Kong and China. The aspiration of mutual judicial recognition and assistance is underpinned by the close political and economic ties between these two jurisdictions, along with the need to reinforce the CEPA, facilitate economic integration and address the inherent problem of conflicting laws. It explains why the difference in economic systems, referring to China's socialist system versus Hong Kong's capitalist system, further contributes to and complicates the issue of the conflict of laws, which necessitates and justifies the issuance of a letter of request between the courts of Hong Kong and China.

Part II parses the anatomy of the Cooperation Mechanism, in conjunction with article 95 of the Basic Law of Hong Kong and the 'one country, two systems' principle. The former provides the legal basis and the latter, the political basis for the Cooperation Mechanism. Through case studies, this article

analyses the views taken by the Hong Kong courts, the SPC and the lower courts in China on the question of whether it is suitable to extend article 5 of China's *Enterprise Bankruptcy Law* (EBL) to cover HK-China CBIs. It further compares the Cooperation Mechanism with previous arrangements, including the one signed in 2006, also between the SPC in China and the HKSAR government, but for the purposes of recognition and assistance in other proceedings, that is, civil and commercial proceedings. The insights gained from this exercise will inform the assessment by the author of whether the Cooperation Mechanism can qualify as a formal mechanism similar to the previous arrangement in 2006.

Part III accounts for the situations of recognition and assistance in Hong Kong and China before the Cooperation Mechanism was introduced in 2021. The cases selected and examined were dated between 1983 and 2020 to show how the territorial approach taken by the Mainland courts led to conflicting decisions in the past, in contrast to the universal approach and common law principles adopted by the Hong Kong courts.

Part IV reflects on the court rulings for effecting mutual recognition and assistance in Hong Kong and China after the implementation of the Cooperation Mechanism commenced on 14 May 2021. For the sake of clarity, the court cases being examined will be subordinated into two groups, as requests for recognition can be directed from China for recognition in Hong Kong or, conversely, from Hong Kong for recognition in China. Part V engages in a comparative study on the treatment of cross-border bankruptcy and insolvency proceedings in the European Union, in view of similar practices found in the China–Hong Kong arrangements prior to the Cooperation Mechanism. Part VI provides some concluding remarks.

I. Judicial recognition between Hong Kong and China to facilitate economic integration and address conflict of laws

The Cooperation Mechanism was quickly incorporated in Justice Harris' ruling in *Re China All Access (Holdings) Ltd*¹⁶ on 21 June 2021, approximately one month following the signing of the Record of Meeting on 14 May 2021, observed the author. In that case and subsequently in other cases including, for example, *Joint and Several Liquidators of Hong Kong Fresh Water International Group Ltd*¹⁷ and *Provisional Liquidator of Global Brands Group Holdings*,¹⁸ the learned judge has recapitulated the Cooperation Mechanism,

¹⁶*Re China All Access (Holdings) Ltd*, Companies (Winding-up) Proceedings No 431 of 2020, HCCW 431/2020, [2021] HKCFI 1842, [2021] HKEC 2777.

¹⁷*Joint and Several Liquidators of Hong Kong Fresh Water International Group Ltd* [2022] HKCFI 924.

¹⁸*Provisional Liquidator of Global Brands Group Holding Ltd vs Computer Share Hong Kong Trustees Ltd* [2022] HKCFI 1789.

adding a pinpointed emphasis that its mandate is to facilitate economic integration and development in Hong Kong and China.¹⁹

(1) Economic incentive for building judicial recognition to reinforce the CEPA

Economic incentive was likely the driving force of judicial recognition, which is not only appealing but consistent with the political ideals of the CEPA.²⁰ Introduced in 2003, the CEPA aimed to solidify preferential trade and investment policies. However, in recent years, as more Chinese companies encountered financial problems due to economic slowdowns amid the COVID-19 pandemic, requests for recognition and assistance in insolvency proceedings increased as companies desired to step out of the market in an orderly and efficient fashion. Chinese companies affected by economic hardship range from supply chain companies to investment holding companies specialising in capital financing. The former example can be found in the liquidation of Shenzhen Everich Supply Chain Co Ltd, a company incorporated in the Mainland and ordered by the Shenzhen Intermediate People's Court to be wound up on the grounds of insolvency.²¹ The latter example is seen in CEFC Shanghai International Group Ltd, which is a Mainland-incorporated investment holding company and part of a conglomerate whose business includes capital financing.²² The CEFC is a quintessential HK-China CBI case given that it is 'in insolvent liquidation in the Mainland and has substantial assets in Hong Kong which are subject to pending creditor's enforcement'.²³ Against this background, it was anticipated back in 2020 that 'a protocol will be entered into between Hong Kong and the Supreme People's Court' which will provide for mutual recognition.²⁴ Such recognition should be possible, as suggested then by three judges in the Shenzhen Bankruptcy Court who asserted in their article²⁵ that 'the Mainland courts may have changed course and future recognition of Hong Kong liquidators can be anticipated'.²⁶

¹⁹See, for example, paragraph 18 of the Provisional Liquidator of Global Brands Group Holding Ltd vs Computer Share Hong Kong Trustees Ltd [2022] HKCFI 1789.

²⁰The Trade and Industry Department of the HKSAR government, 'What is CEPA', see <www.tid.gov.hk/english/cepa/cepa_overview.html#:~:text=What%20is%20CEPA%3F,signed%20on%2029%20June%202003>.

²¹Re Liquidator of Shenzhen Everich Supply Chain Co Ltd [2020] HKCFI 965, [2020] HKEC 1188.

²²Re CEFC Shanghai International Group Ltd (Mainland liquidation) [2020] 1 HKLRD 676, [2020] HKCFI 167, [2020] HKEC 89, para 4.

²³ibid para 1.

²⁴Re Ando Credit Limited [2020] HKCFI 2775, [2020] HKEC 3540, para 2.

²⁵Yan Ni Yue, Shan Tang and Fang Wang, 'Practical Exploration of Cross-Border Insolvency between the Mainland and Hong Kong' (2020) (25) China Academic Journal Electronic Publishing House. doi:10.19684/j.cnki.1002-4603.2020.25.003.

²⁶The article written by the three judges was cited in Brian O'Hare, Pui Yip Leung and Soony Tang, 'A New Era of Mutual Recognition of Insolvency Proceedings between Hong Kong and Mainland China' (2021) 15(2) Insolvency and Restructuring International 29.

Discussions were underway in 2020 for recognition in Hong Kong of Mainland appointed liquidators acting for Chinese companies and, vice versa, for recognition in the Mainland of Hong Kong liquidators appointed over Hong Kong incorporated companies.²⁷ Since the Shenzhen Bankruptcy Court was created with a mandate to handle cross-border cases and its establishment was seen as ‘the latest in a series of moves to create judicial ties between the mainland and Hong Kong’,²⁸ it is particularly encouraging to see that the Shenzhen Intermediate Court issued a civil ruling on 15 December 2021.²⁹ It was the first judgment handed down by a Chinese court pursuant to the Cooperation Mechanism, and was acted upon following the letter of request issued by Justice Harris for the Samson Paper Company Limited in Hong Kong (details of this case will be expounded below in Part IV).

(2) From different economic systems to conflict of laws in Hong Kong and China

Different economic systems – China’s socialist economy and Hong Kong’s capitalist economy – mean differing statute law, remarked Justice Harris, who used the example of China’s EBL to demonstrate that in China primacy is given to reorganisation, ‘reflecting the importance placed in the Mainland on maintaining economic and social stability’, and the favouring of debtor-in-possession solutions in the Mainland.³⁰ In contrast, there are no similar considerations held by the Hong Kong court, although Hong Kong and Chinese judges are well acquainted with these issues. To mitigate the differences, the 2021 SPC Opinion³¹ exhibits the intent of the courts in China and Hong Kong to maintain the principle of collectivity and the principle of *pari passu* distribution which is consistent with the standard recognition order³² and the respective insolvency laws applied in Hong Kong and China.

Other than the difference in economic systems, there are a few concrete reasons why a conflict of laws can arise, an issue that is both common and inevitable in matters of HK-China CBIs. The first reason is owed to the

²⁷In the third paragraph of *Re Ando Credit Limited* [2020] HKCFI 2775, [2020] HKEC 3540, the presiding judge (Justice Harris) alluded to the original Chinese version of the article which, according to Justice Harris, can be found at <<https://wemp.app/posts/c4ee81da-dfc9-45e3-b440-fcf9d88d47c1>>.

²⁸He Hui Feng and Alvin Lum, ‘Shenzhen’s New Bankruptcy Court Could Track Assets Transferred to Hong Kong’, *South China Morning Post* (17 January 2019) <www.scmp.com/economy/china-economy/article/2182479/bankrupt-tycoons-beware-new-court-china-could-track-funds>.

²⁹(2021) 粵03认港破1号 (2021) Yue 03 Ren Gang Po No. 1. See Asian Business Law Institute, [*Judgment*] *First Recognition under the Mainland-HKSAR Arrangement for Mutual Recognition of and Assistance to Bankruptcy (Insolvency) Proceedings*, (undated) <<https://abli.asia/NEWS-EVENTS/Whats-New/ID/207>>.

³⁰Provisional Liquidator of Global Brands Group Holding Ltd vs Computer Share Hong Kong Trustees Ltd [2022] HKCFI 1789, para 13.

³¹The 2021 SPC Opinion, art. 2.

³²*Re Pacific Andes Enterprises (BVI) Ltd* (HCMP 3560/2016, [2017] HKEC 146. *Re Hsin Chong Group Holdings Ltd* (HCMP 313/2019, [2019] HKEC 945, paras. 23–24, 33.

differences in both substantive and procedural laws that underpin the respective insolvency regimes in China and Hong Kong. Not only do their laws differ, but the two jurisdictions are influenced by different legal traditions. In China, a civil law jurisdiction, the EBL is the principal insolvency legislation, which is supplemented by China's *Civil Procedural Law* as the EBL contains no procedural requirements. Yet article 5 of the EBL, arguably the only legislative provision in the law that concerns cross-border insolvency (CBI), has never been invoked (this issue will be expounded in Part II). On the other hand, in Hong Kong, a common law jurisdiction, the key insolvency legislation is the *Companies (Winding Up and Miscellaneous Provisions) Ordinance* (CWUMPO) (Cap 32), which should be read in juxtaposition to the *Companies Ordinance* (CO) (Cap 622), where the schemes of arrangements are coded. In the absence of a statutory corporate rescue regime in Hong Kong, the scheme of arrangement has been used to facilitate restructuring. Another conspicuous legal gap is the lack of a statutory CBI regime in Hong Kong,³³ even after the rewrite of the CO which had resulted in the introduction of the CWUMPO.³⁴ This gap is not ideal: insolvency practitioners and the courts 'are left to look to the common law to find tools to assist them',³⁵ according to Justice Harris, who spoke from his wealth of experience adjudicating CBI cases in Hong Kong. The second reason is that obstacles presented by the conflict in laws cannot be easily overcome or resolved, given that neither Hong Kong nor China has adopted the UNCITRAL Model Law on Cross-Border Insolvency (hereinafter the 'Model Law'),³⁶ even though the principle of modified universalism, which is upheld by the Model Law, has been closely observed by the Hong Kong court.³⁷

³³That is to say, in Hong Kong, there is no statutory CBI regime equivalent to Chapter 15 of the US Bankruptcy Code designed to give foreign representatives access to American courts.

³⁴*Companies (Winding Up and Miscellaneous Provisions) Amendment Ordinance* (Cap 32). This is the key legislation of Hong Kong's corporate insolvency law, which was last amended in 2016 and took effect on 13 February 2017. See Emily Lee and Eric C. Ip, 'Judicial Diplomacy in the Asia-Pacific: Theory and Evidence from the Singapore-Initiated Transnational Judicial Insolvency Network' (2020) 20(2) *Journal of Corporate Law Studies* 409.

³⁵Hon Mr Justice Harris, 'Understanding Cross-Border Insolvency in the Hong Kong Context' (2017) 47 *H.K.L.J.* 59.

³⁶U.N. Commission on International Trade Law, UNCITRAL Model Law on Cross-Border Insolvency.

³⁷For example, Justice Harris in *Re Pioneer Iron and Steel Group Co Ltd* [2013] HKCFI 324 demonstrated the important principle that the application of the Model Law shall not be restricted by local conditions: (a) the Model Law has not been adopted or implemented by either Hong Kong or China; and (b) there is no equivalent cross-border insolvency provision (to section 426 of the UK Insolvency Act 1986 or Chapter 15 of the US Bankruptcy Code) in their respective legislation. Justice Harris' decision in this case mirrors the approach taken by the Hong Kong courts to CBI issues as fairly pragmatic, suggesting that the courts, when considering what steps should be taken in Hong Kong, will recognise foreign liquidations and take into account foreign restructuring arrangements which have been approved overseas. It is generally accepted that although the courts in Hong Kong retain the power of discretion, they will recognise a foreign liquidation ruling or a judicially sanctioned foreign corporate debt-restructuring scheme to prevent the potential unfairness of a creditor trying to gain an advantage over other creditors who observe the same ruling or scheme.

The third reason has to do with different judicial practices in Hong Kong and China in granting recognition and assistance. Unlike the Chinese courts which normally follow rules laid down by higher courts, in particular judicial interpretations made by the Supreme People's Court, as in the 'Provisions Concerning the Jurisdiction Problems of Foreign-related Civil and Commercial Cases' (2002),³⁸ the courts in Hong Kong have resorted to applying common law rules. For example, in *Re Liquidator of Shenzhen Everich Supply Chain Co Ltd*, Justice Harris not only made a distinction between recognition and assistance³⁹ but also provided reasons for assisting foreign liquidators, which were delivered by Lord Hoffmann in the Cambridge Gas case.⁴⁰ First, recognition shall precede assistance because it is only '[u]pon the foreign insolvency proceedings being recognised, [that] the [Hong Kong] Court will grant assistance to foreign officeholders by applying Hong Kong insolvency law'. Second, before recognition will be granted to insolvency proceedings, including those which commenced in a common law jurisdiction or civil law jurisdiction such as China, the Hong Kong Court must satisfy the criteria that the foreign insolvency proceedings were (a) collective insolvency proceedings, and (b) opened in the company's country of incorporation.⁴¹ According to article 2 of the 2021 SPC Opinion, collective insolvency proceedings in Hong Kong are those that commenced in accordance with the CWUMPO⁴² and the CO⁴³ of Hong Kong and comprise (a) compulsory liquidation and (b) creditors' voluntary liquidation, both of which are contained in the CWUMPO, and (c) the scheme of arrangement promoted by a liquidator or a provisional liquidator and sanctioned by a court in Hong Kong in accordance with section 673 of the CO. It is worth noting that the requirement of collective insolvency proceeding is also seen in article 2 (a) of the Model Law to ensure the equality of treatments of all creditors.⁴⁴ Third, the purpose of recognition, and hence the reasons for granting assistance to the foreign officeholders, as explained by Lord Hoffmann in the judgment by the Privy Council for the Cambridge Gas case,⁴⁵ are two-fold. Assistance

³⁸Where the HK-China CBIs are concerned, article 5 of the 2002 SPC Provisions provides that '... the jurisdiction of civil and commercial cases involving Hong Kong Special Administrative Region (HKSAR) ... litigants shall be solved by referring to the Provision'.

³⁹*Re Liquidator of Shenzhen Everich Supply Chain Co Ltd* [2020] HKCFI 965, [2020] HKEC 1188, para 10.

⁴⁰*Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2006] UKPC 26; [2007] 1 A.C. 508; [2006] 3 W.L.R. 689.

⁴¹*Re CEFC Shanghai International Group Ltd (Mainland liquidation)* [2020] 1 HKLRD 676; [2020] HKCFI 167, [2020] HKEC 89, para 8.

⁴²The Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32).

⁴³The Companies Ordinance (Cap. 622).

⁴⁴U.N. Commission on International Trade Law, UNCITRAL Model Law on Cross-Border Insolvency with guide to enactment and interpretation, art. 2 (a) where the definition for 'foreign proceedings' is provided.

⁴⁵*Cambridge Gas Transport Corporation v The Official Committee of Unsecured Creditors (of Navigator Holdings Plc and others)* [2006] UKPC 26; [2007] 1 AC 508, para 22 where the Privy Council further alluded to the court's statutory authority for providing assistance in section 426(5) of the Insolvency Act 1986.

is granted 'to enable the foreign office holder or the creditors to avoid having to start parallel insolvency proceedings'. And it is also granted 'to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum'.⁴⁶ The same rationale should apply to HK-China CBIs.

II. The anatomy of the cooperation mechanism

(1) To fill the legal void in the area of CBI with the cooperation mechanism

As strange as it may sound for an international financial hub, unlike comparable jurisdictions, Hong Kong has no specific legislation equivalent to Chapter 15 of the US Bankruptcy Code,⁴⁷ which leaves the Hong Kong judiciary to handle bankruptcies using common law tools. The legal void in this field means the court is expected to apply the common law principles of recognition and assistance in addressing matters arising from foreign insolvency proceedings.⁴⁸ Despite the fact that judges are empowered by the common law to exercise their discretion, there are restrictions in the development of common law in this field.⁴⁹ There is no oversight by the HKSAR government on this issue, suggested Justice Harris, who expounded that the lack of legislation has provided part of the reason and background to the signing of the Record of Meeting on 14 May 2021. The mandate, or the ultimate

⁴⁶*ibid.*

⁴⁷Chapter 15 is a new chapter added to title 11 of the United States Code, better known as the US Bankruptcy Code, by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Chapter 15 was modelled after and incorporated the Model Law to foster the orderly administration of foreign cases with characteristics of CBI. Generally, a Chapter 15 case is ancillary or complementary to a primary proceeding brought forward in another country. If a petition for recognition is filed by a foreign representative and then recognised by the US court under this chapter, the foreign proceeding will be given automatic and mandatory recognition in the US under section 1517 (of Chapter 15). A foreign proceeding could be recognised as either a foreign main proceeding or a foreign nonmain proceeding within the meaning of section 1517(b). To that end, a foreign proceeding is one pending in the country where the debtor has the COMI, whereas a foreign nonmain proceeding is one pending in a foreign country where the debtor has an establishment within the meaning of section 1502 (also of Chapter 15), referring to 'any place of operations where the debtor carries out a nontransitory economic activity'. See United States Courts, Chapter 15-Bankruptcy Basics Ancillary and Other Cross-Border Cases, <www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-15-bankruptcy-basics>. See also Peter M. Gilhuly, Kimberly A. Posin and Adam E. Malatesta, 'Bankruptcy without Borders: A Comprehensive Guide to the First Decade of Chapter 15' (2016) 24 AM. BANKR. INST. L. REV. 47, at 48. See also Stephen Lubben, *American Business Bankruptcy A Primer* (2019), at 175.

⁴⁸Such matters include recognising the status of foreign office holders in accordance with their appointment by the court in their jurisdiction, which may include not only granting them assistance to deal with local assets but coupling this recognition with some extent of assistance permitted by local insolvency law. Viewed in this way, recognition and assistance are different concepts, at least in theory, although the dividing line is blurred in practice. Even so, 'it is important to bear in mind that recognition does not necessarily include assistance', as explained by Justice Harris in *Provisional Liquidator of Global Brands Group Holding Ltd v Computer Share Hong Kong Trustees Ltd* [2022] HKCFI 1789, para 15.

⁴⁹*Rubin v Eurofinance SA* [2012] UKSC 46; [2013] 1 AC 236. In paragraph 129 of the judgment, Lord Collins describes the limits of the court's ability to develop the law in this field.

purpose of the Cooperation Mechanism, is to facilitate economic integration and development in Hong Kong and China.⁵⁰ In making this claim, Justice Harris referred to paragraphs 3 and 5 of the Record of Meeting which place an expectation on the Hong Kong court to grant assistance to Mainland administrators and cooperate on the implementation of the Cooperation Mechanism.⁵¹ With the goal of economic integration and development comes the need for clear regulatory guidance on mutual recognition and assistance, which will bring about the sustained economic relationship between Hong Kong and China.

(2) The cooperation mechanism under the ‘one country, two systems’ principle

Under the rubric of the ‘one country, two systems’ principle, Hong Kong’s common law system and China’s civil law system coexist and operate in parallel to each other. To put the principle into practice, after the handover, the legal basis for recognition and assistance is built on two pillars: the political pillar known as the ‘one country, two systems’ and the legal pillar embodied in the Hong Kong Basic Law (article 95, to be specific). To break it down and further elaborate, when Hong Kong was still a British colony, judicial recognition and assistance was governed by international treaties such as the New York Convention⁵² and the Hague Convention.⁵³ In relation to this, the United Kingdom extended the New York Convention to Hong Kong in 1975, therefore making it applicable by the courts in Hong Kong for the recognition of arbitral awards.⁵⁴ Second, the Hague Convention improved the organisation of mutual judicial assistance in cases of civil or commercial matters to enable a judicial or extrajudicial document to be served abroad. The United Kingdom also extended the Hague Convention to Hong Kong in 1970.⁵⁵ After the handover of Hong Kong to the Chinese sovereignty on 1 July 1997, Hong Kong and China relied instead on arrangements to facilitate judicial cooperation in accordance with article 95 of the Basic Law in Hong Kong. Details of the arrangements in question will follow in a subsequent section in this part titled ‘Comparing the cooperation mechanism with previous arrangements’.

⁵⁰Provisional Liquidator of Global Brands Group Holding Ltd vs Computer Share Hong Kong Trustees Ltd [2022] HKCFI 1789, para 18.

⁵¹ibid.

⁵²Convention on the Recognition and Enforcement of Foreign Arbitral Awards, arts. 1, 3, Jun. 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, <www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf>.

⁵³Hague Conference on Private International Law, Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163, <www.hcch.net/upload/conventions/txt14en.pdf>.

⁵⁴Guobin Zhu, ‘Inter-regional Conflict of Laws under “One Country, Two Systems”: Revisiting Chinese Legal Theories and Chinese and Hong Kong Law, with Special Reference to Judicial Assistance’ (2002) 32 H. K. L. J. 644.

⁵⁵ibid 668.

History shows that ironically, even after the handover in 1997, Hong Kong was still regarded as a foreign jurisdiction by mainland China. Article 5 of a judicial interpretation issued in 2002 by the SPC in China titled *Provisions Concerning the Jurisdiction Problems of Foreign-Related Civil and Commercial Cases* (hereinafter ‘the Provisions’) prescribes that ‘the jurisdiction of civil and commercial cases involving HKSAR, Macao SAR and Taiwan litigants shall be solved by referring to the Provisions’.⁵⁶ The SPC’s interpretation is reflected in a number of cases in the area of HK-China CBIs. For example, in *BOC (HK) Limited v Shantou Hongye (Group) Co., Ltd.*,⁵⁷ the SPC held that ‘the HKSAR and the Mainland of China belong to different jurisdictions’,⁵⁸ and that ‘... when the foreign-related party to the contract makes a choice of the application law, the mandatory or prohibitory laws and regulations of PRC cannot be circumvented...’.⁵⁹ Apart from the SPC, the lower courts such as the Guangzhou court in *Gu Laiyun and others v Nardu Company Limited*⁶⁰ and the Shanghai courts in *Yong Zhe Express Service v Hong Kong Woolworths Group (Asia) Ltd*⁶¹ have made similar decisions, further holding that the cases originating from Hong Kong should be referred as ‘foreign-related cases’.

Contrary to the above, the Cooperation Mechanism may have indirectly reflected a political stance long held by the Chinese government that the HKSAR is a part of China and hence its matters are subject to an ‘arrangement’ as in the past (see again the section titled ‘Comparing the cooperation mechanism with previous arrangements’). One can expect in the future that the cases commenced in Hong Kong will be treated by the Chinese courts as neither foreign nor local under the ‘one country, two systems’ principle, which has been reinforced following China’s imposition of the *National Security Law* in Hong Kong⁶² which commenced on 30 June 2020.

⁵⁶Emily Lee, ‘Problems of Judicial Recognition and Enforcement in Cross-Border Insolvency Matters between Hong Kong and Mainland China’ (2015) 63(2) *Am. J. Comp. L.* 441–42.

⁵⁷*Bank of China (HongKong) Limited v Shantou Hongye (Group) Co., Ltd* was heard on 9 July 2004, by the Supreme People’s Court.

⁵⁸*Bank of China (HongKong) Limited v Shantou Hongye (Group) Co., Ltd.* (2002) Supreme People’s Court Final Division IV No. 6.

⁵⁹*ibid.*

⁶⁰*Gu Laiyun and others v Nardu Company Limited* was heard on 20 March 2007, by Guangzhou Intermediate People’s Court.

⁶¹*Yong Zhe Express Service v Hong Kong Woolworths Group (Asia) Ltd* was heard on 23 June 2009, by Shanghai No. 1 Intermediate People’s Court.

⁶²The official title of the legislation is the Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region. Since the Standing Committee of the National People’s Congress passed the *National Security Law* on 30 June 2020, it has been listed under Annex III of the Basic Law in Hong Kong. See Decision of the Standing Committee of the National People’s Congress on Adding a Law to the List of the National Laws, in Annex III to the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China. <www.hkii.hk/eng/hk/legis/instrument/A101/annux3.html<https://www.isd.gov.hk/nationalsecurity/eng/index.html>>.

(3) The applicability of Article 5 of the EBL in the implementation of the cooperation mechanism

Even before the Cooperation Mechanism, the legal implication of Hong Kong's political status as a special administrative region under the sovereignty of China changed diagonally in 2011 when the SPC had seemingly ceased to regard Hong Kong as a foreign jurisdiction. This notion is construed from the SPC's reply to the requests for instructions from the lower court for the application made by the Hong Kong-appointed liquidators of Norstar Automobile Industrial Holding Limited who sought recognition in China (hereinafter 'the SPC Interpretation').⁶³ The SPC Interpretation, in effect, reversed the lower courts' decision.⁶⁴ The SPC, the top court in China, refused to recognise a winding up order issued by the Hong Kong court. Rather than expounding on the complex legal issues linked to the Norstar liquidators' application, which motivated the Higher People's Court to seek direction from China's top court in the first place, the SPC Interpretation focused almost entirely on the procedural requirements for recognition and assistance, as prescribed in article 1 of the *Arrangement of the Supreme People's Court between the Courts of the Mainland and the Hong Kong Special Administrative Region on Mutual Recognition and Enforcement of Judgments of Civil and Commercial Cases under the Jurisdiction as Agreed to by the Parties Concerned* (hereinafter 'the 2006 Arrangement'). Profoundly effective, the SPC emphatically pointed out that 'Article 265 of Civil Procedure Law of the People's Republic of China and Article 5 of the Enterprise Bankruptcy Law of the People's Republic of China are to regulate the recognition and enforcement of the judgments made by foreign courts and they are not applicable to this case [either]'.⁶⁵ It is worth noting that although the SPC Interpretation has merely and expressly ruled out article 5 of the EBL from application for cases originating from the HKSAR, it has nevertheless persuaded some insolvency practitioners in Hong Kong to believe that article 5 of the EBL only enables the Chinese courts to recognise foreign judgments but not foreign orders.⁶⁶ In this regard, the author observed that the 2011 SPC interpretation

⁶³Reply of the Supreme People's Court to the request for instructions for the application from Norstar Automobile Industrial Holdings Ltd to recognise a court order of the Hong Kong Special Administrative Region' (isheng.net) <<http://ms.isheng.net/index.php?doc-view-27746>> 28 September 2011).

⁶⁴Brian O'Hare et al provided a useful summary of the Norstar case: 'In September 2011, a Hong Kong liquidator applied to the Mainland Court to recognise a winding-up order issued by the Hong Kong Court. Both the Beijing Intermediate People's Court and the Beijing Higher People's Court had conditionally approved the application. However, due to complex legal issues and lack of precedents for such recognition, the Higher People's Court requested the SPC to confirm inter alia what Mainland law would be applicable to recognise the winding-up order issued by the Hong Kong Court'. See Brian O'Hare, Pui Yip Leung and Soony Tang, *supra* note 26, at 29. (original footnote 9) (2021).

⁶⁵Kinsley Ong, Duncan Watt, Joanne Chan and Faith Lee, 'Mutual Recognition between China and Hong Kong' (2020) Global Restructuring Review, <<https://globalrestructuringreview.com/review/asia-pacific-restructuring-review/2020/article/mutual-recognition-between-china-and-hong-kong>>.

⁶⁶*ibid*.

may have inadvertently caused confusion, as a plain reading of paragraph 2 of article 5 of the EBL seems to suggest that it covers both the (legally effective) judgment and ruling. And the term 'ruling' shall include an order such as a winding up order issued by a court outside mainland China.

After the SPC's interpretation of the *Norstar* case, requests from Hong Kong-appointed liquidators for recognition of their appointments in China were rare. One possible reason was that judges in Hong Kong held no hope for a winding up order issued by the Hong Kong court to be recognised by the courts in China. Both voicing his concern and expressing his disappointment, Justice Harris had commented, quite discretely, that 'I do not intend to spend much time on this issue as it seems to me that there is clearly no realistic possibility of a Mainland Court and regulators recognising a liquidator appointed by this Court and the contrary suggestion has an air of complete unreality about it',⁶⁷ when asked to decide whether or not a liquidator appointed by the Hong Kong Court over the company *Insigma Technology Co Ltd* would be recognised in the Mainland. In this regard, emphasis needs to be made that recognition by the Chinese court is necessary if the liquidators appointed in Hong Kong are to consider further collection of assets and/or investigation of the Company's affairs in China where substantial assets are known to exist. Yet the situation was such that prior to the Cooperation Mechanism, mutual recognition was difficult to attain, and that none of the previous arrangements (which will be expounded below) entered into between Hong Kong and China can apply to HK-China CBIs.

Whether article 5 of the EBL is applicable to HK-China CBIs was one of the key questions addressed in a discussion panel following the signing of the Record of Meeting on 14 May 2021.⁶⁸ In China, CBI matters are stipulated in article 5 of the EBL, although it has never been invoked. As explained by Justice Harris,

As far as I am aware a Mainland court has not yet recognised a foreign insolvency proceeding pursuant to art.5 [of the EBL]. There have been a number of cases of which I am aware, which have an element of recognition, but my understanding is that they are not viewed by Mainland judges as involving a formal recognition of a foreign insolvency proceeding in the way, which the order in the present application explicitly does.⁶⁹

Apparently, in his statement above, Justice Harris had duly paid attention to the 'letter of request', the statutory form to be used by the administrator in

⁶⁷Re *Insigma Technology Co Ltd*, Companies (Winding-up) Proceedings No 224 of 2013, HCCW 224/2013, [2014] HKEC 1685, para 14.

⁶⁸Professor Wang Weiguo, for one, was a proponent for extending article 5 of the EBL for the resolution of the HK-China CBIs.

⁶⁹Re *CEFC Shanghai International Group Ltd* (Mainland liquidation) [2020] 1 HKLRD 676, [2020] HKCFI 167, [2020] HKEC 89, para 27.

his application to seek recognition and assistance. It should be noted that this requirement is reflected in the 2021 SPC Opinion where a letter of request issued by the Hong Kong High Court is expressly required.⁷⁰ However, as Justice Harris pointed out, article 5 of the EBL has never been invoked in situations whereby a letter of request is required. There are a few reasons for that.

First, article 5 of the EBL states that the People's Court shall recognise and enforce the judgment or ruling made by a foreign court in accordance with (a) the international treaties or (b) the principle of reciprocity. But there may be problems meeting both requirements. On the one hand, China is not active in treaty signing. The number of treaties where China is a signatory ranges from 13 to 19 and their purposes and scopes vary. According to the SPC in China,

China currently has treaties on civil and commercial judicial assistance with 13 countries: France, Belgium, Italy, Spain, Bulgaria, Hungary, Thailand, Singapore, Republic of Korea, Argentina, Morocco, Tunis and the United Arab Emirates. It has treaties on civil and criminal judicial assistance and treaties on civil, commercial and criminal judicial assistance with 19 countries: Poland, Rumania, Russia, Ukraine, Belarus, Greece, Lithuania, Mongolia, Turkey, Kazakhstan, Cyprus, Kyrgyzstan, Tajikistan, Uzbekistan, Vietnam, Laos, Democratic People's Republic of Korea, Cuba, and Egypt.⁷¹

On the other hand, as seen from the quotation above, there exist no treaties or conventions to which China is a signatory that focus on CBI to allow for recognition and assistance in foreign insolvency proceedings. Regardless, recognition based on treaties would be out of the question for HK-China CBIs. Treaty signing is also not possible for Hong Kong, which is not an independent country but an SAR whose status is akin to a province under the Chinese politico-legal system.⁷²

Furthermore, the statistical tallies below show that the SPC has classified requests for assistance into different groups, which is useful in distilling information as each group is linked with a specific, practical purpose, such as serving legal documents, conducting an investigation and collecting evidence. According to the SPC in China,

There is a growing number of legal documents being sent abroad and foreign legal documents being received. In 2003, China had 868 requests for assistance in legal documents, and sent 418 requests for assistance in legal documents abroad. It received 38 requests for an investigation and collection of evidence, and sent 12 similar requests abroad. Its closest cooperation in civil judicial assistance was with France, the US, Japan, Italy and Korea.⁷³

⁷⁰The 2021 SPC Opinion, art. 6, para 2.

⁷¹The Supreme People's Court of the People's Republic of China, *Commercial Judicial Assistance* (english.legalinfo.gov.cn) updated 4 June 2015, <https://english.court.gov.cn/2015-06/04/content_21334593.htm>.

⁷²Emily Lee, *supra* note 56, 457.

⁷³The Supreme People's Court of the People's Republic of China, *supra* note 71.

It can be extrapolated from the comment above that requests received by China for assistance are disproportionately dominated by requests to acquire legal documents, although they are not likely the same as requests made by the administrator to acquire legal documents in relation to insolvency liquidation or restructuring since none of the treaties signed by China are related to CBIs. More intriguingly, among the five countries said to have the closest cooperation with China, three (France, Korea, Italy) have already signed treaties with China related to civil and commercial judicial assistance. Still, it is impossible to determine whether any of the requests concerned were made in the statutory form, using letters of request. To take an example, although the SPC has indicated that the number of in-bound requests for assistance (i.e. requests sent from abroad to China) is held at 38, it has nevertheless withheld information regarding the criteria or requirements that must be satisfied before these requests are even considered.

Second, article 5 of the EBL also allows the People's Court to grant recognition based on the principle of reciprocity. According to Ji et al, China has long adopted a narrow theory of reciprocity in that the recognition of judgments is based on 'factual reciprocity', meaning 'reciprocity cannot be established unless a Chinese bankruptcy proceeding has first been recognised in the relevant foreign jurisdiction'.⁷⁴ Recent development on reciprocity, however, shows that a relatively liberal reciprocity theory may be adopted to replace the old, narrow approach, in the light of the SPC's permission for the lower courts to take the first step in recognising judgments of another jurisdiction after considering factors such as past communications with the other jurisdiction.⁷⁵ The new liberal approach, following closely in time with the SPC opinion in 2015 entitled *Several Opinions of the Supreme People's Court on Providing Judicial Services and Safeguards for the Construction of the 'Belt and Road' by the People's Courts* (hereinafter 'the 2015 SPC Opinion'), is said to demonstrate the SPC's intention for the Chinese courts 'to build international judicial cooperation, and its commitment of providing judicial reciprocal treatment'⁷⁶ to judgments in foreign countries. It should be considered that the courts' change of attitude – in favour of a liberal approach toward reciprocity, was expressed in the context of the Belt and Road initiative.⁷⁷ Questions remain as to whether the liberal approach, as

⁷⁴Nuo Ji, Lingqi Wang and Jessica Li, 'What's New in China's Bankruptcy and Restructuring', *Global Restructuring Review* (16 November 2020) <<https://globalrestructuringreview.com/review/asia-pacific-restructuring-review/2021/article/whats-new-in-chinas-bankruptcy-and-restructuring>>. Even so, 'the meaning of reciprocity [under article 5 of the EBL] is very uncertain, 'and no rules have been laid down on how recognition and assistance may be given to foreign insolvency proceedings'. See Meng Seng Wee, 'A Major Step in Developing Mainland China's Cross-border Insolvency Law' (2022) 31(1) *Int'L Insolvency Rev.* 101.

⁷⁵Ji and others (n 74).

⁷⁶*ibid.*

⁷⁷The 'Belt' refers to the land-based 'Silk Road Economic Belt', while the 'Road' refers to the seafaring '21st-Century Maritime Silk Road'. The Belt and Road initiative, along with its development ideas

demonstrated by the 2015 SPC Opinion, covers only those ‘foreign countries’ that have participated in China’s Belt and Road initiative, and whether the ‘foreign judgments’ extend to foreign bankruptcy proceedings or merely apply to civil and commercial judgments.⁷⁸ The combination of factors to be considered, namely (a) which foreign countries, or perhaps more to the point, whether these foreign countries are the Belt and Road countries, and (b) what types of foreign judgments, be they bankruptcy or civil/commercial judgments, can multiply into various scenarios that may be potentially confusing even to the Chinese courts. In this regard, article 5 of the EBL may afford more questions than answers. Besides, the meaning of CBI described in article 5 of the EBL refers expressly to ‘the courts of foreign countries’, and therefore may exclude the courts in HKSAR from relying on this specific provision to seek judicial recognition or assistance from the mainland Chinese courts.⁷⁹ So far, the SPC has not openly discussed or weighed the applicability of article 5 of the EBL on HK-China CBIs. Whether it is out of political concern is unclear. It would seem unlikely that the SPC would undercut China’s claim that HKSAR is part of China based on the ‘one country, two systems’ principle.

Given that the High Court of Hong Kong has successively recognised the appointment of bankruptcy administrators in January and May 2020 for two Chinese companies, namely the CEFC Shanghai International Group Limited and Shenzhen Everich Supply Chain Co Ltd, and that the High Court of Hong Kong recognised the reorganisation proceedings that commenced pursuant to the EBL for the HNA Group Co Ltd in 2021 (these three cases will be expounded in Part IV), the above precedents have fulfilled even the strictest factual reciprocity requirement,⁸⁰ let alone the more liberal approach in the 2015 SPC Opinion. To maintain legal stability while making a contribution to the future legislative reform of the EBL, the National People’s Congress, the legislature in China, might consider integrating the Cooperation Mechanism as a new variable in the equation of article 5

and the blueprint for cooperation mechanisms, were accounted for in a document entitled *Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road*, jointly issued in March 2015 by the National Development and Reform Commission, the Ministry of Foreign Affairs, and the Ministry of Commerce of the People’s Republic of China. <www.beltandroad.gov.hk/visionandactions.html>. See also OECD, *China’s Belt and Road Initiative in the Global Trade, Investment and Finance Landscape* (OECD Publishing 2018), <https://doi.org/10.1787/bus_fin_out-2018-6-en>. This report describes how the purpose of the Belt and Road initiative is to promote policy, infrastructure, trade, financial and people-to-people connectivity, and to facilitate economic cooperation across six main economic corridors encompassing China and other participating countries in Asia, Europe, and Africa.

⁷⁸The typology was used by the SPC before in 2015 when requests for judicial assistance were placed in one of the three types of foreign judgments: (1) civil and commercial judgments; (2) civil and criminal judgments; and (3) civil, commercial and criminal judgments. See The Supreme People’s Court of the People’s Republic of China, *supra* note 71.

⁷⁹Emily Lee, *supra* note 56, at 458.

⁸⁰Nuo Ji, Lingqi Wang and Jessica Li, *supra* note 74.

of the EBL, allowing in effect the Chinese courts to recognise the Hong Kong judgments based on the principle of reciprocity. Otherwise, neither the Cooperation Mechanism nor article 5 of the EBL in its current form can constitute a formal mechanism without the required statutory basis, which is detrimental for mutual judicial cooperation between the HKSAR and China.

(4) Comparing the cooperation mechanism with previous arrangements

According to the Department of Justice in Hong Kong, up until August 2022, there were nine arrangements with Mainland China. Other than the 2021 Cooperation Mechanism, the previous eight arrangements include the following: (1) Arrangement for Mutual Service of Judicial Documents in Civil and Commercial Proceedings between the Mainland and Hong Kong Courts (entered into force on 30 March 1999); (2) Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region (entered into force on 1 February 2000); (3) 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 Arrangements between Parties Concerned (entered into force on 1 August 2008); (4) Arrangement on Mutual Taking of Evidence in Civil and Commercial Matters between the Courts of the Mainland and the Hong Kong Special Administrative Region (entered into force on 1 March 2017); (5) Arrangement on Reciprocal Recognition and Enforcement of Civil Judgments in Matrimonial and Family Cases by the Courts of the Mainland and of the Hong Kong Special Administrative Region (entered into force on 15 February 2022); (6) 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 (not yet in force); (7) Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region (entered into force on 1 October 2019); and (8) Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region (articles 1 and 4 entered into force on 27 November 2020; articles 2 and 3 entered into force on 19 May 2021).⁸¹

Where this article is concerned, among those previous arrangements listed above, the 2006 Arrangement between the SPC and the HKSAR Government is the most significant and, after being signed on 14 July 2006, took effect on

⁸¹For details, see *supra* note 14 regarding information provided by the Hong Kong Department of Justice.

1 August 2008.⁸² The mandate of the 2006 Arrangement was to enable mutual recognition of judgments in civil and commercial matters but with a caveat: the Arrangement covers only judgments that relate to disputes in which the parties concerned have agreed in written form to designate a people's court of the Mainland or a court of the HKSAR as the forum with sole jurisdiction for resolving such dispute.⁸³ Although the scope of the 2006 Arrangement did not extend to cover either personal bankruptcies or corporate insolvencies, it was nevertheless the first formal mechanism available for reciprocal recognition of judgments by the courts of Hong Kong and China, as the signing of the 2006 Arrangement further led to the enactment of the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap. 597), which accords the implementation of the 2006 Arrangement with statutory backing.

To update, the 2006 Arrangement was substantially amended in 2019 and retitled: *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* (hereinafter 'the 2019 Arrangement'). Compared to the 2006 Arrangement which is restricted to rulings on monetary matters, the 2019 Arrangement expands its scope of application to include both monetary and non-monetary rulings. And to distinguish it from the 2006 Arrangement, there is no 'Choice of Court Agreement in writing' contained in the 2019 Arrangement. The 2019 Arrangement has not yet come into effect.⁸⁴ Furthermore, in paragraph 5 of article 3 of the 2019 Arrangement, it specifically excludes bankruptcy (insolvency) cases.⁸⁵ It follows that currently, other than the Cooperation Mechanism, there exists no feasible option for liquidators in Hong Kong or administrators in China to seek recognition and assistance which will enable them to perform their functions.

It is noted that the Cooperation Mechanism has been alluded to by some, including Justice Harris,⁸⁶ as 'the new arrangement', implying that the Cooperation Mechanism is a continuity of the previous arrangements, including the 2006 and 2019 Arrangements, likely because all three were signed by the SPC and the Department of Justice of the HKSAR. With due respect, the author has studiously avoided referring to the Cooperation Mechanism as

⁸² *ibid.*

⁸³ The 2006 Arrangement, art. 3, para 1.

⁸⁴ According to the Hong Kong Department of Justice (DoJ), the 2019 Arrangement will be implemented by local legislation in Hong Kong. In that regard, the DoJ has conducted a consultation exercise on a legislative proposal to implement the Arrangement. And the consultation had ended on 31 January 2022. See <https://www.doj.gov.hk/en/mainland_and_macao/RRECCJ.html>.

⁸⁵ For extended discussion, see Part V of this article on legal harmonisation.

⁸⁶ Justice Harris is one of those who has referred to the Cooperation Mechanism as the new arrangement. *Re China All Access (Holdings) Ltd, Companies (Winding-up) Proceedings No 431 of 2020, HCCW 431/2020, [2021] HKCFI 1842, [2021] HKEC 2777, para 11.*

the new arrangement for the following reasons. First, the Cooperation Mechanism is less formal than the previous arrangements, including the 2006 and 2019 Arrangements. The 2006 Arrangement had led to the enactment of the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap. 597) in Hong Kong. In a similar vein, the Legislative Council (LegCo), the legislative body in Hong Kong, passed the Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Ordinance (Cap 645) on 26 October 2022 to implement the 2019 Arrangement,⁸⁷ although it (Cap 645) is not yet in force.⁸⁸ In contrast, the Cooperation Mechanism has not been formally implemented in Hong Kong, through any enactment of new law or amendment to the old, such as the said Ordinance (Cap. 597). The significance could well be understood through the lenses of legal certainty and stability. To that end, one might question whether the (2021) SPC Opinion has embodied the legal substance, or has indeed attained the legal effect, similar to that of the 2006 Arrangement, the latter of which has been enacted into a domestic law in Hong Kong known as the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap. 597) and hence is legally enforceable. Given that the SPC Opinion has not been codified into law through any formal legislative process in either Hong Kong or mainland China, it remains to be seen whether it is automatically enforceable without any further SPC intervention in the future, even if the SPC is tasked with the duty of interpreting the laws in China. Considering the fact that the SPC Opinion was the final product of rounds of consultation between the SPC and the HKSAR government and yet was not enacted into law, the SPC Opinion may lack the stability of the law typically expected from the existing legislation in either Hong Kong or mainland China, especially if the SPC Opinion is subject to further negotiation or changes based on the experiences of the pilot courts.

Other than a lack of formal legislation, the different stages of development in CBI law on both sides was said to also set the Cooperation Mechanism apart from the previous arrangements between China and Hong Kong.⁸⁹ It addressed a seeming contrast between China in promulgating the 2021 SPC Opinion, which sets out an entirely new set of CBI rules to implement the Cooperation Mechanism and the action taken in Hong Kong, where only the Practical Guide was issued. With due respect, the author does not

⁸⁷Joseph Kwan and Andy Lam, 'The Newly Enacted Regime for Reciprocal Enforcement of Judgments in Mainland and Hong Kong' (2023) <www.deacons.com/2023/03/03/the-newly-enacted-regime-for-reciprocal-enforcement-of-judgments-in-mainland-and-hong-kong/#:~:text=The%20Mainland%20Judgments%20in%20Civil,a%20date%20to%20be%20announced>.

⁸⁸In item six of the website created by the (Hong Kong) Department of Justice regarding 'mutual legal assistance', under the category of 'Arrangements with the Mainland', it is stated that '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' (i.e. the 2019 Arrangement) is 'not yet in force' <www.doj.gov.hk/en/mainland_and_macao/arrangements_with_the_mainland.html>.

⁸⁹The author would like to thank the anonymous reviewer for pointing out this issue.

share this viewpoint because the drafting of the 2021 SPC Opinion had drawn experts from both sides, and hence it is a joint project reflecting the intellectual work of both sides.⁹⁰ The Cooperation Mechanism should therefore be understood as part of a long process of negotiation in improving legal cooperation between China and Hong Kong, similar to the evolutionary approach taken in the EU for the enactment of EU insolvency regulations (see Part V on legal harmonisation).⁹¹ Second, unlike the previous 2006 Arrangement, the 2021 SPC Opinion, which is the main body of the Cooperation Mechanism, was rolled out on a trial basis only.⁹² With the branding of a ‘pilot measure’, the 2021 SPC Opinion could well be seen as a temporary measure to guide the Intermediate Courts in Shenzhen, Shanghai and Xiamen (i.e. the pilot courts). Having said that, it is also not uncommon for China to enact legislation on a trial basis in order to test the effectiveness of a new initiative, although the legislation nevertheless still has the force of law. It might well be the case that this practice is employed for the 2021 SPC Opinion, especially if both China and Hong Kong are not yet ready to reform their CBI laws.⁹³ Third, the 2021 SPC Opinion is sported as a unilateral judicial interpretation directed from the SPC to its subordinated courts for giving ‘recognition and assistance to bankruptcy (insolvency) proceedings in the Hong Kong Special Administrative Region’, as is so indicated close to the end of the title of the 2021 SPC Opinion in its English translation. It remains to be seen how impactful the 2021 SPC Opinion is. One way to gauge its impact is by judging the frequency of letters of requests sent by the Hong Kong courts being honoured by the three pilot courts in China. The 2021 SPC Opinion’s broader impact cannot be fully assessed since it is still in its infancy in terms of having been implemented by the pilot courts in China and the courts in Hong Kong alike. But after the Opinion had a reasonable time to be put into practice, say five to ten years, an initial or interim impact study would be warranted – likely using evidence gleaned from court cases accumulated in that time frame to conduct qualitative and quantitative analyses – to determine whether, for debtor companies and their appointed administrators, the Opinion makes recognition and assistance more readily accessible to them.

⁹⁰The concept is drawn from the 14 May 2021 plenary discussion that followed the signing of the Record of Meeting by Ms Teresa Cheng and Mr Yang Wanming.

⁹¹The author would like to thank the anonymous reviewer for pointing out this issue and contributing to this part of the discussion.

⁹²This conservative approach was also used for the EBL, which was introduced in 2006 and preceded by the EBL (Trial Implementation) of 1986. The Chinese authorities prefer to test the water first to gauge the degree of acceptance of a new law by lawmakers, policymakers, regulators, judges, insolvency practitioners and the companies that hire them, along with other stakeholders.

⁹³Again, the author would like to thank the anonymous reviewer for contributing to this part of the discussion.

(5) The adoption of the concept of COMI to prevent forum shopping

Unlike previous arrangements, a distinctive feature of the 2021 SPC Opinion is the adoption of the concept of COMI. COMI, as defined in the 2021 SPC Opinion, refers mainly to the place of incorporation along with consideration of factors such as the principal place of business of the company.⁹⁴ With the objective of preventing fraudulent or abusive forum shopping, pursuant to article 4, paragraph 3 of the 2021 SPC Opinion, the company in Hong Kong must pass a test concerning both the look back period⁹⁵ and the COMI. Consequently, when a Hong Kong administrator applies for recognition or assistance, the COMI of the company represented by him/her must be in Hong Kong continuously for at least six months. While this test may be easy to satisfy by Hong Kong companies that have a registered office in Hong Kong, it is not so straightforward for companies whose place of registration is neither Hong Kong nor China. According to Justice Harris,

A central component of the arrangement is that the test applied by the Mainland court involves assessing whether in the six-month period before an application for recognition is made, the centre of main interest of the relevant company has been located in Hong Kong. If it is, then, regardless of where the Company is incorporated, the Mainland court may recognise the liquidators appointed by the Hong Kong court and grant them assistance to carry out their function within that court's jurisdiction.⁹⁶

There are two points to be addressed thereto. On the one hand, in the 2021 SPC Opinion, the COMI is presupposed to be 'the place of incorporation of the debtor',⁹⁷ a term similar in meaning to 'the debtor's registered office'⁹⁸ in the Model Law and 'the place of the registered office'⁹⁹ in the European Insolvency Regulation (also known as 'EIRR 2015' or 'EIR Recast'), although additional factors, namely the location of the debtor's main office, the location of its main business and the location of its main property, will also be considered before the assumption gets overridden by another claim that the COMI should be somewhere else.¹⁰⁰ With several factors being called into concern, it seems that the Mainland courts are willing to broaden jurisdiction considerations; this practice will help satisfy the

⁹⁴The SPC Opinion, art. 4, para 2.

⁹⁵With respect to the look back period, it should be stressed that no similar requirement is found in the UNCITRAL Model Law on Cross-Border Insolvency, although the 6-month period is twice as long as the 3-month period stipulated in article 31 of the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (recast) (hereinafter the 'EIRR 2015').

⁹⁶Re China All Access (Holdings) Ltd, Companies (Winding-up) Proceedings No 431 of 2020, HCCW 431/2020, [2021] HKCFI 1842, [2021] HKEC 2777, para 7.

⁹⁷The 2021 SPC Opinion, art. 4(3).

⁹⁸U.N. Commission on International Trade Law, UNCITRAL Model Law on Cross-Border Insolvency, art. 16.

⁹⁹The EIRR 2015, art. 3(1).

¹⁰⁰The 2021 SPC Opinion, art. 4(3).

jurisdictional competence of the pilot court to hear a recognition application. On the other hand, in Justice Harris's interpretation above, the phrase 'regardless of where the company is incorporated' signals a potential improvement to increase the possibility of recognition for companies whose winding up applications have been accepted by the Hong Kong court, but which were incorporated in a third jurisdiction (other than Hong Kong and China). It will likely benefit foreign-incorporated companies, a type of company that has increasingly become a norm of HK-China CBIs, being an inevitable consequence of the 'wide-spread use by Hong Kong companies, listed and private, of off-shore jurisdictions such as Bermuda, the Cayman Islands and the British Virgin Islands',¹⁰¹ according to Mr Edward Middleton, a veteran insolvency practitioner in Hong Kong. Mr Middleton's comment echoes with Justice Harris who in recent years has dealt with many applications for recognition and assistance from various jurisdictions which have principally come from common law jurisdictions such as the Cayman Islands, Bermuda and the British Virgin Islands,¹⁰² although the court has also granted applications from civil jurisdictions such as Japan¹⁰³ and China.¹⁰⁴

III. Recognition and assistance *before* the cooperation mechanism

For more than two decades, with respect to judgments and orders concerning HK-China CBIs, requests from Hong Kong for recognition and assistance by the courts in China or, conversely, requests from China for recognition and assistance by the courts in Hong Kong, were riddled with uncertainty resulting from inconsistent court decisions or the conflict of laws created by the reality that the two jurisdictions were subject to different insolvency regimes.

(1) In China: taking the territorial approach, resulting in conflicting decisions

Before 2021, when the Cooperation Mechanism was introduced, decisions made in China with respect to recognition and assistance were inconsistent. A positive decision was found in 1983 where the receiver appointed in Hong Kong reached a successful agreement with a local government to gain control of the assets located in Shenzhen for LMK Nam Sang Dyeing,

¹⁰¹ *Global Insolvency Practice Course: Alumni – Edward S. Middleton*, International Association of Restructuring, Insolvency & Bankruptcy Professionals, <www.insol.org/INSOLfaculty/fellows.php?a=16>.

¹⁰² *Re Liquidator of Shenzhen Everich Supply Chain Co Ltd* [2020] HKCFI 965, [2020] HKEC 1188, para 8.

¹⁰³ *Re Takamatsu* [2019] HKCFI 802, [2019] 5 HKC 505.

¹⁰⁴ Justice Harris spearheaded the recognition of Mainland liquidators in Hong Kong in *re Joint and Several Liquidators of CEFC Shanghai International Group Ltd* [2020] HKCFI 167.

whose parent company was in Hong Kong and was insolvent.¹⁰⁵ It is worth noting that the case was not processed as a formalised bankruptcy proceeding because the court did not have legal authority at that time to grant recognition of such insolvency proceedings.¹⁰⁶ Instead, the court allowed the receiver appointed in Hong Kong to negotiate with a local government,¹⁰⁷ showing the lack of a facilitative mechanism in China at that time as the old EBL, which was enacted in 1986 and applied only to state-owned enterprises, did not address the business failures of foreign-related enterprises.¹⁰⁸ A negative decision was nevertheless found in 1990 in the Liwan District Construction case,¹⁰⁹ which concerned a Chinese Company (Liwan) and a Hong Kong company (Euro-American China Property Co. Ltd). The Guangzhou Intermediate People's Court refused to recognise the authority of a Hong Kong representative who had been appointed in a Hong Kong insolvency proceeding, as the Chinese court, which took a territorial approach, found that 'the liquidator who had been appointed in the Hong Kong liquidation lacked the authority to represent the Hong Kong party in the Chinese litigation'.¹¹⁰

(2) In Hong Kong: upholding the universal approach and common law principles

Hong Kong recognises foreign insolvency proceedings if they satisfy two core requirements in accordance with common law principles. First, the foreign insolvency proceedings are collective insolvency proceedings,¹¹¹ and second, the foreign insolvency proceedings are commenced in the company's country of incorporation.¹¹² With respect to the first requirement, the key word is 'collective', which signifies that the insolvency proceeding

¹⁰⁵Shuai Guo and Bob Wessels, 'Cross-Border Insolvency between Mainland China and Hong Kong: A First Glance from a Global Perspective' (2021) 18(4) *Int'L Corporate Rescue* 248.

¹⁰⁶Jingxia Shi, 'Chinese Cross-Border Insolvencies: Current Issues and Future Developments' (2001) 10(1) *Int'L Insolvency Rev.* 39.

¹⁰⁷*ibid.*

¹⁰⁸For a more detailed analysis of the development of China's EBL, see Emily Lee and Karen Ho, 'China's New Enterprise Bankruptcy Law—A Great Leap Forward, but Just How Far?' (2010) 19(2) *Int'L Insolvency Rev.* 145–77.

¹⁰⁹*Liwan District Construction Company v Euro-America China Property Limited*, A People's Court in Guangdong Province, reported 9 February 1990. In this case, Liwan, the plaintiff, was a Chinese company while Euro-American China Property Limited, the defendant, was a company registered in Hong Kong. Initially involving a breach of contracts, the case became more complex later on as the defendant was wound up by a Hong Kong court. For a more detailed analysis of this case, see Donald J. Lewis and Charles D. Booth, 'Case Comment, *Liwan District Construction Company v. Euro-America China Property Limited*' (1990) 6 *China L. & Prac.* 27.

¹¹⁰Charles D. Booth, 'Living in Uncertain Times: The Need to Strengthen Hong Kong Transnational Insolvency Law' (1996) 34 *Colum. J. Transnat'l L.* 434.

¹¹¹*Re Joint Provisional Liquidators of China Lumena New Materials Corp* [2018] HKCFI 276.

¹¹²*Re Joint Liquidators of Supreme Tycoon Ltd* [2018] HKCFI 277; [2018] 1 HKLRD 1120.

will uphold the principles of (modified) universalism¹¹³ to include local and foreign creditors, giving them equal opportunities to participate in insolvency proceedings and in the distribution of the debtor company's assets. Apparently, the second requirement is premised on the notion of COMI. The combination of both requirements can be translated to mean that when the request for assistance is made to the local court (which is the assisting court), the previous insolvency proceedings must be opened in the foreign country or jurisdiction where the company was incorporated. As far as these common law principles are concerned, they have been maintained with a fair amount of consistency.

In Hong Kong, in following the common law tradition, once the foreign insolvency proceedings have been recognised, the court which accepted the application will grant assistance to the foreign officeholders based on its insolvency law, and is hence allotted the label 'the assisting court'. The purpose of assistance is to enable foreign courts to surmount the problems posed by a worldwide winding up of the company and its affairs due to the territorial limits of each court's powers, as illuminated in the *Singularis* case,¹¹⁴ where the Privy Council outlined the limits to the court's common law power to assist a foreign court in overseas insolvency proceedings. The powers of assistance, however, cannot be exercised without proper checks and balances. In this regard, Lord Sumption in *Singularis* outlines the conditions to be satisfied before the court exercises its common law powers of assistance. First, the power of assistance is not available to enable the foreign officeholders, such as foreign liquidators, to do something that they could not do under the law by which they were appointed. Accordingly, the Companies Court in Hong Kong does not grant a foreign liquidator, whose appointment it has recognised, all the powers available to a Hong Kong liquidator appointed by it pursuant to the CWUMPO.¹¹⁵ Second, assistance must also be consistent with the substantive law and policy of the assisting court. Third, the power of assistance is available only when it is necessary for the performance of the foreign officeholder's functions. In justifying the restrictions above, examples of the promiscuous creation of other common law powers to compel the production of information, in accordance with (a) rules of forensic procedure and (b) statutory provisions for obtaining evidence in foreign jurisdictions, were cited and disapproved by Lord Sumption, who eloquently expressed his view that '[t]he limits of this power are implicit in the reasons for recognising its existence'.¹¹⁶

¹¹³The 'pure' universalism approach is arguably non-existent and has become less practical. Therefore, what we mean by 'universalism' is in reality 'modified universalism'. Indeed, modified universalism has been the theoretical approach employed most often in the context of CBI. See Emily Lee and Eric C. Ip, *supra* note 34, at 414.

¹¹⁴*Singularis Holdings Ltd v PricewaterhouseCoopers*, [2014] UKPC 36, [2015] 2 W.L.R. 971.

¹¹⁵Re CEFC Shanghai International Group Ltd (Mainland liquidation) [2020] 1 HKLRD 676, [2020] HKCFI 167, [2020] HKEC 89, para 11.

¹¹⁶*Singularis Holdings Limited v PricewaterhouseCoopers*, [2014] UKPC 36, [2015] 2 W.L.R. 971, para 25.

More recently, Justice Harris spearheaded the recognition of Mainland liquidators in Hong Kong over a Chinese company (CEFC Shanghai International Group Ltd).¹¹⁷ The CEFC case was remarkable because, as observed by Justice Harris:

[T]his is the first application, of which I am aware, for an order by administrators of a company in liquidation in the Mainland for recognition of their appointment and judicial assistance at common law. It is certainly the first such case in Hong Kong.¹¹⁸

Before January 2020 when the decision in the CEFC case was made,¹¹⁹ 'there has not yet been a case in which a court in the Mainland has granted formal recognition of a foreign liquidator', a point raised again by Justice Harris in the Ando case in which provisional liquidators, similar to the CEFC case, also sought judicial assistance in insolvency proceedings in China so that ultimately the Hong Kong liquidator will be able to recover substantial receivables believed to be owed by creditors in the Mainland.¹²⁰

It will be interesting to see whether, after the CEFC case, more positive changes can be brought about by the Cooperation Mechanism. According to Justice Harris, applications for the recognition of the appointment of administrators and judicial assistance will have to be decided on a case by case basis, pursuant to the (substantive) law of the jurisdiction of the assisting court and without contravention of its public policy.¹²¹ The learned judge seemed to be hinting at the Chinese judges' attitude towards CBIs, since he was convinced that mutual judicial cooperation will not be possible unless a unitary approach for transnational insolvencies can be formed and deemed acceptable by the courts of both sides.¹²² Justice Harris' remark is right on the mark: the lack of a 'unitary approach', which gave rise to conflicting decisions in China,¹²³ will make recognition difficult for any court that puts a premium on consistency.

Following the CEFC case, another similar request was made in the Shenzhen Everich Supply case¹²⁴ in which the Mainland liquidator has

¹¹⁷Re Joint and Several Liquidators of CEFC Shanghai International Group Ltd 1 HKLRD 676, [2020] HKCFI 167, [2020] HKEC 89.

¹¹⁸ibid para 2.

¹¹⁹ibid para 27.

¹²⁰Re Ando Credit Ltd [2020] HKCFI 2775, [2020] HKEC 3540, para 2.

¹²¹According to Justice Harris, '[t]he extent to which greater assistance should be provided to Mainland administrators in the future will have to be decided on a case by case basis and the development of recognition is likely to be influenced by the extent to which the court is satisfied that the Mainland, like Hong Kong, promotes a unitary approach to transnational insolvencies'. See Re CEFC Shanghai International Group Ltd (Mainland liquidation) [2020] 1 HKLRD 676, [2020] HKCFI 167, [2020] HKEC 89, para 33.

¹²²ibid.

¹²³The problem, along with examples of conflicting decisions in China, was discussed at the beginning of Part III titled 'In China: Taking the Territorial Approach, Resulting in Conflicting Decisions'.

¹²⁴Shenzhen Everich Supply Chain Co, Ltd (in Liquidation in the Mainland of the People's Republic of China) [2020] HKCFI 965 (also known as the 'Nianfu' case).

sought the recognition and assistance of an administrator in China by the Hong Kong court. The request was made to the Hong Kong court through two counsels located in Hong Kong, Mr Look Chan Ho and Mr Tommy Cheung. In making the application, the two counsels also cited the CEFC case as a preference. This case (regarding Shenzhen Everich) shows that although Hong Kong is a common law jurisdiction, the fact does not prevent its court from granting requests from a civil jurisdiction such as China. It is noted that when Justice Harris delivered his decision in favour of recognition and assistance, the official court record for the 'Date of Reasons for Decision' was marked 4 June 2020, which also precedes the Cooperation Mechanism.

IV. Recognition and assistance *after* the cooperation mechanism

Taking a doctrinal approach, this part analyses an ensemble of cases either pursuant to or indirectly influenced by the Cooperation Mechanism. To remove any doubt, emphasis must be made that the CEFC case, which is often cited by office holders, was decided on 13 January 2020, in accordance with the common law principles for recognition and assistance instead of the Cooperation Mechanism, which did not come about until about 16 months later on 14 May 2021. In this part of the discussion, the author seeks to identify cases whose rulings were either based on or heavily influenced by the Cooperation Mechanism. Doing so would, in the author's estimation, help assess whether, and if so, to what extent, the Cooperation Mechanism has impacted the courts of China and Hong Kong in terms of the way they deal with requests for recognition and assistance. With that in mind, the author has studied attentively the legal reasoning and interpretation of the courts in granting or, conversely, rejecting the requests sought, for example, by the liquidators of the company. The cases selected for examination will be separated into two groups, given that letters of request can come in one of two ways as follows:

(1) Requests from China for recognition in Hong Kong

To the author's best knowledge, there have been zero cases so far where the Hong Kong Court, mainly the Court of First Instance, has received a letter of request from a Mainland court pursuant to the Cooperation Mechanism. In other words, this has not happened yet.

Nevertheless, it is possible that the Hong Kong Court of First Instance's decisions in the following cases may have been indirectly influenced by the Cooperation Mechanism and hence might turn out to be of interest.

(1.1) Re Founder Information (Hong Kong) Ltd [2021] HKCFI 1508

This court decision was made on 24 May 2021, only ten days after the Cooperation Mechanism was formally introduced. Although the case turned out to be a useful guide for those intending to seek recognition and assistance back then pursuant to the Cooperation Mechanism, for the sake of clarity it should be emphasised that the application was not made by administrators in China but rather the liquidators of Founders Information (Hong Kong) Limited for an action against the Chinese company that provided a guarantee to the Founder Information (Hong Kong) Limited.

Two cases mentioned above (the CEFC and Shenzhen Everich) served as a beacon of light in the present case¹²⁵, where Justice Harris explained that if the administrators of the Chinese company¹²⁶, which was in administration in Beijing, China, wished to defend the proceedings on behalf of the Chinese company, they must demonstrate that they are the duly authorised agent. One way to do so is to make an application ‘for formal recognition and assistance’.¹²⁷ It is noted that Justice Harris did not make the decision for this case based on the Cooperation Mechanism, likely because Beijing is not among the three designated cities pursuant to the 2021 SPC Opinion. That being said, the author takes the view that should the administrators of the Chinese company wish to make their application pursuant to article 6 of the 2021 SPC Opinion – which provides that some materials, for example, an application and a letter of request for recognition and assistance, are required to be submitted to the Hong Kong court – the Hong Kong court is unlikely to reject it given that the same materials would also be required if the Hong Kong court decided to apply instead the common law principles for recognition and assistance. Hypothetically speaking, if the administrators for the Chinese company decided later to apply to Hong Kong for recognition of their appointment made in China and for assistance, article 6 of the 2021 SPC Opinion would provide them with clear guidance when they sought access to the Hong Kong court, which would prove especially helpful if they were unfamiliar with Hong Kong law and/or the common law principles for recognition and assistance.

(1.2) Re HNA Group Co Limited [2021] HKCFI 2897 (also known as Re Jiang Wenyu [2021] HKCFI 2897)

The significance of this case lies in the fact that it is the only case so far that concerns recognition of a Mainland bankruptcy procedure by the Hong Kong

¹²⁵Re Founder Information (Hong Kong) Ltd [2021] HKCFI 1508, [2021] HKEC 2269, para 5.

¹²⁶The Chinese Company is Peking University Founder Group Company (‘PUFG’) Limited. At the time of judgment for the case (Re Founder Information (Hong Kong) Ltd [2021] HKCFI 1508), the PUFG was in administration in Beijing, China.

¹²⁷Justice Harris continued on by referring to his earlier decisions in CEFC Shanghai International Group Limited [2020] HKCFI 167, para. 1 and Shenzhen Everich Supply Chain Co, Ltd [2020] HKCFI 965, para. 2. See Re Founder Information (Hong Kong) Ltd [2021] HKCFI 1508, [2021] HKEC 2269, para 5.

court. The recognition was not made pursuant to the Cooperation Mechanism, although it was referred to in the reasoning of the court because the Mainland court in question was located in Hainan, which is not a pilot area as of yet. Nevertheless, Justice Harris, in making his decision, has taken this issue into consideration, as he raised the question about the applicability of the Cooperation Mechanism in this case. In the light of the deliberation process, it is likely that the court's decision was to some degree influenced by the Cooperation Mechanism.

In considering the administrators' request and ultimately, in making his decision on 16 September 2021, Justice Harris, first and foremost, applied the common law principles for recognition and assistance, further holding that for recognition in Hong Kong of foreign judgments to occur, two requirements must be satisfied. First, the process that the (Hong Kong) Court is asked to recognise must constitute a collective insolvency process. Second, the foreign insolvency proceedings are opened in the company's country of incorporation or where its COMI is located.¹²⁸ In making an order to grant the administrator's request for recognition and assistance, Justice Harris held that this case has satisfied both requirements. The second issue is not controversial as, Justice Harris explained, the company (HNA Group Company) is incorporated in the Mainland.¹²⁹ Considering the first issue, the Court held that in this case, the Mainland reorganisation concerns all of the company's creditors, making it suitable to characterise the reorganisation process as collective in nature, thus capable of being recognised in Hong Kong.¹³⁰

The final issue in this case did concern the Cooperation Mechanism, considering that the purpose of the 'arrangement' – a term used by Justice Harris to refer to the Cooperation Mechanism – is to provide a procedure for recognition and assistance of insolvency proceedings between the Hong Kong court and three pilot courts in China, namely, the Intermediate People's Courts in Shenzhen, Shanghai and Xiamen, which is self-evidently not extending to Hainan. This issue is potentially problematic, said Justice Harris, as the Chinese court that accepted and oversaw this case was the Hainan Province Higher People's Court. Regarding this issue, Justice Harris ruled that 'whether or not it is appropriate for a court in the Mainland other than one of the three specified courts to apply for recognition and assistance',¹³¹ it is a matter suitable for the SPC in China to decide, and this issue alone 'is not of itself a bar to the Hong Kong court granting recognition'.¹³² Justice Harris went on to explain that 'it may be that the Hainan Province Higher People's Court would not recognise Hong Kong insolvency proceedings

¹²⁸Re HNA Group Co Limited [2021] HKCFI 2897, para 6.

¹²⁹ibid.

¹³⁰ibid para 8.

¹³¹ibid para 9.

¹³²ibid.

and liquidators'¹³³ but the fact would not change the legal basis for granting the order, citing 'reciprocity is not a requirement of common law recognition and assistance in Hong Kong'.¹³⁴ From here, the author observes that the Cooperation Mechanism and the common law principles for recognition and assistance are not mutually exclusive when it comes to standards adopted by the Hong Kong court for granting recognition and assistance. In other words, the implementation of the Cooperation Mechanism does not affect the application of the common law principles in Hong Kong for facilitating recognition and assistance. It is foreseeable that the two sets of procedural requirements, which are set in the common law principles and the Cooperation Mechanism respectively, may be jointly considered by the Hong Kong court when granting recognition as they are not contrary to each other.

In view of the two cases (1.1 and 1.2) above, in which the Hong Kong court's decisions were influenced by the Cooperation Mechanism even though it was not directly applied because the Chinese courts concerned were not the pilot courts, the author warns that the Cooperation Mechanism will likely have limited impact if it is not extended to other courts in China outside the pilot areas.

Last but not least, the HNA Group case marked for the first time the Hong Kong Court's recognition of reorganisation proceedings commenced under China's EBL.¹³⁵ Considering that reorganisation and liquidation are often mistakenly treated as two separate processes, Justice Harris' decision in the case helps clarify that, from the perspective of China's EBL, insolvency is a legal ground for reorganisation, and if reorganisation fails, matters will proceed to liquidation.¹³⁶ In China, in seeking the reorganisation of a company in bankruptcy, it is necessary to establish that the company has become insolvent before the Chinese court can order that the reorganisation process commence.¹³⁷ As seen from the order made by the Hainan Province Higher People's Court, a liquidation group was formally appointed as the company's administrator. Consequently, the three administrators seeking recognition and assistance were part of the liquidation group for the HNA Group Company. This point provides a different angle for consideration as to why, from the perspective of the Hong Kong court, recognition of and assistance to foreign insolvency proceedings can be extended to foreign reorganisation proceedings.

¹³³ibid.

¹³⁴ibid.

¹³⁵Anson Wong and Look Chan Ho, *HK's Inaugural Recognition of Mainland Reorganisation Proceedings: Re HNA Group*, <www.lexology.com/library/detail.aspx?g=245a52cd-f4b5-4b07-adbf-c049b81cbd8e>.

¹³⁶It is noted that Chapter 8 of China's EBL deals with reorganisation, and that article 88 of the EBL provides that the court should terminate the reorganisation procedure and declare the company bankrupt when the reorganisation fails. See also *Re HNA Group Co Limited* [2021] HKCFI 2897, para 7.

¹³⁷*Re HNA Group Co Limited* [2021] HKCFI 2897, para 2.

(2) Requests from Hong Kong for recognition in China

At the time of writing, there are four cases relevant to requests of this sort,¹³⁸ and in response to those applications, a letter of request was issued pursuant to the Cooperation Mechanism. Take, for example, the application made by Samson Paper Company Limited which is, according to Justice Harris, ‘a straightforward application[,] and the first made pursuant to the cooperation arrangement entered into on 14 May 2021 by Hong Kong’s Secretary for Justice and the Supreme People’s Court’.¹³⁹ As a matter of fact, the decision in *Re Samson Paper* has been cited and reinforced in subsequent cases where the Hong Kong court agreed to issue a letter of request to the Shenzhen court and Shanghai court respectively.

(2.1) *Re Samson Paper Co Limited (In Liquidation) [2021] HKCFI 2151*

The *Samson Paper* case exemplifies a practice in Hong Kong to apply the principles for granting a letter of request, if asked for permission for Hong Kong liquidators to seek recognition and assistance in another jurisdiction. As explained by Justice Harris, the main points to consider while applying the principles are as follows: (a) it is an inherent jurisdiction of the court to grant a letter of request, and (b) the jurisdiction to which the letter of request will be sent is the most appropriate or convenient forum for determining the issue in question.¹⁴⁰ In applying these principles to this case, Justice Harris concluded that the liquidators’ request will be granted because it is an express statutory power under Hong Kong law to commence legal proceedings to recover assets for the company; consequently, the liquidators’ power will extend to commencing proceedings outside Hong Kong.¹⁴¹ It follows that the court will grant permission to issue a letter of request in view that the assistance is based on conventional grounds, for example, collection of assets, which shall extend to foreign assets.¹⁴² Additionally, in determining which court is the most appropriate entity to which a letter of request should be directed, Justice Harris decided that since the Shenzhen Bankruptcy Court is an administrative section of the Shenzhen Court rather than a separate entity, ‘it was more appropriate to direct the letter of request simply to the Shenzhen Intermediate People’s Court’.¹⁴³

¹³⁸These four cases are: (1) *Re Samson Paper Co Ltd (In Liquidation) [2021] HKCFI 2151*; (2) *Zhaoheng Hydropower (Hong Kong) Limited (In Liquidation) [2022] HKCFI 248*; (3) *Re Ozner Water International Holding Ltd [2022] HKCFI 363*; and (4) *Joint and Several Liquidators of Hong Kong Fresh Water International Group Ltd [2022] HKCFI 924*.

¹³⁹*Nuoxi Capital Ltd v Peking University Founder Group Co Ltd [2021] HKCFI 3817*; [2021] HKEC 5793, para 47.

¹⁴⁰*Re Samson Paper Co Ltd (In Liquidation) [2021] HKCFI 2151*, para 2.

¹⁴¹*ibid* paras. 7–9 where *Akira Sugiyama v Kosei Securities Co (Asia) Ltd [1992] 1 HKC 261*, *Re Southern Pacific Personal Loans Ltd [2014] Ch 426*, and *Re China Agrotech Holdings Ltd [2017] HKCLC 365* were applied.

¹⁴²*Re Samson Paper Co Ltd (In Liquidation) [2021] HKCFI 2151*, para 2.

¹⁴³*ibid* para 15.

The *Samson Paper* case is ground-breaking in that Justice Harris issued the very first letter of request to the Shenzhen Bankruptcy Court, requesting the latter to recognise and assist the Hong Kong liquidators. Following that, the *Re Samson Paper* letter of request was taken up by the Shenzhen Court and a judgment was issued upon it.¹⁴⁴ And since the request has already been approved by the Shenzhen Intermediate People's Court on 15 December 2021,¹⁴⁵ the *Samson Paper* becomes the first case where a Chinese court has formally recognised and assisted liquidators appointed by the Hong Kong court pursuant to the Cooperation Mechanism. In applying the Cooperation Mechanism to grant recognition and assistance, the move by the Shenzhen Intermediate Court signifies their willingness to apply rules and mechanisms with more cohesion, suggested Deloitte, one of the big four accounting firms in Hong Kong heavily engaged in HK-China CBI dispute resolution.¹⁴⁶ But the impact of the Cooperation Mechanism can be greater, affecting not only Hong Kong and the three designated courts in China – the four jurisdictions that are referred in the 2021 SPC Opinion. A bilateral recognition and assistance arrangement can further deepen cooperation between various jurisdictions in different regions and cities in the Greater Bay Area (GBA), an integrated economic, business, innovation and technology hub that aims to bring together the two Special Administrative Regions of Hong Kong and Macau with nine cities in the Guangdong province in China.¹⁴⁷ According to the Hong Kong Trade Development Council, the GBA has been a feature of a number of China's national strategies,¹⁴⁸ implying that the economic, social, cultural and legal integration in the GBA is on China's agenda for national developments. In view of the above, it is possible that the GBA initiative will be an incentive for the Cooperation Mechanism to expand in its application to cover more courts and cities in China.

(2.2) Zhaoheng Hydropower (Hong Kong) Limited (In Liquidation) **[2022] HKCFI 248**

In this case, the application was made by liquidators of Zhaoheng Hydropower as they sought recognition of their appointments in Mainland China. The decision was made on 20 January 2022, in which Justice Harris reinforced his previous decision in *Re Samson Paper* by approving the issuance of a letter

¹⁴⁴(2021) 粵03认港破1号 (2021) Yue 03 Ren Gang Po No. 1 (Shenzhen Court Decision).

¹⁴⁵Deloitte, *The First Hong Kong Liquidation Proceedings Recognized by Chinese Mainland Court under New Mutual Recognition Framework* <www2.deloitte.com/cn/en/pages/finance/articles/1st-hk-liquidation-proceedings-recognized-by-mainland-court.html>.

¹⁴⁶ibid.

¹⁴⁷The nine cities are Guangzhou, Shenzhen, Zhuhai, Foshan, Zhongshan, Dongguan, Huizhou, Jiangmen & Zhaoqing.

¹⁴⁸Hong Kong Trade Development Council, Guangdong-Hong Kong-Macao Greater Bay Area, <<https://research.hktcdc.com/en/article/MzYzMDE1ODI0>>.

of request to the Shenzhen Court for an order to recognise the appointment of the liquidators and provide the necessary assistance to them.

(2.3) Re Ozner Water International Holding Limited [2022] HKCFI 363

Ozner Water International Holding Limited is the parent company (hereinafter the 'Parent') of Hong Kong Fresh Water International Group Limited. The Parent, which is in liquidation in Hong Kong, is a Cayman-incorporated entity listed in Hong Kong. It was held by the Hong Kong Court of First Instance to issue a letter of request on 27 January 2022,¹⁴⁹ with respect to the liquidators' capacity as the liquidators of the Parent, to facilitate their efforts to take control of the Parent's assets in Shenzhen.¹⁵⁰

As explained by Justice Harris, this is the third application for issue by the court, which is the Court of First Instance in Hong Kong, of a letter of request directed to the Shenzhen Intermediate People's Court seeking its assistance in aid of the Parent's liquidation and liquidators.¹⁵¹ The application was made pursuant to the Cooperation Mechanism whose purpose is to facilitate mutual recognition of insolvency processes and office holders by courts of Hong Kong and the Mainland. In reinforcing his decision for the first application, as in the Samson Paper case, the learned judge supposed that it was not necessary for him to repeat the explanation contained in that decision, except to stress that this application is different from the two previous applications in that the Parent is not incorporated in Hong Kong but in the Cayman Islands. The application was granted because Justice Harris considered it a proper case for a letter of request to be issued, having regard to the genesis and purpose of the Cooperation Mechanism and its terms which include, for example, the criteria to be satisfied before the Shenzhen Intermediate People's Court can consider recognising the liquidators and granting them assistance.

(2.4) Joint and several liquidators of Hong Kong Fresh Water International Group Limited [2022] HKCFI 924

In the Fresh Water case, the liquidators of the company made an application for a letter of request to be issued to the Shanghai No.3 Intermediate People's Court ('Shanghai Court') pursuant to the Cooperation Mechanism. As explained in (2.3) above, the company, Hong Kong Fresh Water International Group Limited, is incorporated in Hong Kong and it forms part of a corporate group headed by Ozner Water International Holding Limited, the parent

¹⁴⁹In a commentary made by a law firm, this case was '[t]he first time recognition and assistance under the Cooperation Mechanism has been granted by the Hong Kong Court for a Cayman Islands incorporated company'. See Sidley Austin LLP, *Hong Kong Liquidators Seek Mainland Assets of Hong Kong Listed Company* (21 March 2022) <www.sidley.com/en/insights/newsupdates/2022/03/hong-kong-liquidators-seek-mainland-assets-of-hong-kong-listed-company>.

¹⁵⁰Re Ozner Water International Holding Ltd [2022] HKCFI 363.

¹⁵¹ibid para 1.

company. Both the parent company and the company are in liquidation in Hong Kong. For the company, an order was made on 6 April 2022, to grant the application and to issue the letter of request. Regarding the matter, Justice Harris commented that ‘it is desirable that the liquidators’ appointment is recognised and assisted in Shanghai’.¹⁵² The considerations were, first, that the company serves as an intermediate holding company within the group and, second, that the company’s main assets in the Mainland are its shareholding in wholly-owned subsidiaries incorporated in Shanghai.¹⁵³

In reaching his decision, Justice Harris, citing his decision in *Re Samson Paper*,¹⁵⁴ reiterated the principles governing the granting of a letter of request, as he continued to stress that Hong Kong has jurisdiction over this case as the company’s COMI was in Hong Kong¹⁵⁵ and that the law is well settled that the court (in this case, the High Court of Hong Kong) has an inherent jurisdiction to grant a letter of request in order to permit Hong Kong liquidators to seek recognition and assistance in another jurisdiction.¹⁵⁶ The technique of issuing letters of request to foreign courts to facilitate judicial assistance is inspired by the notions of territorial sovereignty in the public international law area, which is further extended to the private international law area, suggested Justice Harris. He states that.

Letters of request are a private international law response to ancient public international law notions of territorial sovereignty, according to which the jurisdiction of the courts of one sovereign state does not run beyond that sovereign state’s own territorial limits.¹⁵⁷

To put it in colloquial terms, the principles governing the granting of a letter of request would be maintained when it comes to balancing convenience with territorial sovereignty, which constitutes the very notion of comity. To allow judicial actions of another nation within its territory is therefore a recognition of such reality, having due regard both to international duty and convenience, and to the rights of its own citizens under the protection of its laws.¹⁵⁸ In the example of the letter of request, the interplay of comity and judicial assistance is obvious. In the present case, the assistance was sought by the liquidators in support of conventional asset collection

¹⁵²Joint and Several Liquidators of Hong Kong Fresh Water International Group Ltd [2022] HKCFI 924, para 15.

¹⁵³ibid para 4.

¹⁵⁴Justice Harris especially referred to paragraphs 7–9 of *Re Samson Paper Co Ltd (in liquidation)* [2021] 3 HKLRD 727.

¹⁵⁵Joint and Several Liquidators of Hong Kong Fresh Water International Group Ltd [2022] HKCFI 924, para 15.

¹⁵⁶ibid para 8.

¹⁵⁷ibid para 7.

¹⁵⁸Janis Sarra, ‘Northern Lights, Canada’s Version of the UNCITRAL Model Law on Cross-Border Insolvency’ (2007) 16 *Int’l Insolvency Rev.* 19–61. In this article, Professor Sarra cited the Supreme Court of Canada in order to properly define ‘comity’, upon which the notion of ‘judicial assistance’ in the context of international law was further developed.

action. Justice Harris, citing section 251 of the CWUMPO,¹⁵⁹ explained that the granting of a letter of request in the present case would be consistent with these principles.

Lastly, in terms of the significance of the Fresh Water case, Justice Harris suggested that this is ‘the first application pursuant to the Cooperation Mechanism for a letter of request to be issued to the Shanghai Court’,¹⁶⁰ adding that the three previous letters of request¹⁶¹ pursuant to the Cooperation Mechanism were all issued to the Shenzhen Intermediate People’s Court.¹⁶² Given that the Fresh Water case is the fourth in a row and that its ruling was made very recently on 6 April 2022, the change brought about by the Cooperation Mechanism, in Hong Kong at least, is seen as positive and becoming more far-reaching than ever before, despite the fact that it is still in an infantile state of development.

V. Legal harmonisation: a comparative study on EU insolvency regulations, relating to China–Hong Kong arrangements prior to the cooperation mechanism

This part highlights some similarities and nuanced differences between EU Insolvency Regulations and China–Hong Kong arrangements prior to the Cooperation Mechanism, with respect to CBI proceedings.

(1) Similar practices in excluding bankruptcy and insolvency proceedings, but differences remain

The Brussels Convention of 1968 (hereinafter the ‘Brussels Convention’)¹⁶³ was the landmark legislation in the European Community for the enforcement and recognition of civil and commercial judgments amongst European States. According to article 1(2) of the Brussels Convention, there is a carve-out for bankruptcy and insolvency proceedings, as it is stated that the Convention shall not apply to ‘bankruptcy, proceedings relating to the

¹⁵⁹Pursuant to section 251 of the CWUMPO, the liquidators are authorised jointly and severally to exercise the following functions and powers: (1) take into their custody, or under their control, all the property and things in action to which the company is or appears to be entitled; (2) sell the real and personal property and things in action of the company; (3) do all acts and execute, in the name and on behalf of the company, all deeds, receipts and other documents, and for that purpose use, when necessary, the company’s seal; and (4) do all other things as may be necessary for winding up the affairs of the company and distributing its assets. See *Joint and Several Liquidators of Hong Kong Fresh Water International Group Ltd* [2022] HKCFI 924, para 14.

¹⁶⁰*ibid* para 2.

¹⁶¹The previous three letters of request have been discussed above in (2.1), (2.2), and (2.3).

¹⁶²*Joint and Several Liquidators of Hong Kong Fresh Water International Group Ltd* [2022] HKCFI 924, para 2.

¹⁶³1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (hereinafter the ‘Brussels Convention’). Convention on the Mutual Recognition and Enforcement of Judgments of 27 September 1968 (consolidated version published in *OJ* 1998 C27/1).

winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings'.¹⁶⁴

The exclusion was deemed necessary in the initial stage of drafting the Brussels Convention, when it became clear that a separate insolvency convention to deal with the insolvency of both individuals and companies and other legal persons 'seemed to be the only method of achieving harmony in this area of the law',¹⁶⁵ and hence the working group drafting the Convention was split in 1963 to create a second working group that would draft a separate insolvency convention.¹⁶⁶

It has been suggested that the 2006 Arrangement, after it was codified into Hong Kong law to become the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap. 597), thus becoming the last formal arrangement between Hong Kong and China for mutual judicial assistance and recognition, embodied a practice similar to the Convention.¹⁶⁷ The author agrees that the practice is, in effect, quite similar, in view that the 2006 Arrangement also did not cover bankruptcy and insolvency proceedings, which were being carved out until they became noticeable in the Cooperation Mechanism. The author, however, disagrees with the notion that the 2006 Arrangement and the Cooperation Mechanism are closely similar to the Brussels Convention in terms of scope of coverage. The reason is that the 2006 Arrangement was very limited in its scope, covering only judgments in which the parties concerned have agreed in writing to designate a People's Court of the Mainland or a court of the HKSAR as the forum with sole jurisdiction over the resolution of disputes from a specified contract¹⁶⁸ with a choice of court agreement.¹⁶⁹ In contrast, the Brussels Convention was a wide-ranging arrangement that dealt with a multitude of proceedings with regard to civil and commercial matters that went far beyond contractual disputes.¹⁷⁰ A close reading of the text of the 2006 Arrangement also reveals that there is no specific exclusion of bankruptcy and insolvency proceedings. Suffice to say there was only an 'implicit' carve-out in the 2006 Arrangement that will

¹⁶⁴The Brussels Convention, art. 1(2).

¹⁶⁵Paul J. Omar, 'Genesis of the European Initiative in Insolvency Law' (2003) 12 *Int'l Insolvency Rev.* 150–51.

¹⁶⁶*ibid.* 150. See also Paul J. Omar, 'The Insolvency Exception in the Brussels Convention and the Definition of "Analogous Proceedings"', *I.C.C.L.R.* (2011), at 137. See also P. Jenard, *Report on the Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters (Signed at Brussels, 27 September 1968)* (also known as the 'Jenard Report'), at 11.

¹⁶⁷The author would like to thank the anonymous reviewer for bringing the issue to the author's attention.

¹⁶⁸A specified contract is defined as a contract other than '(a) an employment contract; and (b) a contract to which a natural person acting for personal consumption, family or other non-commercial purpose is a party' See the 2006 Arrangement, art. 3(2).

¹⁶⁹The 2006 Arrangement, art. 3(1).

¹⁷⁰An example of a multitude of proceedings can be found in article 5 of the Brussels Convention, and includes matters relating to a contract, maintenance, tort, or matters as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, etc.

be applicable to a limited group of Mainland judgments resulting from contractual disputes only,¹⁷¹ which would by necessary implication exclude bankruptcy and insolvency. As a matter of fact, an ‘explicit’ carve-out of bankruptcy and insolvency proceedings did not occur until the 2019 Arrangement, which supersedes the 2006 Arrangement. Article 3, paragraph 5 of the 2019 Arrangement clearly states that ‘This Arrangement, for the time being, does not apply to judgments in the following civil and commercial matters: ... (5) bankruptcy (insolvency) cases’.¹⁷² Nevertheless, unlike the Brussels Convention which provides a formal, uniform framework for mutual recognition and enforcement of judgments in civil and commercial matters, the 2019 Arrangement does not yet constitute a formal mechanism for the same purpose, as it is not yet in force.¹⁷³

Despite the technical differences explained above, there are easier parallels to draw between the 2006 Arrangement, the 2019 Arrangement and the Brussels Convention, as all of them have carved out bankruptcy and insolvency proceedings due to their complexity and the sui generis nature of the concept of conflict of laws in CBIs. According to a background brief prepared by the HKSAR Government and submitted to the LegCo¹⁷⁴ for the Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Bill, which seeks to implement the 2019 Arrangement,¹⁷⁵ it was acknowledged that the 2019 Arrangement does not cover insolvency and bankruptcy proceedings due to the complexity involved.¹⁷⁶ The HKSAR Government further provided the rationale for the exclusion (i.e. the carve-out) in a follow-up response to LegCo Members’ questions. First, corporate insolvency and debt restructuring matters are already covered by the Cooperation Mechanism (specifically, the Record of Meeting, which took effect on 14 May 2021).¹⁷⁷ Second, the Mainland has yet to promulgate a national law on personal bankruptcy.¹⁷⁸ The first reason for rationalising the carve-out

¹⁷¹Enzo Chow, ‘Endless Waltz: Enforcement of Mainland Judgements in Hong Kong’ (2007) (5) Hong Kong Lawyer, at 33 (where it was suggested that ‘the future legislation [to implement the 2006 Arrangement] will be applicable to a limited group of Mainland judgments resulting from contractual disputes only’).

¹⁷²The 2019 Arrangement, art. 3(5).

¹⁷³Arrangement 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’ (i.e. the 2019 Arrangement) is “not yet in force”. <www.doj.gov.hk/en/mainland_and_macao/arrangements_with_the_mainland.html>.

¹⁷⁴Legislative Council, *Bills Committee on Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Bill – Background Brief Prepared by the Legislative Council Secretariat*, LC Paper No. CB (4)394/2022(01).

¹⁷⁵ibid para 2.

¹⁷⁶ibid para 25.

¹⁷⁷ibid para 26.

¹⁷⁸Department of Justice, *Bills Committee on Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Bill (‘Bills’) Follow-up to the first meeting on 17 May 2022* (27 May 2022), LC Paper No. CB(4)464/2022(02), Annex A titled ‘Rationale for excluding Mainland or Hong Kong Judgments given in respect of the matters under Clauses 5,6 and 7 of the Bill’, A.v-A.vi.

of insolvency proceedings from the 2019 Arrangement is comparable to the Convention's exclusion of the same matter. As explained by Schollmeyer,

The Brussels Convention does not apply to insolvency procedures because the complementing Convention had been expected at the time the Brussels Convention was drafted.¹⁷⁹

The complementing Convention alluded to above is the Convention on Insolvency Proceedings,¹⁸⁰ which was signed on 23 November 1995 by the Plenipotentiaries of twelve Member States.¹⁸¹ As a mandatory legal framework of intra-community cooperation, the Convention on Insolvency Proceedings 'implements Article 220 of the Treaty establishing the European Community [also known as the 'EC Treaty'] and complements the 1968 Brussels Convention'.¹⁸² In terms of its approach, the Convention on Insolvency Proceedings is based on the principle of the universality of insolvency;¹⁸³ therefore, insolvency proceedings opened in a Contracting State have legal effects not only in that State but automatically in any other Contracting State.¹⁸⁴

(2) Lessons from the European experience in legal harmonisation

In the European Union (EU), the harmonisation of conflict of laws, in the realm of insolvency or bankruptcy proceedings in particular, did not occur until the European Insolvency Regulation 2000¹⁸⁵ (hereinafter 'EIR 2000'), which was introduced on 29 May 2000, approximately 32 years after the Brussels Convention's 1968 enactment. The EIR 2000 was the first EU law to introduce 'a coherent system of legal rules to govern transnational insolvency procedures involving companies, traders or individuals'.¹⁸⁶ The EU-wide insolvency regulation was launched by the working group drafting the Brussels Convention, which was split in two, at which point a separate working group (hereinafter the 'insolvency working group') was tasked to draft the insolvency regulation.

¹⁷⁹Eberhard Schollmeyer, 'The New European Convention on International Insolvency' (1996–1997) 13 *BANKR. Dev. J.* 421.

¹⁸⁰The text of the Convention on Insolvency Proceedings was published in Official Journal No L 6500/96.

¹⁸¹The twelve Member States are Belgium, Denmark, Germany, Greece, Spain, France, Italy, Luxembourg, Austria, Portugal, Finland and Sweden. See the Council of European Union, 'Report on the Convention on Insolvency Proceedings' (May 3, 1996), Annex, <http://aei.pitt.edu/952/1/insolvency_report_schmidt_1988.pdf>.

¹⁸²ibid 11.

¹⁸³Kurt Malangré, *Report on the Convention on Insolvency Proceedings of 23 November 1995*, European Parliament Report-A4-0234/1999 (23 April 1999), in 'B. Explanatory Statement, 3. The contents of a regulation on cross-border insolvency proceedings', <[¹⁸⁴The Convention on Insolvency Proceedings, art. 17\(1\).](http://www.europarl.europa.eu/doceo/document/A-4-1999-0234_EN.html#:~:text=In%20its%20approach%20the%20Convention,(Article%2017(1))>>.</p>
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¹⁸⁵Council Regulation (EC) 1346/2000 of 29 May 2000 on insolvency proceedings.

¹⁸⁶EUR-Lex, *Insolvency Proceedings*, <

The insolvency working group presented a draft convention in 1970¹⁸⁷ (hereinafter the '1970 Convention'), which was not adopted.

The reaction to the draft convention was critical, especially because the text was meant to work only with the parallel introduction of uniform rules across the Member States. This would result in domestic reforms for rules concerning cross-border cases but also for those cases with no international element. ... Overall, the comparative novelty of the problems faced in international insolvency, at that time a little developed factor in international commerce, meant that the text met with almost unanimous opposition.¹⁸⁸

The 1970 Convention was opposed due to its radical nature, and the anticipated impact on domestic laws, given the disparity between rules in Member States concerning cross-border cases. Another reason for its rejection, which was more technical than political, was the accession of three Member States,¹⁸⁹ which together joined the European Community as of 1 January 1973, meaning the 1970 Convention would require more work before it could be adopted by all Member States.¹⁹⁰ The insolvency working group came up with another draft known as the 1980 Convention¹⁹¹ but it failed to reach a consensus for reasons similar to the 1970 Convention. Overall, the convention project 'was abandoned, partly because it was overly ambitious and partly because it was overly complex'.¹⁹² The next effort came when the 1995 Convention was opened to Member States for signature but was unsuccessful due to political reasons, as the UK failed to sign up by the time the period for signature had expired, causing the convention to lapse.¹⁹³ Nevertheless, the 1995 Convention was hailed as a manageable compromise to resolve significant issues common to CBIs such as the jurisdiction of courts, recognition and enforcement of judgments and so on. According to Ghio,

Miguel Virgos highlighted that those previous initiatives had failed because they had aimed too high, at the expense of any possible compromise across strongly held national views, especially on the impact on domestic creditors, and Ian Fletcher agreed that the 1995 Convention pursued a pragmatic course leading to an acceptance compromise.¹⁹⁴

¹⁸⁷EEC Draft Convention on Bankruptcy, Winding-Up, Arrangements, Compositions, and Similar Proceedings (1970).

¹⁸⁸Emilie Ghio, *Redefining Harmonisation* (Elgar, 2022), Chapter 5 Harmonisation in action: European Insolvency Law, at 107.

¹⁸⁹They were Denmark, the Republic of Ireland and the United Kingdom. See Gabriel Moss, Ian F. Fletcher and Stuart Isaacs, *Moss, Fletcher and Isaacs on The EU Regulation on Insolvency Proceedings* (3rd edn, Oxford University Press 2016), at 3 (original footnote 5).

¹⁹⁰*ibid* 1.03.

¹⁹¹It is also known as the 1980 Draft EEC Bankruptcy Convention. Carl Tjur, 'An Analysis of the 1980 Draft EEC Bankruptcy Convention' (1982) 10 *Int'l Bus. Law.* 22. See also Donald T. Trautman, Jay Lawrence Westbrook and Emmanuel Gaillard, 'Four Models for International Bankruptcy' (2015) 41(4) *Am. J. Comp. L.* 573–625.

¹⁹²Emilie Ghio, *supra* note 188, at 107.

¹⁹³Paul J. Omar, *supra* note 165, at 161.

¹⁹⁴Emilie Ghio, *supra* note 188, at 108.

After the political reasons evaporated, the 1995 Convention was resurrected and modelled into the EIR 2000, which imposed conflicts of law rules for insolvency proceedings concerning debtors based in the EU with operations in more than one member state. The EIR 2000 was replaced and superseded by the European Insolvency Regulation Recast 2015¹⁹⁵ (hereinafter 'EIRR 2015') for insolvencies beginning on or after 26 June 2017.¹⁹⁶ The trajectory development of the EU's insolvency regulations is inspiring for the China–Hong Kong Cooperation Mechanism, in the light of the EU's resolution on achieving procedural harmonisation prior to substantive harmonisation. The rationale for compromise is remarkable for the 1995 Convention, which 'represented an important departure from the scope of the first drafts which sought to harmonise both procedural as well as substantive rules'.¹⁹⁷ Legal harmonisation is necessary considering the number of jurisdictions in the European Community and the sensitive and complex nature of CBI. With this realisation, the legal harmonisation of EU insolvency regulations began with procedural harmonisation in the EIR 2000,¹⁹⁸ with more substantive harmonisation happening in the EIRR 2015.¹⁹⁹ Despite that, the EIRR 2015 falls short of full substantive harmonisation, given the different substantive laws in each Member State.²⁰⁰

VI. Conclusion

The Cooperation Mechanism is the colloquial name given to a combination of the Record of Meeting, the Practical Guide and the 2021 SPC Opinion, which also signifies that it is an umbrella term that covers the three agreements between the authorities in Hong Kong and the Mainland on matters involving recognition of each jurisdiction's insolvency or bankruptcy procedures. As provided for by the Record of Meeting, Mainland courts selected and designated as pilot areas can initiate judicial cooperation with Hong Kong courts. In the same fashion, the three designated courts in China are able to receive requests from liquidators or provisional liquidators sanctioned by Hong Kong courts. Additionally, the 2021 SPC Opinion has designated courts in the municipalities of Shanghai, Shenzhen, and Xiamen as pilot areas.²⁰¹ It provides that any Hong Kong administrator (e.g. liquidator) applying for assistance and

¹⁹⁵Council Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) [2015] *OJ L* 141/19.

¹⁹⁶Thomson Reuters Practical Law, <[https://uk.practicallaw.thomsonreuters.com/0-502-7023?transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/0-502-7023?transitionType=Default&contextData=(sc.Default))>.

¹⁹⁷Emilie Ghio, *supra* note 188, at 108.

¹⁹⁸Emilie Ghio, Gert-Jan Boon, David Ehmke, Jennifer Gant, Line Langkjaer and Eugenio Vaccari, 'Harmonising Insolvency Law in the EU: New Thoughts on Old Ideas in the Wake of the COVID-19 Pandemic' (2021) 30 *Int'L Insolvency Rev* 433.

¹⁹⁹*ibid* at 434.

²⁰⁰J. Ernst Degenhardt, 'The Harmonization of EU Insolvency Laws: A Harmonization of Apples and Pears' (2017) 26(5) *Norton J. Bankr. L. & Prac.* 629.

²⁰¹The SPC Opinion, art. 1.

recognition from the pilot areas' courts require a letter of request and a copy of the judgment authorising such to be issued by the High Court of the HKSAR.²⁰² Finally, in view of the fact that the SPC Opinion only applies to companies that had a COMI in Hong Kong for at least 6 months,²⁰³ this specific requirement further shows the Chinese authority's intention to prevent forum shopping.

From the jurisprudence, or at least from the court cases examined in this article, in the past 16 months following the implementation of the Cooperation Mechanism, only four letters of request have been made pursuant to the Cooperation Mechanism, all of which were issued by the Hong Kong court (and none by the Chinese courts). Sending such a formal request is, in effect, a two-stage process, considering that the application for recognition and assistance consists of a two-part question: (a) Has the COMI of the company been in Hong Kong for at least six months?²⁰⁴ and (b) Is the occasion appropriate for the issuance of a letter of request given that the Mainland is the most appropriate forum for settling the relevant issues?²⁰⁵ Situations that meet the requirements are embodied in circumstances where substantial assets need to be realised by the liquidator, who is under a duty to do so if it is in his knowledge, or alternatively he has reasonable grounds to believe that those assets are located in China.

The development of court cases reveals that the Cooperation Mechanism is more far-reaching than originally envisaged. First, it applies not only to insolvency liquidation but also insolvency restructuring. Second, it is an inherent jurisdiction of the court to grant a letter of request, as suggested by Justice Harris in the *Samson Paper* case, which has been cited repeatedly. Last but not least, in the *HNA Group* case, the question of whether it is appropriate for a Chinese court – other than those courts designated in the 2021 SPC Opinion – to apply for recognition and assistance pursuant to the Cooperation Mechanism was raised by Justice Harris. The question may be raised by other judges too, although it is a matter that must be decided by the SPC in China. Despite that matter being unsettled, the question is not of itself a bar that would prevent the Hong Kong court from granting recognition. In Hong Kong, the courts are more flexible, as compared to those in China. After all, as suggested by Justice Harris, it is an inherent jurisdiction of the court to approve an application to issue a letter of request. In the light of this, the Hong Kong court is more readily able to exercise discretion in applying the Cooperation Mechanism to other courts in China outside the pilot areas due, principally, to the fact that reciprocity is neither a requirement

²⁰²The SPC Opinion, art. 6.

²⁰³The SPC Opinion, art. 4.

²⁰⁴The SPC Opinion, art. 4.

²⁰⁵The SPC Opinion, art. 6.

nor a concern for the Hong Kong court in applying the common law principles of recognition. On the other hand, for the sake of clarity and certainty, it remains to be seen whether the SPC in China will make any decision to extend the Cooperation Mechanism, allowing it to apply on a nationwide basis.

From the author's perspective, the introduction of the Cooperation Mechanism is very timely in the light of the exponential growth in the number and scale of HK-China CBI cases in recent years. There are, however, considerable limits to the Cooperation Mechanism. For one, the 2021 SPC Opinion was launched for trial implementation and, accordingly, involves only the Hong Kong court and three designated courts in China, implying that improvement in mutual recognition and assistance will be gradual and thus may not be felt immediately. This observation is evidenced by the fact that there has been no formal letter of request sent from a Mainland court to the Hong Kong court pursuant to the Cooperation Mechanism. One can also imagine problems arising in the implementation of the 2021 SPC Opinion in regard to the construction of jurisdiction issue, due to the fact that the High Court in Hong Kong and the Intermediate People's Courts in Shanghai, Xiamen and Shenzhen may disagree on fundamental issues such as the COMI, which is a loaded concept subject to potentially different interpretations. Let us suppose, for instance, that the debtor company is listed in Hong Kong but its main assets are located in China: in this case, both the courts in Hong Kong and China are likely to claim jurisdiction, raising the question of which one should obtain the main jurisdiction and which should defer and assume only a subordinated role in overseeing the insolvency proceedings.

Whether article 5 of the EBL can be extended to HK-China CBIs is a matter that carries strong implications, both political and legal, and is a matter that should be decided by the SPC in China. The author considers the question would affect more for an 'in-bound letter of request', which, from the perspective of article 5 of the EBL, refers to requests sent to the Chinese courts from the Hong Kong court. It would have less of an impact on an 'out-bound letter of request', or a request sent to the Hong Kong court from China, given that reciprocity is not a requirement for the Hong Kong court in the recognition of foreign judgments, meaning recognition will still be made regardless of whether the Chinese courts extend the same to Hong Kong. This uncertainty in terms of legal treatment will likely be common and inevitable in HK-China CBIs. Those affected will include not only the debtor company but its employees along with other creditors, the insolvency practitioners appointed over the debtor company, and the courts in charge. Consequently, whether the inclusion of the Cooperation Mechanism in the EBL is appropriate is a question worthy of consideration in a future law reform.

The author argues that the Cooperation Mechanism cannot qualify as a formal mechanism for mutual recognition and assistance in the same way as the 2006 Arrangement. In order to maintain legal stability and certainty, a formal mechanism is good for all stakeholders involved in, and hence affected by, the judgments and orders made by the courts in Hong Kong and China in matters of HK-China CBIs, which are heavily laden by a conflict of laws in these two jurisdictions. The potential impact of the Cooperation Mechanism is far reaching as it is suitable to provide guidance for not only insolvent liquidations and restructuring, but also schemes of arrangements, winding up orders and letters of request. To safeguard legal interests and avoid uncertainties, having a formal mechanism for mutual recognition and assistance is key and its significance cannot be overemphasised. In that regard, the author suggests that the 2021 SPC Opinion, or its amendment in the future, be incorporated into domestic laws that have a cross-border dimension, for example, the Mainland Judgments (Reciprocal Enforcement) Ordinance in Hong Kong and article 5 of the EBL in China. A formal mechanism can boost creditor confidence, streamline insolvency proceedings, and stimulate further economic growth for global economic hubs such as mainland China and Hong Kong.

The EU's journey in introducing a mandatory framework for intra-community cooperation on CBI matters offers some practical insights into a similar practice in China–Hong Kong arrangements prior to the Cooperation Mechanism. Most noticeably, a similar compromise was made in the 2006 Arrangement and the 2019 Arrangement, with a view to achieving legal harmonisation. The EU's experience is helpful for China and Hong Kong, which are two different jurisdictions with significantly different insolvency laws. And in making insolvency judgments, the Hong Kong courts rely heavily on common law insolvency principles while the Chinese courts do not. Conflict of laws is not only expected but will anchor the making of any formal mechanism between China and Hong Kong for the mutual enforcement and recognition of insolvency judgments. To that end, prioritising procedural harmonisation is key to the successful implementation of the Cooperation Mechanism.

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Notes on contributor

Emily Lee (LLB, LLM, PhD) is the Director of the Asian Institute of International Financial Law (AIFL) and Associate Professor at the Faculty of Law of the University of Hong Kong. Her research interests are in the fields of financial law, FinTech regulations and policies, corporate insolvency law, cross-border insolvency law and comparative law. Her research work has been published by leading peer-reviewed journals such as the *American Journal of Comparative Law*, *Law and Contemporary Problems*, *Journal of Corporate Law Studies*, *Journal of Business Law* and *Common Law World Review*. Her work has been cited by McKinsey & Company's McKinsey Global Institute, the Financial Services Development Council (a high-level, cross-sectoral advisory body established by the Hong Kong Special Administrative Region Government), a former US bankruptcy judge and academics, among others. She is also a member of the United Nations Commission on International Trade Law (UNCITRAL)'s expert group.