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Citation	American Journal of Comparative Law, 2015, v. 63 n. 2, p. 439-465
Issued Date	2015
URL	http://hdl.handle.net/10722/200644
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Problems of Judicial Recognition and Enforcement in Cross-Border Insolvency Matters Between Hong Kong and Mainland China†

This Article first explores whether it is legally possible to extend the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements between Parties Concerned to cover cross-border insolvency matters between Hong Kong and mainland China and, if so, the advantages and disadvantages of so doing. It then examines other alternatives for facilitating judicial recognition and enforcement of judgments between the courts in Hong Kong and mainland China that focus specifically on cross-border insolvency judgments (including court orders) that concern both Hong Kong and mainland China, such as signing a new arrangement, a special treaty, or a Memorandum of Understanding. It seeks to highlight the deficiencies of the Arrangement as well as discuss the options to remedy those deficiencies. The situation for Hong Kong–China cross-border insolvency cases is opaque due to the lack of local cross-border insolvency legislation in Hong Kong. In China, there is only one article (article 5) of the 2006 Enterprise Bankruptcy Law that concerns cross-border insolvency, but that article is inapplicable to Hong Kong–China cross-border insolvency cases. That article is inapplicable because it applies only to cross-border insolvency cases involving a foreign state. Since Hong Kong is not a foreign state, it is precluded from the article's application. Also, Hong Kong and China have not adopted the UNCITRAL Model Law on Cross-Border Insolvency. Although internationally accepted soft law standards such as the Model Law can provide institutional guidance to cross-border insolvency matters, it is compatible with Hong Kong–China cross-border insolvency cases only when a third jurisdiction is involved. The lack of a formal judicial recognition mechanism for Hong Kong–China cross-border insolvency judgments creates problems such as legal uncer-

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† DOI <http://dx.doi.org/10.5131/AJCL.2015.0012>

tainty and forum shopping. This Article aims to raise awareness of the difficulties facing practitioners involved in Hong Kong–China cross-border insolvency cases and to share academic perspectives on the issue.

INTRODUCTION

Disputes from cross-border corporate insolvencies (CBI) between the Hong Kong Special Administrative Region (HKSAR) and mainland China (hereinafter, “HK-China CBI”) occur frequently, and a customized solution is long overdue; but there is no sign from either government of establishing any formal judicial assistance and recognition mechanism in light of this issue in the near future. In order to enforce insolvency judgments that have cross-border implications, a mutual judicial recognition mechanism is required. In the context of this Article, CBI judgments or orders refer to those made by the courts in Hong Kong or mainland China which would be enforced in the counterparty’s jurisdiction. For example, CBI judgments or orders made by the Hong Kong courts need to be recognized by the mainland Chinese courts prior to being enforced in mainland China, and vice versa.

Without a formal judicial recognition mechanism in place and in operation, insolvency practitioners appointed in Hong Kong must be innovative and strategically plan for the possibility that subsequent insolvency proceedings may take place in mainland China by taking administrative action such as changing the legal representatives and management personnel of Chinese subsidiary companies. This administrative measure of changing legal representatives has a certain innovative aspect to it because it is a means to sidestep the problem of a lack of judicial assistance and recognition mechanism for HK-China CBI cases. It would not be required, however, if a clearly stated insolvency procedure with legal certainty for all concerned parties existed. Understandably, a change of legal representatives is not intrinsic to corporate insolvencies as it can also happen where, for example, there is a shareholder dispute. And even if a change of legal representatives helps in creditors’ rights enforcement, it would be left to the vagaries of mainland China’s Administration for Industry and Commerce, which may or may not permit it.

Judicial recognition is a rather practical issue; the mainland Chinese courts usually would not have any problem recognizing the liquidators or provisional liquidators who are appointed by the Hong Kong courts, provided that the company in liquidation is incorporated in Hong Kong.¹ In theory, the Administration for Industry and Com-

1. For example, in *Securities and Futures Comm’n v. China Metal Recycling (Holdings) Limited*, HCCW 210/2013, (C.F.I. Nov. 12, 2014) (Legal Reference System) (H.K.), the two provisional liquidators were appointed by the Hong Kong court.

merce will respect the order given by the Chinese court to allow a change of legal representatives, but in practice, they may try to delay this change through administrative action, for example: (1) requiring the consent of the existing legal representatives to the change of legal representatives; (2) requiring the resignation of the existing legal representatives before the change of legal representatives; (3) requiring that the existing legal representatives relinquish the official corporate seal, a device necessary to officiate corporate documents, including the authorization of the change of legal representatives—a device that is typically controlled by the legal representatives as a symbol of their authority; and/or (4) simply withholding the registration without giving any reason. For an offshore company undergoing liquidation, the liquidator must be appointed by the court from the offshore company's place of incorporation.

Part I explains why judicial recognition and assistance between Hong Kong and mainland Chinese courts, which are required for enforcing judgments or orders made in HK-China CBI cases, are a matter of regional conflict of laws. Part II explores the possibility of extending the *Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements Between Parties Concerned*² (the Arrangement) to cover HK-China CBI matters. Part III examines other available options for enabling mutual judicial recognition and assistance between Hong Kong and mainland China. Part IV provides assessments and comments on these possible options. The conclusion sets out final remarks.

I. REGIONAL CONFLICT OF LAWS

Before Hong Kong was returned to Chinese sovereignty, it was regarded as a foreign jurisdiction by mainland China. Ironically, even after the return of Hong Kong to China in 1997, Hong Kong has still been regarded as a foreign jurisdiction by mainland China, as evidenced by a judicial interpretation issued in 2002 by the Supreme People's Court in China titled *Provisions Concerning the Jurisdiction Problems of Foreign-Related Civil and Commercial Cases* (the "Provision"; emphasis added), article 5 of which prescribes that "the jurisdiction of civil and commercial cases involving HKSAR, Macao SAR and Taiwan litigants shall be solved by referring to the Provi-

2. Signed by the Supreme People's Court (China) and Department of Justice (Hong Kong Special Administrative Region), July 14, 2006, available at <http://www.legislation.gov.hk/intracountry/eng/pdf/mainlandrej20060719e.pdf> [hereinafter Arrangement].

sion.”³ Under the rubric of “One Country, Two Systems,” two judicial systems (i.e., those of Hong Kong and mainland China) began to operate in parallel within one country.⁴ Guobin Zhu has suggested that conflict of laws between the HKSAR and mainland China “is seen in a ‘vertical’ sense, so it cannot be regulated by an analogy of general conflict of laws rules.”⁵ On the other hand, if the conflict of laws is between the HKSAR and a province or another autonomous region in China, then such a conflict would be treated at a horizontal level.⁶ This horizontal-level classification has inspired academics to invent a theory of regional conflict of laws (also referred to by some commentators, such as Guobin Zhu, as *inter*-regional conflict of laws) in order to cope with conflict-of-laws cases involving the courts in Hong Kong and those in mainland China.

The HKSAR and mainland China’s interwoven history paved the way for dual legal systems within one sovereign nation. The *Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of China on the Question of Hong Kong* (the “Sino-British Joint Declaration”) announced on December 19, 1984 that the colony of Hong Kong would be returned to China as the HKSAR on July 1, 1997.⁷ The Declaration was an agreement between China and the United Kingdom, with China guaranteeing the HKSAR’s freedoms and pluralism under the rule of law for fifty years, beginning on the date of return.

Six years after Hong Kong reverted to Chinese sovereignty as the HKSAR, the *Closer Economic Partnership Arrangement* (CEPA), an economic agreement to foster and facilitate bilateral trades between Hong Kong and mainland China, was signed on June 29, 2003. CEPA laid out the basis for economic integration between the HKSAR and mainland China under the political arrangement of the “One Country, Two Systems” principle which enabled the HKSAR’s capitalist and mainland China’s socialist economies to coexist under the same sovereign nation but operate within separate legal and business frameworks. Since the signing of CEPA, the two sides have concluded

3. Xinyi Gong, *When Hong Kong Becomes SAR, Is the Mainland Ready? Problems of Judgments Recognition in Cross-Border Insolvency Matters*, 20 INT’L INSOLVENCY REV. 57, 58 (2011).

4. *Id.* at 57.

5. Guobin 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*, 32 H.K. L.J. 615, 626 (2002).

6. *Id.* at 627.

7. Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of China on the Question of Hong Kong, Dec. 19, 1984, U.K.-P.R.C., GR. BRIT. T.S. No. 20 (Cd. 9352), available at http://www.legislation.gov.hk/blis_ind.nsf/CurAllEngDoc/034B10AF5D3058DB482575EE000EDB9F?OpenDocument [hereinafter Sino-British Joint Declaration].

a number of supplemental agreements to broaden its coverage; the latest, Supplement IX, was signed on June 29, 2012, exactly nine years after CEPA was first signed.⁸ Mainland China is Hong Kong's largest trading partner, according to the latest Hong Kong Government Yearbook: "The 'External Direct Investment Statistics of Hong Kong 2011' released by the Census and Statistics Department indicates that Hong Kong's FDI [foreign direct investment] inflow in 2011 amounted to [HKD]\$751.8 billion . . . [Of all FDI source countries or territories,] [t]he mainland of China was the largest, accounting for 36.3 per cent of the total as at the end of 2011."⁹ Yet in spite of closer integration through CEPA, mainland China and the HKSAR still remained, and continue to remain, two separate judicial jurisdictions; as a result, judicial assistance and recognition of court judgments and orders remain a problem between mainland China and the HKSAR.

In our modern era of globalization, failing or failed companies with business interests in multiple jurisdictions disrupt international trade and commerce unless CBI laws enable their orderly restructuring or liquidation across multiple jurisdictions. The bankruptcy of Lehman Brothers Holdings Inc. in 2008 is the quintessential CBI: the U.S. investment bank's bankruptcy resulted in more than seventy-five insolvency proceedings in 16 jurisdictions concerning US\$619 billion in debt and 25,000 employees worldwide.¹⁰ This type of CBI is nonetheless distinct from HK-China CBI; while there is a border between the HKSAR and mainland China, it is not a border as usually understood in the context of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency. Under the context of this Model Law, the term "foreign" is used to describe a collective judicial or administrative proceeding in a "foreign State," which intrinsically excludes Hong Kong due to its status as a SAR within its sovereign, China.¹¹ As such, it is important to note that although internationally accepted soft law standards such as the Model Law can provide institutional guidance on CBI matters, they are not entirely compatible with HK-China CBI cases, unless the cases involve a third jurisdiction such as, typically, a tax haven jurisdiction. Edward Middleton, Head of Restructuring

8. GOVERNMENT OF HONG KONG SPECIAL ADMINISTRATIVE REGION, GOVERNMENT YEARBOOK 2012, ch. 5 (*Commerce and Industry*), at 91, <http://www.yearbook.gov.hk/2012/en/pdf/E05.pdf>.

9. *Id.* at 87.

10. U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL PRACTICE GUIDE ON CROSS-BORDER INSOLVENCY COOPERATION 123, U.N. Sales No. E.10.V.6 (2009), http://www.uncitral.org/pdf/english/texts/insolven/Practice_Guide_Ebook_eng.pdf. See also Emily Lee, *Investor Protection in Lehman Brothers' Insolvency Litigation*, 7 J. COMP. L., no. 2, 2012, at 284, 284.

11. U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY art. 2, U.N. Sales No. E.14.V.2 (1997), <http://www.uncitral.org/pdf/english/texts/insolven/insolvency-e.pdf>.

Services at KPMG Hong Kong, suggests that “[a]lmost all of our work is cross-border, an inevitable consequence of Hong Kong’s relationship with mainland China . . . and 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.”¹² Recent case law in Hong Kong has further strengthened the insolvency practitioner’s viewpoint: in two separate and unrelated HK-China CBI cases involving Moulin Global Eyecare Trading Limited¹³ and Ocean Grand Holdings Ltd.,¹⁴ there was a common ground suggesting that HK-China CBI typically involved companies whose assets and/or investors were located in both jurisdictions, with investors located in Hong Kong, and with the joint venture (JV) investment located in mainland China. Understandably, the mainland Chinese courts will have jurisdiction because China is the JV’s place of incorporation and is also the location of the JV’s assets. Yet the Hong Kong courts can also claim jurisdiction, if and when the JV’s investors who reside in Hong Kong commence insolvency proceedings in the Hong Kong courts against the JV. The insolvency proceedings can become even more circuitous if, in the establishment of the JV, the Hong Kong investors incorporated a company in a tax haven jurisdiction, with the objective of investing in the JV. Since neither Hong Kong nor mainland China has adopted the Model Law, this type of HK-China CBI case explains why the divergence of Hong Kong’s insolvency law from mainland China’s Enterprise Bankruptcy Law (EBL)¹⁵ cannot be easily amended by applying universal insolvency soft law standards such as those set out in the Model Law.

In fact, Hong Kong and mainland China have different insolvency laws. In Hong Kong, although it does not have a uniform corporate insolvency law, statutory provisions relating to corporate insolvency are embedded in the Companies Ordinance¹⁶ and its subsidiary legislation, such as the Companies (Winding-Up) Rules.¹⁷ In mainland China, by contrast, the EBL is China’s singular corporate insolvency law. Moreover, in reality, of the few countries that have

12. *Global Insolvency Practice Course: Alumni—Edward S. Middleton*, INTERNATIONAL ASSOCIATION OF RESTRUCTURING, INSOLVENCY & BANKRUPTCY PROFESSIONALS, <https://www.insol.org/INSOLfaculty/fellows.php?a=16>.

13. *Re Moulin Global Eyecare Holdings Ltd.*, [2007] 4 H.K.L.R.D. 315, [2007] HKEC 409 (C.F.I.).

14. *Re Ocean Grand Holdings Ltd.*, [2008] HKEC 664, HCMP 120/2008 (C.F.I. Apr. 15, 2008) (Legal Reference System).

15. *Zhong Hua Ren Min Gong He Guo Qi Ye Po Chan Fa* (中華人民共和國企業破產法) [Enterprise Bankruptcy Law of the People’s Republic of China] (promulgated by the Standing Comm., Nat’l People’s Cong., Aug. 27, 2006, effective June 1, 2007) LawInfoChina No. CLI.1.7895(EN), translated at <http://www.lawinfochina.com/display.aspx?id=5425&lib=law>.

16. Companies (Winding Up and Miscellaneous Provisions) Ordinance, (2014) Cap. 32.

17. Companies (Winding-Up) Rules, (2005) Cap. 32H.

adopted the Model Law into their domestic insolvency laws, many have amended it contrary to the intention of the drafters. Consequently, it is reasonable to expect that the international protocols set by the Model Law can be breached, if and when the national insolvency law does not conform with the Model Law or the court presiding over the insolvency case chooses not to adopt it.

A CBI concerns a failing or failed debtor company whose creditors, assets, and/or place of incorporation are located in different jurisdictions. Therefore, restructuring or liquidation of the debtor company occurs in multiple jurisdictions; and judicial decisions concerning that restructuring or liquidation made in one jurisdiction may not be recognized or enforced in another. Judicial recognition or assistance in recognizing a judgment or award falls into the area of private international law (i.e., conflict of laws). An example will serve to illustrate the importance of judicial recognition and enforcement in CBI cases: Company A's place of incorporation and business operations are in Hong Kong. In order to ensure a steady supply of raw materials for Company A's manufacturing business, a JV was established in mainland China. As a result of an economic slowdown, the JV fell into financial difficulty and failed to pay its debts to its creditors when they were due. A creditor of the JV applied for its insolvency in mainland China, but the creditor also named Company A as a second defendant, as he feared that the JV's insolvency meant it lacked the ability to pay its debts but that Company A, as a JV shareholder, might have funds to repay them. Subsequently, a liquidator was appointed by a court in Hong Kong. Cooperation between courts in Hong Kong and mainland China is necessary and critical considering that Hong Kong and mainland China have different insolvency laws and procedures for appointing liquidators. Therefore, in all CBI cases, granting judicial recognition of foreign judicial decisions or providing judicial assistance can contribute greatly to a quick yet orderly resolution of a CBI dispute.

A. *Judicial Recognition for Cross-Border Instances Before the Reversion of Sovereignty*

Before China resumed sovereignty over Hong Kong on July 1, 1997, China regarded Hong Kong as a foreign jurisdiction and, as such, judicial recognition between them was sought through international conventions, namely the New York Convention and the Hague Convention.¹⁸ However, after the reversion of sovereignty, international conventions could no longer be applied because under international law, "an international convention may only be applied among states as independent subjects of the international commu-

18. See *infra* text accompanying notes 52–55.

nity, but not directly to any part of a country without transplantation.”¹⁹ HK-China CBI thus became subject to neither international nor traditional domestic laws. This legal lacuna poses challenges to Hong Kong and mainland Chinese courts in granting mutual judicial recognition to assist each respective jurisdiction in the restructuring or liquidation of companies, and in ensuring that justice is done in resolving CBI disputes.

B. Judicial Recognition for Cross-Border Instances After the Reversion of Sovereignty

The existing legal framework for judicial recognition between Hong Kong and mainland China lies with the Arrangement, which was adopted at the 1,390th Meeting of the Judicial Committee of the Supreme People’s Court (SPC) on June 12, 2006. The Arrangement took effect on August 1, 2008 after consensus was reached by both signatories, the SPC and the HKSAR government. However, as its name suggests, the Arrangement applies only to civil and commercial matters, and does not cover CBI matters. This unsettled CBI issue ought to be resolved, sooner rather than later, given Hong Kong’s status as a global financial center and China’s as the world’s second-largest economy. Moreover, as a result of these statuses, their respective courts are frequently asked to adjudicate on CBI disputes, even though neither jurisdiction has adopted the Model Law.

In the following sections, the author will examine methods to fill the legal lacuna and resolve the unsettled CBI issue: specifically, whether it is legally possible to extend the Arrangement to cover HK-China CBI matters; whether a bilateral agreement or treaty that focuses on mutual judicial recognition of CBI judgments will be signed; and whether Hong Kong and mainland Chinese courts are likely to sign a Memorandum of Understanding for CBI judicial recognition.

II. OPTION NUMBER ONE: EXTENDING THE ARRANGEMENT TO COVER CBI MATTERS

In Hong Kong, a foreign judgment may be enforced either by statute or at common law. The coming into effect of the Arrangement in August 2008 resulted in the enactment of the Mainland Judgments (Reciprocal Enforcement) Ordinance,²⁰ which is now part of Hong Kong law. Also, under the Foreign Judgments (Reciprocal Enforcement) Ordinance,²¹ a final and conclusive judgment made by a

19. Weidong Zhu, *The Relationships Between China and Its Special Administrative Regions and Their Regulation*, 4 J. CAMBRIDGE STUD. 111, 117 (2009).

20. Mainland Judgments (Reciprocal Enforcement) Ordinance, (2008) Cap. 597.

21. Foreign Judgments (Reciprocal Enforcement) Ordinance, (1997) Cap. 319, was enacted in May 1960; in its text, Hong Kong is still referred to as a (British) colony.

foreign superior court may be recognized and enforced in Hong Kong on a reciprocal basis, subject to that foreign judgment being registered with the High Court of Hong Kong.

There are a few salient features about the Arrangement. First, it covers only judgments that are final and conclusive, as required by paragraph 2(c) of the “Key Features” of the Arrangement.²² Under the Arrangement, in the context of mainland China, a judgment refers to one made by (1) the SPC;²³ (2) a court of first instance, such as the Higher or Intermediate People’s Court, or a designated Basic Level People’s Court that has been authorized to exercise jurisdiction in civil and commercial cases of the first instance involving foreign or Hong Kong parties and from which no appeal is allowed, either according to the law or in respect of which the time limit for appeal has expired and/or no appeal has been filed;²⁴ or (3) a court of the second instance.²⁵ A judgment can also be made in accordance with the trial supervision procedure by bringing the case up for retrial by a people’s court at the next higher level.²⁶ In the context of Hong Kong, a judgment in the meaning of the Arrangement refers to one made by the District Court of Hong Kong or a higher level court.²⁷ The second salient feature of the Arrangement is that it covers only “civil and commercial cases” and, as such, insolvency cases are excluded from its application. Judicial recognition of HK-China CBI cases thus falls into a legislative lacuna.

Extending the Arrangement is arguably the most effective approach to be undertaken in closing the gap, since it is an existing agreement that already serves the purpose of judicial recognition and enforcement of judicial decisions between Hong Kong and mainland Chinese courts. However, the proposition to extend the Arrangement has met with opposing views from various parties.

A. *Practical Concerns*

Extending the Arrangement to cover judgments for HK-China CBI cases has evident advantages, given that the Arrangement has laid down a solid foundation for reciprocal judicial recognition and enforcements of judgments made by courts of either side. While application of the Arrangement is restricted only to those of civil and

22. *Key Features of the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements between Parties Concerned* (n.d.), DEPT. OF JUSTICE, GOVT. OF THE HONG KONG SPECIAL ADMIN. REGION, <http://www.doj.gov.hk/eng/topical/pdf/mainlandrej20060717e.pdf>.

23. Arrangement, *supra* note 2, art. 2(1)(i).

24. *Id.* art. 2(1)(ii).

25. *Id.*

26. *Id.* art. 2, ¶ 3.

27. *Id.* art. 2(2).

commercial matters, the author argues that the Arrangement is still not fully compatible with HK-China CBI cases, even absent such a restriction. That is because 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 to have sole jurisdiction for resolving such dispute.²⁸ Whether or not the written agreement on choice of court (the "Choice of Court Agreement") is a first-threshold requirement is unclear; and therefore, this clause of the Arrangement leaves plenty of room for debate. The author argues that if one is to accept the Choice of Court Agreement as a necessary and first-threshold requirement, then, to borrow the words of Professor Andrew Phang, "this is due to the adoption of a strictly doctrinal 'black letter' approach towards the law [or rather, the Arrangement], overlooking (in the process) the important factors of history and context (including that of the personalities [of the parties] involved)."²⁹ Instead of applying a doctrinal approach to interpreting the Arrangement, a substantive law approach for upholding property rights protection should be taken as an underlying principle, on which Hong Kong and mainland Chinese courts base their decisions on whether to grant or reject judicial recognition for parties involved in HK-China CBI cases. The author further argues that the Choice of Court Agreement should not be strictly required to the extent that without such an agreement, final judicial judgments will not be enforced. A flexible approach as advocated here is intended to ensure that, once a dispute has been settled in Hong Kong, a duplicative suit will not be filed in China, or vice versa. Failing to achieve this flexible approach, the impact of the Arrangement will be undercut significantly. Since the SPC is predisposed to interpreting legal questions arising from the Arrangement in the interests of both mainland China and the HKSAR, the author suggests that the Court should issue a clear interpretation as to whether or not the Choice of Court Agreement (as indicated in Article 1 of the Arrangement) is a first-threshold requirement.

But supposing that the Choice of Court Agreement is in fact interpreted as constituting a requirement, then the author argues that the requirement—i.e., signing an agreement to indicate that either a Hong Kong or mainland Chinese court is to be the choice of court—cannot be easily satisfied by some concerned parties involved in CBI disputes. There are at least two reasons for this: First, the creditor does not always enter into a Choice of Court Agreement with the debtor company prior to the occurrence of a debt or dispute. This is especially true if both parties have a long-term business relationship

28. *Id.* art. 3, ¶ 1.

29. Andrew Phang, *Implied Terms, Business Efficacy and the Officious By-stander—A Modern History*, 1998 *J. Bus. L.* 1, 16.

or when the debtor company is still substantially solvent. In this regard, the official *Interpretation of the Arrangement* by the SPC is relevant.³⁰ Article 3 of the *Interpretation* provides that “A ‘choice of court agreement in writing’ referred to in this Arrangement means any agreement in written form made . . . for resolving any dispute which has arisen or may arise in respect of a particular legal relationship.”³¹ The author interprets this paragraph to mean that even if the Choice of Court Agreement were *not* entered into before the dispute arises by parties concerned and were *not* a part of a main contract that gives rise to the debtor company’s payment obligation, a *subsequent* and *separate* Choice of Court Agreement can still be made by the parties concerned after the dispute arises, so as to meet the requirement within Article 1 of the Arrangement. This is true because a Choice of Court Agreement is independent from the main agreement. The invalidity of the former (or the complete lack of it) thus would not, or should not, adversely impact on the latter. Compliance with this requirement (again, presuming a Choice of Court Agreement even constitutes a requirement) thus centers on whether the parties concerned will be willing and prepared to designate a mainland Chinese or Hong Kong court as their court of choice. This last point provides the second reason why the requirement in Article 1 of the Arrangement may not be easily satisfied by some parties: they might have deliberately avoided designating mainland Chinese courts to adjudicate their CBI cases. Judicial corruption is still perceived as rampant in mainland China.³² Although the problem has improved due to recent anti-corruption and judicial reform efforts, it remains a concern for some people who believe that mainland Chinese courts obstruct justice. Concerned parties would thus avoid designating any mainland Chinese court as their court of choice. This, therefore, renders Article 1 of the Arrangement extremely difficult to apply. On the other hand, if Article 1 of the Arrangement is to be strictly imposed on parties, it would operate more like a hurdle rather than a requirement, for those who do not wish to name a

30. Or, in full: Zui Gao Ren Min Fa Yuan Jie Shi Guan Yu Nei Di Yu Xiang Gang Te Bie Xing Zheng Qu Fa Yuan Xiang Hu Ren Ke He Zhi Xing Dang Shi Ren Xie Yi Guan Xia De Min Shang Shi An Jian Pan Jue De An Pai (最高人民法院解釋關於內地與香港特別行政區法院相互認可和執行當事人協議管轄的民商事案件判決的安排) [Interpretation by the Supreme People’s Court on the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements Between Parties Concerned], Judicial Interpretation No. 9 of 2008 (adopted at the 1,390th meeting of the Judicial Committee of the Supreme People’s Court on June 12, 2006, promulgated July 4, 2008) [hereinafter Interpretation].

31. *Id.* art. 3.

32. Ling Li, *Corruption in China’s Courts*, in JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION 196, 201 (Randall Peerenboom ed., 2010).

mainland Chinese court as their court of choice but otherwise wish to enforce a foreign judgment in mainland China.

Besides judicial corruption, mainland Chinese courts have often been criticized for granting favorable judgments to local enterprises at the expense of foreign parties, a practice which is referred to as “local protectionism”:

Local protectionism means that in dealing with litigation, courts are often biased in favor of parties from their own region. This problem is well-known and deeply-rooted in China due to the lack of the courts’ independence—the local courts are dependent on the local government in terms of funding, and personnel decisions relating to the local judiciary are also in the hands of the local government.³³

Local protectionism subverts justice, and thus serves as a reason that prevents parties from choosing to use mainland Chinese courts to adjudicate their cases. They would rather name a foreign court as their court of choice in the hope, or expectation, of getting fair treatment by judges in whom they can place their confidence and trust. The fact that mainland Chinese courts are funded by their local government enables the local government to interfere with the judicial process by pressuring or instructing the court to make rulings in favor of local businesses that contribute to the local economy by, for example, paying taxes and providing jobs. In light of that, if the foreign party needs to sign a Court of Choice Agreement with a local party in mainland China, it would most likely consider a jurisdiction outside mainland China. Therefore, unless both the foreign and local Chinese parties have a written agreement to designate the Hong Kong court as their choice of court, then judicial recognition and enforcement granted through the Arrangement would not be possible, owing to the requirement set out in Article 1 of the Arrangement. This again explains why some parties may consider it difficult to satisfy that requirement.

The requirement within Article 1 of the Arrangement consequently needs proper characterization before it can be applied universally to parties seeking foreign judicial recognition for judgments involving HK-China CBI cases. The issue raised here merits careful evaluation, although in practice the issue may be less serious than one might think. As shown in Table 1 below, HK-China CBI cases often involve a (parent) company representing a foreign party incorporated in a tax haven jurisdiction outside Hong Kong and

33. Robin Hui Huang, *Private Enforcement of Securities Law in China: A Ten-Year Retrospective and Empirical Assessment*, 61 AM. J. COMP. L. 757, 795 (2013). See also Tom Ginsburg, *Judicial Independence in East Asia: Lessons for China*, in JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION, *supra* note 32, at 247.

TABLE 1. HK-CHINA CBI CASES THAT MEET THE REQUIREMENT
WITHIN ARTICLE 1 OF THE ARRANGEMENT.

Company Name	Place of Company Registration	Place of Insolvency Proceedings	Year of Company Insolvency
Akai Holdings	Bermuda	Hong Kong and Bermuda	2000
Zhu Kuan (Hong Kong) Co. Ltd.	Hong Kong	Hong Kong	2004
Euro-Asia Agricultural (Holdings)	Bermuda	Hong Kong	2004
Moulin Global Eyecare Holdings Limited	Bermuda	Hong Kong	2005
Ocean Grand Holdings	Bermuda	Hong Kong and Bermuda	2006
U-Right International Holdings Limited	Bermuda	Hong Kong	2008
Tak Fat Group	Cayman Islands	Hong Kong	2008
Peace Mark (Holdings)	Bermuda	Hong Kong	2008
Sanlu	China	China	2008
Asia Aluminum Holdings	Bermuda	Hong Kong	2009
Fu Ji Food and Catering Services Holdings	Cayman Islands	Hong Kong	2009
First Natural	Bermuda	Unreported	2009
Pioneer Iron	British Virgin Islands	Hong Kong and British Virgin Islands	2010
Grande Holdings	Bermuda	Hong Kong	2011
Proview Technology	Unreported	China	2012
Zhejiang Glass	China	China	2013

Sources: SOUTH CHINA MORNING POST (public announcements section), <http://www.scmp.com/frontpage/hk>; *HKE News Releases*, HONG KONG EXCHANGES AND CLEARING LIMITED, <http://www.hkex.com.hk/eng/newsconsul/hkexnews/2015news.htm>.

mainland China. Most of these companies have their place of insolvency proceedings in Hong Kong, mainland China, or in both Hong Kong and a tax haven jurisdiction, thereby meeting all the requirements within Article 1 of the Arrangement.

B. Changes Required

Before extending the Arrangement to cover HK-China CBI cases, the following changes must be made:

1. Removing the Requirement of “Monetary Judgments”

In insolvency proceedings, judicial rulings are not always pecuniary in nature; judgments and orders can also be non-monetary. The former refers to judgments that forbid the debtor company to continue trading, should the judge consider it has little or no prospect to pay its debts when they fall due. The latter includes orders for specific performance by the debtor company or its directors, such as to release accounting records and financial documents. Non-monetary judgments or orders may also concern the appointment of liquidators, the granting of injunctive relief, and/or the confirmation or granting of certain rights such as the preferential rights associated with employee entitlements. Insolvency judgments or orders can be non-monetary, owing to the fact that insolvency law contains very specific procedural requirements, distinct from those in civil and commercial law. For instance, in Hong Kong, the compulsory winding up or liquidation of a company starts with the Hong Kong court's appointment of a liquidator. In the event that there is an appointment of a liquidator by a court in Hong Kong to deal with the debtor company's assets in both Hong Kong and mainland China, the judgment would most likely be barred from application of the Arrangement or the Mainland Judgments (Reciprocal Enforcement) Ordinance. The reason is because the parties may fail to satisfy the “payment of money” requirement provided in Article 1 of the Arrangement, because the appointment of a liquidator is not a matter concerning payment.

2. Removing the Exclusion of “Any Employment Contracts”

Article 3 of the *Interpretation* provides that employment contracts are excluded from the application of the Arrangement. Not surprisingly, outstanding employment entitlements (e.g., unpaid salaries and wages) are an integral part of a corporate insolvency case. Since the resolution of HK-China CBI cases will inevitably involve the need to pay and settle with the debtor company's unpaid employees, the exclusion of employment contracts is unacceptable because otherwise some creditors will receive favorable treatment by the Arrangement (which facilitates judicial enforcement), while others (unpaid employees, who are also creditors of the debtor company) will not. It is worthwhile to note that the unfair result will be attained regardless of how HK-China CBI cases are resolved, i.e., whether by court judgment or by voluntary reorganization agreement. Unfair treatment is a cause for concern since employees are a distinctive class of creditors. Furthermore, different treatment of creditors con-

travenes articles 13, 21(2), 22, and 32 of the Model Law,³⁴ which upholds the equal treatment of creditors.

3. Removing the Requirement of a Choice of Court Agreement

There are a number of reasons to remove the requirement for a Choice of Court Agreement. First, the parties' choice of court must be surrendered if and when it is inconsistent with the Model Law's designation (which will decide on which court is to stage the main insolvency proceeding), if the Model Law can be applied to those HK-China CBI involving a third jurisdiction other than Hong Kong and mainland China. The main insolvency proceeding is defined as "the proceeding pending in the debtor's centre of main interests [which] is expected to have principal responsibility for managing the insolvency of the debtor regardless of the number of States in which the debtor has assets and creditors."³⁵ In other words, the court of the main insolvency proceeding is the court within whose jurisdiction the debtor company has its main business interests. Such a designation reflects the universalism principle upheld by the Model Law because insolvency proceedings are collective by nature. Therefore, to holistically and universally resolve a CBI case, the Model Law calls for only one main insolvency proceeding to be carried out in the jurisdiction where the debtor company's center of main (business) interests is located, regardless of how many concurrent (ancillary) proceedings are taking place. Courts of non-main proceedings are bound to assist the court of main proceeding by, say, remitting assets seized by their courts to the court of the main insolvency proceeding, in order to facilitate equal and collective distribution of assets amongst all creditors, regardless of where those assets are located. If the Arrangement is to align with the Model Law, the requirement in Article 1 of the Arrangement will be difficult to satisfy because the parties' choice of court cannot always be honored, if and when it is inconsistent with the Model Law's designation of a specific jurisdiction responsible for presiding over the main insolvency proceeding.

Second, creditors may not always have a Choice of Court Agreement with the debtor company, especially before the latter becomes

34. U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION pt. 2 (Guide to Enactment and Interpretation), 60 ¶ 119, 107 ¶ 240, U.N. Sales No. E.14.V.2 (2013), <http://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf>. Articles 13 and 32 of the Model Law prescribe that it "does not affect the ranking of claims," which include unpaid wages claims by China-based employees, since Hong Kong courts regard them as foreign creditors and, conversely, unpaid wages claims by Hong Kong-based employees, which are regarded similarly by Chinese courts. Note that articles 21(2) and 22 of the Model Law concern relief that may be granted by the court upon its recognition of a foreign proceeding and of the protection of creditors, which may be relevant to the circumstances of the case herein.

35. *Id.* at 19, ¶ 1 (explaining the purpose of the Model Law).

insolvent. This makes the requirement in Article 1 of the Arrangement difficult to enforce. Third, parties to a CBI case will understandably choose a court that they believe will work in their best interests should a dispute arise.

For the reasons stated above, the author suggests that it is not necessary to restrict the choice of court to be either in Hong Kong or mainland China. By insisting on the restrictive requirement of jurisdictions agreements in mainland China or of applying Chinese law, the Arrangement could encourage forum shopping by enabling “a party to seize the Chinese court with the purpose to avoid a jurisdiction clause concluded by it,”³⁶ and therefore would “invalidate many jurisdiction clauses which might be valid under the law of other countries.”³⁷ This is especially true when the parties (e.g., creditors) are of different backgrounds, located in different countries, and/or with different levels of intellectual or financial resources. Furthermore, considering that a fair number of CBI cases between Hong Kong and mainland China involve a parent company which is incorporated in a tax haven jurisdiction, it is unlikely that different parties (e.g., creditors, employees, shareholders) with conflicting interests could easily reach an agreement over exclusive jurisdiction. Such an agreement will be very difficult, if not impossible, to achieve amongst creditors who find themselves mired in a complex CBI case.

It should be noted that a jurisdiction clause is “severable and independent from the main contract.”³⁸ Yet, the restrictive requirement of jurisdictions agreements in China could also lead to invalid application of law, if choice-of-law rules are not provided (as is the case in the PRC Civil Procedure Law)³⁹ or applied wrongly (e.g., applying the *lex causae*⁴⁰ where the *lex fori*⁴¹ should be applied instead) for deciding the validity of the jurisdiction clause. Professor Zheng Sophia Tang of The University of Leeds suggests:

Some Chinese courts treat jurisdiction clauses no differently from underlying contracts and, as a result, apply the *lex causae* to decide the existence and validity of a choice of

36. Zheng Sophia Tang, *Effectiveness of Exclusive Jurisdiction Clauses in the Chinese Courts—A Pragmatic Study*, 61 INT'L & COMP. L.Q. 459, 464 (2012).

37. *Id.*

38. *Id.* at 462.

39. Zhong Hua Ren Min Gong He Guo Min Shi Su Song Fa (中華人民共和國民事訴訟法) [Civil Procedure Law of the People's Republic of China] (promulgated by Presidential Order No. 44, Apr. 9, 1991, with immediate effect, as amended by Presidential Order No. 59, Oct. 28, 2007, and by Decision of Aug. 31, 2012).

40. *Lex causae* is Latin for the law governing the substance of the case, designated by the rules of conflict of laws. *Glossary*, EUROPEAN COMM'N: JUSTICE, http://ec.europa.eu/justice/glossary/lex-fori_en.htm.

41. *Lex fori* is Latin for the laws of a forum, which is a term used in private international law (i.e., conflict of laws) to refer to the law of the court within which a lawsuit is instituted or remedy sought. “Traditionally the *lex fori* governs questions of procedure, regardless of the *lex causae*.” *Id.*

court clause. This approach is subject to criticism because it fails to comply with the doctrine of severability, which is a common doctrine in the conflict of laws.⁴²

One can observe that the internationalization of China's economy has far outpaced the internationalization of its domestic legislation; this might explain why the PRC Civil Procedure Law does not provide choice-of-law rules. Despite this deficiency in lawmaking, it should be upheld that in private international law (i.e., conflict of laws), the jurisdiction agreement and thus the validity of a jurisdiction clause is an issue relating to procedure; therefore, it should be governed by the *lex fori* and not the *lex causae* unless the parties have previously agreed otherwise. Fortunately, most mainland Chinese courts use the *lex fori* to decide matters concerning a jurisdiction clause.⁴³

III. OTHER AVAILABLE OPTIONS FOR ENABLING MUTUAL JUDICIAL RECOGNITION AND ASSISTANCE BETWEEN HONG KONG AND MAINLAND CHINA

A. *Signing a New Arrangement that Focuses on CBI Matters*

The author makes this proposal because of the limited scope of the Arrangement. First, by its usage of the term “particular legal relationship,”⁴⁴ the Arrangement envisaged a commercial contractual relationship between the parties in dispute and applies only to limited types of judgments—that is, “monetary judgments relating to commercial contracts.” Moreover, due to the restrictive condition of requiring a prior agreement by the parties on court jurisdiction in order for the Arrangement to apply, the parties (i.e., litigants) must have submitted their contract dispute to the exclusive jurisdiction of a Hong Kong or mainland Chinese court. Second, the Arrangement only applies to “final judgments,” thereby excluding judicial orders or rulings concerning procedural or interlocutory matters, which are necessary in resolving disputes throughout the insolvency proceedings. Third, the Arrangement concerns only “monetary judgments,” excluding insolvency judgments or orders that are non-monetary but aim to facilitate the procedural requirement such as the appointment of liquidators. Last but not least, Article 9 of the Arrangement provides that recognition and enforcement of a judgment shall be refused if the Chinese court considers that enforcement of a judgment made by the Hong Kong court is contrary to the social and public interests of mainland China. Likewise, the Hong Kong court can also consider refusing to enforce a judgment made by the Chinese court if enforce-

42. Tang, *supra* note 36, at 462.

43. *Id.* at 463–64.

44. Arrangement, *supra* note 2, art. 3.

ment would be contrary to the public policy of Hong Kong. The author suggests adding the word “manifestly” before “contrary to the social and public interests of mainland China” and “contrary to the public policy of Hong Kong” in order to ensure that this particular restriction upon judgment enforcement will not be invoked so easily as to harm the effectiveness of the Arrangement.

B. *Signing a Treaty*

Treaty-signing has been an activity accelerated by demand after China's accession to the World Trade Organization (WTO) on December 11, 2001. Prior to that, since 1978, China participated in the United Nations (UN) and other international organizations by attending various treaty-making conferences sponsored by the UN or other world governmental organizations.⁴⁵ Keyuan Zou suggests that China respects international law with respect to its practice of treaty-making; where there is a conflict between a treaty that China had acceded to and China's relevant domestic law, the treaty prevails.⁴⁶

In terms of the types of treaties, China has entered into over ninety tax treaties;⁴⁷ and, more recently, it has completed formal negotiations on a bilateral investment treaty with the United States⁴⁸ and ratified a judicial cooperation treaty with Australia to combat rising cross-border crime.⁴⁹ But a treaty instituting judicial cooperation on CBI cases is not yet envisaged. Judicial recognition assistance will be required where there is a conflict-of-laws situation. Mainland Chinese courts are no stranger to foreign-related cases, but they are more accustomed to applying their domestic (i.e., Chinese) law. According to statistics published by the SPC:

Since 2001, in the judgments of foreign-related cases, the application of Chinese laws averagely accounted for 90.83% every year; foreign laws, about 3.73%; international treaties, about 3.05%; international practices, about 1.05%; and in a small portion of cases, Chinese laws and international treaties and practices were both applicable at the same time (accounting for about 1.33% [on average] and annually).⁵⁰

45. Keyuan Zou, *International Law in the Chinese Domestic Context*, 44 VAL. U. L. REV. 935, 935–36 (2010).

46. *Id.* at 938–39.

47. David G. Dunbar, *Treaty Shopping and China's Response* (pt. 1), 23 J. INT'L TAX'N 36 (2012).

48. *US/China: Investment Treaty Could Fail on Blocked Bids*, OXFORD ANALYTICA DAILY BRIEF (Aug. 2, 2013).

49. *China Ratifies Treaty on Judicial Recognition with Australia*, XINHUA NEWS (Oct. 31, 2006), available at http://en.people.cn/200611/01/print20061101_317106.html.

50. Qisheng He, *China's Private International Law (1978–2008)*, 5 FRONTIERS OF LAW IN CHINA 188, 200 (2010).

This data might explain why China is not particularly active in treaty-signing. Chinese academics also suggest that “when trying foreign-related civil and commercial cases, China’s courts basically prefer Chinese laws to foreign laws and international treaties or practices.”⁵¹ Regardless of the preferential choice by the mainland Chinese courts, entering into a bilateral treaty between Hong Kong and mainland China for the specific purpose of judicial recognition and assistance is highly unlikely given the political relationship between the HKSAR and mainland China. Hong Kong’s status as a Special Administrative Region means that it is a subordinated region of its sovereign (China) and not an independent state that can otherwise have capacity to sign a treaty. Under the Chinese politico-legal system, the level of a SAR government is akin to that of a provincial government. Hong Kong’s political status will thus prevent it from signing a bilateral treaty with China because a treaty must be signed between state authorities and Hong Kong does not qualify as one.

It is important to note that before Hong Kong’s reversion to Chinese sovereignty on July 1, 1997, China regarded Hong Kong as a foreign jurisdiction and, as such, judicial recognition between Hong Kong and China was sought through international conventions. First, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention) sets out the common legislative standards for the recognition of arbitration agreements, stating that foreign and non-domestic arbitral awards cannot be discriminated against and thus should be entitled to court recognition and enforcement in the same way as domestic awards.⁵² In relation to this, the United Kingdom extended the New York Convention to Hong Kong in 1975, therefore it is applicable by the courts in Hong Kong.⁵³ Second, the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters of 1965 (the Hague Convention) improved the organization of mutual judicial assistance in cases of civil or commercial matters to enable a judicial or extrajudicial document to be served abroad.⁵⁴ The United Kingdom also extended the Hague Convention to Hong Kong in 1970.⁵⁵ After the reversion of sovereignty in 1997, both the New York Convention and the Hague Convention ceased to be applicable between Hong Kong and mainland China. The Hong Kong–China

51. *Id.*

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

53. Zhu, *supra* note 5, at 644.

54. Hague 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, <http://www.hcch.net/upload/conventions/txt14en.pdf>.

55. Zhu, *supra* note 5, at 668.

relationship is now governed by the Basic Law of Hong Kong, the SAR's de facto constitution under the "One Country, Two Systems" principle. Although article 153 of the Basic Law provides that international agreements can be applied to Hong Kong, cross-border matters between Hong Kong and China are not part of the "external affairs" governed by Chapter VII of the Basic Law, to which article 153 belongs. That is because the "external affairs" will inevitably involve a foreign state, and thus excludes Hong Kong.

As mentioned before, even after the return of Hong Kong to China in 1997, Hong Kong has continued to be regarded as a foreign jurisdiction by China, as evidenced by article 5 of the judicial interpretation issued in 2002 by the SPC titled *Provisions Concerning the Judicial Problems of Foreign-Related Civil and Commercial Cases*.⁵⁶ Under the rubric of "One Country, Two Systems," two judicial systems (in Hong Kong and mainland China, respectively) now operate in parallel within one country.⁵⁷

Besides, although article 5 of the EBL⁵⁸ made provisions for recognition and enforcement of foreign corporate insolvency judgments, it does not provide any mechanism to facilitate CBI matters, either between two independent states or between the HKSAR and mainland China. It is important to note that article 5 of the EBL refers expressly to "the courts of foreign countries," which therefore excludes the courts in HKSAR from relying on this specific provision to seek judicial recognition or assistance from the mainland Chinese courts.

C. *Signing a Memorandum of Understanding*

In the last two decades, China has signed Memoranda of Understanding (MOUs) with South Korea, Singapore, Macao SAR, Pakistan, and Qatar for achieving the following respective purposes with each country or territory: (1) avoiding double taxation and preventing fiscal evasion,⁵⁹ (2) free trade,⁶⁰ (3) education exchanges and cooperation,⁶¹ (4) strengthening the consultation and cooperation

56. Gong, *supra* note 3, at 58 (emphasis added).

57. *Id.* at 57.

58. Enterprise Bankruptcy Law of the People's Republic of China art. 5 (promulgated by the Standing Comm., Nat'l People's Cong., Aug. 27, 2006, effective June 1, 2007) CLI.1.7895(EN).

59. Memorandum of Understanding on the Agreement between the Government of the People's Republic of China and the Government of the Republic of Korea for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, July 13, 2007 (unreported).

60. Memorandum of Understanding on the Free Trade Agreement and Other Trade Issues Between the Government of the People's Republic of China and the Government of the Islamic Republic of Pakistan, Apr. 5, 2005 (unreported).

61. Memorandum of Understanding on Exchanges and Cooperation in the Field of Education Between the Ministries of Education of the Republic of Singapore and the People's Republic of China, Mar. 21, 2002 (unreported).

between government ministries,⁶² and (5) cultural cooperation.⁶³ China's accession to the WTO in 2001 has increased its use of MOUs for making a greater political and economic impact on the world stage. For example, on August 2, 2011, China's State Administration for Industry and Commerce and the U.S. Department of Justice and Federal Trade Commission signed an MOU on antimonopoly and antitrust cooperation.⁶⁴ Where the status of agreement-making bodies is concerned, apart from country-to-country relations, an MOU can also be signed between a country's central government and a local government for carrying out certain regulatory or administrative targets.⁶⁵ Furthermore, a "notice" may be issued by a state agency in order to facilitate the "earnest implementation"⁶⁶ of an MOU signed between the governments of signatory countries.

China's legal history provides evidence that MOUs were often deployed by China to reach certain agreements with Hong Kong, even when Hong Kong was a British colony. In 1991, the United Kingdom and Chinese governments signed the *Memorandum of Understanding Concerning the Construction of the New Airport in Hong Kong and Related Questions*—evidence of the practical implementation of the Sino-British Joint Declaration which is the instrument announc-

62. Memorandum of Understanding Between the Ministry of Foreign Affairs of the People's Republic of China and The Ministry of Foreign Affairs of the State of Qatar, Apr. 9, 1999 (unreported).

63. Memorandum of Understanding on Cultural Cooperation Between the Ministry of Culture of the People's Republic of China and the Ministry of Information and the Arts of the Republic of Singapore, Oct. 15, 1996 (unreported).

64. Xiaosong Zhang & Zihao Zhang, *XNA: China, US Sign Memorandum of Understanding on Anti-Monopoly Cooperation*, XINHUA NEWS, Aug. 4, 2011.

65. Guo Jia Shui Wu Zong Ju Guan Yu Yin Fa Nei Di He Ao Men Te Bie Xing Zheng Qu Guan Yu Dui Suo De Bi Mian Shuang Chong Zheng Shui He Fang Zhi Tou Lou Shui De An Pai Yi Ding Shu He Liang Jie Bei Wang Lu De Tong Zhi (國家稅務總局關於印發《內地和澳門特別行政區關於對所得避免雙重徵稅和防止偷漏稅的安排》議定書和諒解備忘錄的通知) [Notice of the State Administration of Taxation on Issuing the Protocol and the Memorandum of Understanding Concerning the "Arrangement Between the Mainland of China and the Macao Special Administrative Region for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income"] (promulgated July 24, 2009), 2009 GUO SHUI HAN (國稅函) no. 396.

66. Fo Shan Shi Guo Jia Shui Wu Ju Zhuan Fa Guo Jia Shui Wu Zong Ju Guan Yu Zhong Hua Ren Min Gong He Guo Zheng Fu He Da Han Min Guo Zheng Fu Guan Yu Dui Suo De Bi Mian Shuang Chong Zheng Shui He Fang Zhi Tou Lou Shui De Xie Ding Liang Jie Bei Wang Lu You Guan Tiao Kuan Huan Han Sheng Xiao Zhi Xing De Tong Zhi (佛山市國家稅務局轉發國家稅務總局關於《中華人民共和國政府和大韓民國政府關於對所得避免雙重徵稅和防止偷漏稅的協定》諒解備忘錄有關條款換函生效執行的通知) [Notice of the State Taxation Bureau of Foshan on Forwarding and Distributing the Memorandum of Understanding on the "Agreement between the Government of the People's Republic of China and the Government of the Republic of Korea for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income"] ¶ 1 (promulgated July 8, 2008), 2008 FO GUO SHUI HAN (佛國稅函) no. 389.

ing the implementation of the policy and principle of “One Country, Two Systems.”⁶⁷

The “One Country, Two Systems” paradigm, created by the late Chinese leader Deng Xiaoping to address the conflict between Hong Kong’s capitalist market economy and mainland China’s socialist economy, provides a useful background that illustrates China’s desire to sign MOUs in the pursuit of certain political and economic outcomes. Recognition and enforcement was granted by and between the Chinese central government and Hong Kong’s local authorities for undertaking certain political, economic, and administrative actions or upholding the rule of law under the Basic Law of Hong Kong.⁶⁸ Unless otherwise indicated, an MOU may work to the same effect as a treaty. For example, the law of treaty interpretation in the United States⁶⁹ “lists many of the other names carried by documents which fall under this definition: ‘Among the terms used are: treaty, convention, agreement, protocol, covenant, charter, statute, act, declaration, *concordat*, exchange of notes, agreed minute, memorandum of agreement, memorandum of understanding, and *modus vivendi*.’”⁷⁰ Justin Lowe suggests that “whatever their designation, all agreements have the same legal status, except as their provisions or the circumstances of their conclusion indicate otherwise.”⁷¹

There are advantages and disadvantages to deploying an MOU to achieve certain political, legal, and administrative purposes. The advantage to signing an MOU is that it is rather flexible: parties to an MOU can often suspend or opt out of certain agreements for an unspecified period of time. The disadvantage, however, is that an MOU tends to have less binding effect in comparison to a treaty. The legal effect of an MOU is not uniform; that is because although an MOU “could be construed as a contract, courts will not necessarily bind the government to every memorandum signed.”⁷² In certain cases, “[s]ignatories [to an MOU] ‘agree that this [MOU] shall have no legal effect or impose a legally binding obligation’ but otherwise identify a laundry list of things on which they ‘agree’ to work together on, including information sharing, cooperation, and promotion of cer-

67. Albert H.Y. Chen, *Some Reflections on Hong Kong’s Autonomy*, 24 H.K. L.J. 173, 178 (1994).

68. William I. Friedman, *China’s One Country, Two Systems Paradigm Extends Itself Beyond the Mainland’s Borders to the Southern Provincial Government of Hong Kong*, 11 J. TRANSNAT’L L. & POL’Y 65 (2001).

69. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 301 cmt. (1987) [hereinafter RESTATEMENT (THIRD)].

70. Justin Lowe, *What Would Grotius Do? Methods and Implications of Incorporating the Contract Law Doctrine of Illusory Promises into the Law of Treaty Interpretation*, 6 WASH. U. GLOBAL STUD. L. REV. 703, 706 n.12 (2007) (quoting RESTATEMENT (THIRD), *supra* note 69).

71. *Id.*

72. Timothy E. Steigelman, *New Model for Disaster Relief: A Solution to the Posse Comitatus Conundrum*, 57 NAVAL L. REV. 105, 126 (2009).

tain programs.”⁷³ Under these circumstances, signatories to the MOU would avoid creating rule-making institutions, meaning the MOU only serves to reflect a political or non-binding intent.⁷⁴

IV. COMMENTS AND FURTHER ASSESSMENT

Professor Wei Wang of Fudan University’s School of Law in China suggests that there are meaningful differences between the terms “agreement” and “arrangement” and that mainland China’s choice of the word “arrangement” in the title of the Closer Economic Partnership Arrangement was deliberate:

From the negotiating history of the CEPA, it appears the use of the term “arrangement” was the result of an understanding between Mainland China and HKSAR negotiators that most FTAs [Free Trade Agreements] in the world are preferential agreements among states, while the negotiated trade agreement between Mainland China and the HKSAR was under one country, China. Therefore, based on the principle of the “one country, two systems,” the agreement [of CEPA] was entitled arrangement.⁷⁵

By the same token, the term “Arrangement” used in 2006 by the SPC to conclude the bilateral agreement between Hong Kong and mainland China that aims to facilitate judicial recognition must be read into as China’s intention in upholding the “one country” aspect of the “One Country, Two Systems” principle in relation to Hong Kong. That is perhaps why the negotiated bilateral agreement in 2006 for judicial recognition between Hong Kong and mainland China was also entitled “arrangement.” The interpretation by Professor Wei Wang reflects the view held by Lung Wan Pun, senior government counsel with the HKSAR’s Department of Justice, who specializes in international law and believes that Hong Kong’s status as a SAR that practices different social, economic, and legal systems from the rest of mainland China rendered it necessary for special arrangements to be made “to allow for a system for the application and conclusion of treaties specifically in relation to the Hong Kong SAR”⁷⁶

Moreover, according to the Constitution of mainland China,

73. Duncan B. Hollis, *The Elusive Foreign Compact*, 73 MO. L. REV. 1071, 1089 n.74 (2008) (quoting a 2007 MOU between the Canadian province of British Columbia and the State of Oregon). See also *id.* at 1084 n.50.

74. *Id.* at 1089.

75. Wei Wang, *CEPA: A Lawful Free Trade Agreement Under “One Country, Two Customs Territories?”*, 10 LAW & BUS. REV. AMERICAS 647, 654 (2004).

76. Lung Wan Pun, *Application and Conclusion of Treaties in the Hong Kong Special Administrative Region of the People’s Republic of China: Sixteen Years of Practice*, 12 CHINESE J. INT’L L. 589, 590 (2013).

Treaties and important agreements refer to: [1] Treaties of friendship and cooperation, treaties of peace and other treaties of a political nature; [2] Treaties and agreements concerning territory and delimitation of boundary lines; [3] Treaties and agreements which contain stipulations inconsistent with the laws of the People's Republic of China; [4] Treaties and agreements which are subject to ratification as agreed by the contracting parties; [5] Other treaties and agreements subject to ratification.⁷⁷

It should be noted that the Standing Committee of the National People's Congress is tasked with the responsibility of ratifying treaties and important agreements entered into by and between China and foreign states.⁷⁸ In contrast, the Arrangement was concluded by mutual consultation between the SPC in China and the HKSAR, in accordance with article 95 of the Basic Law of Hong Kong. Consequently, the Arrangement could not possibly be viewed as a treaty or agreement involving foreign parties but rather as an understanding between the courts of mainland China and the HKSAR, as the title of the Arrangement suggests.

In terms of facilitating "judicial cooperation," as early as 1998, a SPC Circular⁷⁹ permitted Taiwanese judgments to be recognized and enforced by the mainland Chinese courts. Mirroring the Arrangement with the HKSAR, mainland China and the Macao SAR signed an Arrangement on Mutual Recognition and Enforcement of Judgments on Civil and Commercial Matters on February 28, 2006, which became effective on April 1, 2006.⁸⁰ Even though the HKSAR was the first special administrative region in China, Professor Xianchu Zhang and the late Professor Philip Smart, both of the University of Hong Kong, suggest that "in developing direct cross-border judicial assistance, Hong Kong . . . has fallen behind both the Macao SAR and Taiwan."⁸¹ This might explain the non-enforcement of each other's judgments by the mainland Chinese and Hong Kong courts. Professors Zhang and Smart suggested:

77. Wang, *supra* note 75, at 659. See also Zhong Hua Ren Min Gong He Guo Di Jie Tiao Yue Cheng Xu Fa (中華人民共和國締結條約程序法) [Law of the People's Republic of China on the Procedure of the Conclusion of Treaties] art. 7 (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 28, 1990, with immediate effect) LawInfoChina No. CLI.1.4922(EN), translated at <http://www.lawinfochina.com/display.aspx?lib=law&id=1213&CGid=>.

78. Wang, *supra* note 75, at 659.

79. Professors Xianchu Zhang and Philip Smart pointed out that on May 22, 1998 the Chinese Supreme People's Court issued the *Provisions on Recognition of Civil Judgments of Taiwan Courts by the People's Courts*. See Xianchu Zhang & 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*, 36 H.K. L.J. 553, 556 (2006).

80. *Id.* at 557.

81. *Id.*

Based on their experience, some mainland judges have pointed out that it is much more difficult for Mainland judgments to be recognised and enforced in Hong Kong than in Macao . . . The then Secretary for Justice [for the HKSAR], Elsie Leung, admitted that it would be ridiculous if after the handover Mainland judgments could be enforced in foreign countries, but not in Hong Kong.⁸²

In light of the large trading volume and multitudinous investment activities across the Hong Kong–mainland China border, as well as the lawsuits associated with those activities resulting from the debtors’ non-payment of its debt, any further reciprocal non-enforcement of judgments for HK-China CBI cases by courts of either side is bound to cause serious legal confusion. It is under this circumstance that the author is raising public awareness and proposing legal methods to fill the legal lacuna since the Arrangement falls short in giving judicial recognition or assistance for judgments on HK-China CBI disputes.

CONCLUSION

Since there already exists an international soft law for CBI matters—namely, the Model Law—which, although not a treaty, still promotes judicial recognition, assistance, and enforcement between courts overseeing insolvency proceedings, the law (or rules of international law on judicial recognition) “should not be left to divergent and parochial state interpretations.”⁸³ Unfortunately, this argument is open to challenges in the present context of HK-China CBI matters, as neither Hong Kong nor mainland China has adopted the Model Law. Therefore, unless both the Hong Kong and Chinese insolvency regulations are in line with the current international framework (as reflected in and represented by the Model Law), either the extension of the (existing) Arrangement after substantial revisions or the signing of a new Arrangement will be necessary and crucial for parties that seek judicial recognition and enforcement of HK-China CBI judgments rendered in either the Hong Kong or mainland Chinese courts. The overarching aim of extending the (existing) Arrangement or signing a new one is to avoid the duplication of litigation costs (e.g., counsel fees, court fees, enforcement fees) and time associated with duplicative insolvency court procedures for proceedings that are based on the same facts and the same debtor-creditor relationships, where one action is initiated in Hong Kong and the other in mainland China. This is a natural conclusion that can be inferred from article

82. *Id.*

83. William J. Aceves, *The Vienna Convention on Consular Relations: A Study of Rights, Wrongs, and Remedies*, 31 VAND. J. TRANSNAT’L L. 257, 301 (1998).

16 of the *Interpretation*, which provides that “[t]he scope of reciprocal recognition and enforcement of judgments by the courts of the Mainland and of the HKSAR shall include, apart from the sum specified in the judgment, any interest that becomes due under the judgment as well as lawyers’ fees and litigation costs that have been certified by the court”⁸⁴

Professors Zhang and Smart projected that the impact of the Arrangement will be minimal due to its very restricted scope.⁸⁵ According to José Alejandro Carballo Leyda, in the *Notice of the Supreme People’s Court on the Implementation of the [New York] Convention on the Recognition and Enforcement of Foreign Arbitral Awards*⁸⁶ (to which China has acceded), which was issued by the SPC on April 10, 1987 (the “SPC 1987 Notice”), the term “commercial legal relationship” was defined as follows:

[A] non-exhaustive list of examples such as: “disputes relating to the sale of goods, property leasing, construction contracting, contract processing, technology transfer, equity joint ventures, cooperative joint ventures, prospecting and developing natural resources, insurance, credit, personal services, agency, consultancy services and carriage of goods by sea, civil aviation, rail transport and road transport, as well as product liability, environmental pollution, marine casualties and title.”⁸⁷

The author notes that Leyda wrote this statement in the context of recognition and enforcement of arbitration awards in mainland China, Hong Kong, and Taiwan; however, given that no illustrative definition was given by the SPC for the underlying Arrangement, the SPC 1987 Notice can provide some reference value. One thing is certain: the Arrangement excludes HK-China CBI matters from its application. The irony is that HK-China CBI matters often arise in the context of joint venture enterprises that fail, and such enterprises are the usual investment vehicles deployed by Hong Kong and mainland Chinese parties wishing to do business together. It is based on this interesting fact that the author examined the possibility of ex-

84. See *Interpretation*, *supra* note 30, art. 16.

85. Both professors considered that the Arrangement “will likely be of quite limited use in the future.” See Zhang & Smart, *supra* note 79, at 553.

86. Zui Gao Ren Min Fa Yuan Guan Yu Zhi Xing Wo Guo Jia Ru De Cheng Ren Ji Zhi Xing Wai Guo Zhong Cai Cai Jue Gong Yue De Tong Zhi (最高人民法院關於執行我國加入的《承認及執行外國仲裁裁決公約》的通知) [Notice of the Supreme People’s Court on the Implementation of the [New York] Convention on the Recognition and Enforcement of Foreign Arbitral Awards Acceded to by China] (promulgated Oct. 4, 1987), 1987 FA JING FA (法(經)發) no. 5.

87. José Alejandro Carballo Leyda, *A Uniform, Internationally Oriented Legal Framework for the Recognition and Enforcement of Foreign Arbitral Awards in Mainland China, Hong Kong and Taiwan?*, 6 CHINESE J. INT’L L. 345, 350 (2007).

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tending the Arrangement to cover HK-China CBI matters. However, due to the complexity of the insolvency legal relationships and court procedures, a separate and tailor-made Arrangement for the judicial recognition and enforcement of HK-China CBI matters would be more effective in achieving the substantive and procedural justice sought by litigants in HK-China CBI disputes.

