BEIJING'S INITIATIVE ON CROSS-BORDER INSOLVENCY: REFLECTIONS ON A RECENT VISIT OF HONG KONG PROFESSIONALS TO BEIJING

Xianchu Zhang and Charles D. Booth***

In April 2001, a group of insolvency professionals from the Hong Kong Special Administrative Region visited Beijing and held a constructive meeting on cross-border insolvency with a delegation of Beijing government officials and insolvency professionals. The meeting was initiated by the Foreign Economic and Trade Commission of the Beijing Municipal Government. This article describes the discussions of the meeting with some analysis of the issues concerned, with a focus on cross-border insolvency issues arising in the insolvency of foreign investment enterprises in Beijing. The article argues that China should adopt a national solution to cross-border insolvency issues and that the Mainland judiciary should be more actively involved in the process.

Introduction

On 12 April 2001, a full-day meeting on cross-border insolvency took place at the offices of the Foreign Economic and Trade Commission of the Beijing Municipal Government (Beijing Commission) between a group of insolvency professionals from the Hong Kong Special Administrative Region (the Hong Kong SAR) and a delegation of Beijing government officials and insolvency professionals. The meeting was initiated by the Beijing Commission through the Zhong Tian Law Firm.[1] The Beijing hosts were headed by Mr Cheng Gang, the deputy director of the Foreign Investment Department of the Beijing Commission; Mr Cheng Xuqi, Vice Chairman and the Head of the

* Associate Professor, Faculty of Law, University of Hong Kong.
** Associate Professor, Faculty of Law, University of Hong Kong, and Director, Asian Institute of International Financial Law (AIIFL). Both authors would like to thank their colleague, Philip Smart, and Alan Tang of KPMG for their comments on an earlier version of this article.

1 The law firm initiated contact through the Hong Kong Official Receiver's Office (the ORO). The ORO contacted the Hong Kong Society of Accountants, which through one of its member's firms contacted other professional firms and the University of Hong Kong, which eventually led to the formation of the visiting group to Beijing. The members of the Hong Kong group included Mr P. W. Mak and Mr Eric Y. S. Tsui of the ORO, Mr Alan C.W. Tang of KPMG, Mr Kenneth Chen of RSM Nelson Wheeler, Mr Johnson C. H. Kong of BDO International McCabe Lo & Co, Mr Joseph Lam of Deacons, Mr Raymond W. K. Lau of Lovells, and Mr Charles Booth and Mr Xianchu Zhang of the Faculty of Law, University of Hong Kong.

Secretariat of the Beijing Association of Foreign Investment Enterprises (the Beijing Association); and Ms Jin Yiyan of Zhong Tian.[2]

Mr Cheng Gang opened the meeting. He noted that over 15,000 foreign investment enterprises (FIEs) were operating in Beijing with accumulated direct investment of more than US$22 billion. The investment from Hong Kong in Beijing represents 60 per cent of the total. Against this backdrop and the imminent accession of China into the World Trade Organisation (WTO), he stressed that the legal issues concerning cross-border insolvency have become increasingly important and urgently demand solutions. As such, he believed that the exchange of views between the officials and professionals from the two cities would assist in promoting the mutual understanding of each other's insolvency laws and procedures and in increasing the likelihood of co-operation in cross-border insolvencies.

Insolvency of FIE Foreign Investors

Mr Cheng Xuqi then described the practice in Beijing for dealing with the investment in FIEs of insolvent foreign investors. According to the Liquidation Provisions of Foreign Investment Enterprises adopted by the Standing Committee of the Beijing People's Congress on 14 August 1993 (the Beijing Provisions),[3] the Beijing Commission is the municipal authority in charge of FIE liquidations.[4] Currently, there are three ways to dispose of an insolvent foreign investor's investment in an FIE in Beijing after valid proof of the liquidation is presented to the Beijing municipal authority concerned. Firstly, the foreign investor's shares in the FIE in Beijing may be transferred to a new foreign investor. The merit of this method lies in the avoidance of any negative disruption to the business operation of the FIE caused by the liquidation of the original investor in a foreign jurisdiction. However, the application of this method is subject to certain limitations. Under the law, any transfer of investment rights or obligations by one party to a joint venture must be consented to by all other parties to the joint venture and approved by the state authority.[5]

Secondly, the foreign investor's shares in the FIE may be transferred to the remaining shareholders of the joint venture. Again, this option is also subject

[2] The other members of the Beijing team included Mr Zhou Naxin of the Judicial Bureau of Beijing, Mr Bai Yanjing, Mr Li Yaping and Mr Duan Xinhua of the Beijing Commission, Mr Tian Zhiping of Xingzhou CPA of Beijing, Mr Xing Sumin of Jingdu Assets Valuation Company Ltd of Beijing, and Mr Du Xinli of the China University of Politics & Law.

[3] The Beijing Provisions are posted on a major Mainland website at http://www.chinainfobank.com/IrisBin/Text. Visited on 16 May 2001.

[4] *See ibid.* Art 7.

[5] Art 10 of the Sino-Foreign Contractual Joint Venture Law of 1988, as amended in 2000; and Art 36 of Implementing Regulations of Sino-Foreign Equity Joint Venture Law of 1983.

to the restrictions as mentioned above. Although this practice may not be significantly detrimental to the business operation of the FIE, it has not proved popular insofar as domestic investors are concerned. This is because most domestic investors in joint ventures are in poor financial condition and frequently suffer from severe cash flow problems which make it difficult, if not impossible, to purchase the insolvent foreign investor's interest.[6] In addition, and more crucially, the domestic purchase of the foreign interest may cause the enterprise concerned to lose the preferential treatment granted to FIEs under the law.[7]

Thirdly, if neither a third party nor the domestic party to the joint venture wants to buy the shares of the foreign bankrupt, the joint venture has to be dissolved through liquidation. This is apparently the least attractive option since it not only ends the joint venture, but also subjects the parties to time-consuming proceedings. Currently, the dissolution of FIEs in Beijing is governed by the Regulations on Dissolution of Foreign Investment Enterprise promulgated by the municipal legislature of Beijing on 8 June 1995.

Liquidations of FIEs in China

For the liquidation of FIEs in China, there are two sets of rules dealing with general (solvent) liquidation and bankrupt (insolvent) liquidation, respectively.

General Liquidations

General liquidations are governed by the Liquidation Procedures of Foreign Investment Enterprises adopted by the Ministry of Foreign Trade and Economic Co-operation (MOFTEC) on 9 July 1996 (the MOFTEC National FIE Liquidation Procedures), and by the Liquidation Provisions discussed above. It is apparent that the promulgation of the national MOFTEC Procedures does not preclude the continued application of the Beijing Provisions, for both are applicable to the situations where a solvent FIE is able to liquidate itself.[8] The national Procedures are also applicable to special liquidations where a solvent FIE is unable to liquidate itself due to its internal difficulties

6 In many joint ventures, the poor financial condition of the Chinese party forces it to make its capital contribution in the form of land use rights, facilities or premises. This weak capital structure often limits the further development of the joint venture since the Chinese side is unable to contribute more. For a discussion, *see* Lu Shengliang, *Liyong Waizi de Guoji Jingyan yu Zhongguo Shijian (International Experience and the Practice in China of Foreign Capital Utilization)* (1997), pp 244–245.

7 Art 4 of the Sino-Foreign Equity Joint Venture Law of 1979, as amended in 2001; and Art 18 of the Implementing Regulation of Sino-Foreign Contractual Joint Venture Law of 1995. Both state that, as a general principle, foreign investment to a joint venture shall not be less than 25% of the total investment.

8 *See* MOFTEC National FIE Liquidation Procedures, Art 3. Art 5 further provides in regard to expiration of the joint venture operation, dissolution approved by the state authority, and termination of a joint venture by the People's Court or an arbitration tribunal.

or its being ordered to close by the state authority for committing serious violations of the law.[9] However, the Procedures cannot be applied to insolvent liquidations.

During the Beijing meeting, the Beijing team presented each member of the Hong Kong group with a booklet of enterprise bankruptcy regulations,[10] containing both the MOFTEC National FIE Liquidation Procedures and the Beijing Provisions.

A post-meeting comparison of the two regulations yielded a few contradictions. For example, Article 7 of the MOFTEC Procedures provides that during the liquidation, the FIE cannot start any new operations, whereas Article 6 of the Beijing Provisions states that upon commencement of the liquidation, the FIE shall stop its operational activities unless the state authorities approve otherwise. Secondly, under the national regulation, the liquidation committee should notify known creditors within 10 days of its formation;[11] but the local rules stretch the duration to 20 days.[12] Thirdly, according to Article 22 of the Beijing Provisions, a claim is deemed to be given up if the creditor fails to register his right within the statutory period unless acceptable justification is proved before the distribution. However, Article 19 of the MOFTEC Procedures entitles a creditor who fails to register his claim to participate in liquidation if his claim is known to the liquidation committee. Greater thought needs to be given to the harmonisation of the local and national approaches. These inconsistencies will likely cause confusion and chaos in practice.

Bankrupt Liquidations

As for bankrupt liquidations, Article 2 of the MOFTEC National FIE Liquidation Procedures stipulates that once the enterprise is declared bankrupt, the liquidation shall be carried out in accordance with the relevant bankruptcy laws and regulations. For bankrupt liquidations, attention must be paid to existing bankruptcy enacted laws by the central government. There are no local provisions in Beijing applicable to bankrupt liquidations of FIEs.

The national legislation contains only a very limited number of legal rules applicable to bankrupt liquidations involving foreign interests.[13] In this vacuum,

9 *Ibid.*, Arts 3 and 35.

10 The booklet is entitled *Collections of the Latest Laws and Regulations Concerning Foreign Investment* and was compiled by the Trade Promotion Chamber of Beijing, the Association of Foreign Legal Advisers of Beijing, and the Zhong Tian Law Firm.

11 MOFTEC National FIE Liquidation Procedures, Art 17.

12 Beijing Provisions, Art 20.

13 As demonstrated by the recent bankruptcy of the Guangdong International Trust and Investment Company (GITIC), the largest bankruptcy of a financial institution in PRC history (with unpaid foreign debts over US$1.5 billion). For analysis of this case, *see* Gordon G. Chang, "Examination of Technical Bankruptcy Issues Crucial for GITIC Creditors", (Feb 2000) *China Law & Practice* 67–72 and Gordon G. Chang, "Bankruptcy Law in China: Too Much or Too Little?" (June / July 1999) *China Law & Practice* 22–25.

the courts therefore apply principles drawn from Chinese insolvency legislation generally. This national insolvency legislation includes the following:

1 The Law of the People's Republic of China on Enterprise Bankruptcy (Trial Implementation), which only has 36 short articles and may only be applied to the bankruptcy of state-owned enterprises (SOEs);[14]
2 Chapter 8 of the Company Law of 1993, entitled Bankruptcy, Dissolution and Liquidation of the Company, which includes merely 10 articles and applies to bankruptcy proceedings of corporations formed under the Company Law; and
3 Chapter 19 of the Civil Procedure Law dealing with bankruptcy and debt repayment procedures, which includes only eight articles and governs the bankruptcy of other enterprises including FIEs.

The insufficient national legislation on foreign-related bankruptcy and the lack of co-operative arrangements between the Mainland and the Hong Kong SAR on cross-border insolvency have led to the development in Beijing of the locally-made enactments noted above (for solvent FIEs).[15] Other local procedures have developed elsewhere in China.[16]

Jurisdiction

In terms of jurisdiction, it was noted that since all FIEs in Beijing are registered at the municipal level with the Administration of Industry and Commerce (the AIC), their bankruptcy or liquidation cases accordingly are heard by the Intermediary People's Court of the city, unless that court authorises a lower court to deal with the proceedings. Therefore, cases involving FIEs are likely to be handled by more experienced judges better able to draw on the application of principles from the national insolvency legislation noted above in an effort to address the lack of sufficient applicable legal rules.

Clearly, the bankruptcy legal regime is still underdeveloped in Mainland China. Although the development of a market economy has led to the call

[14] Adopted by the Standing Committee of the National People's Congress, 2 Dec 1986. The law has proved defective and outdated in practice. As a result, numerous rules, measures and policies have been adopted in the form of judicial interpretations and administrative decrees to remedy the situation. Consequently, many bankruptcy cases are handled pursuant to government policy and circulars. The Government has been deeply involved in such proceedings.

[15] *See* n 3 above.

[16] Other local procedures have developed elsewhere in China. For an investigation report of the practice in the Shenzhen Special Economic Zone (the Shenzhen SEZ), *see* Xianchu Zhang and Charles D. Booth, "Chinese Bankruptcy Law in an Emerging Market Economy: The Shenzhen Experience", a paper presented at the Chinese Insolvency Law Symposium: Developing an Insolvency Infrastructure, organised by AIIFL at the University of Hong Kong, 17 Nov 2000.

for the modernisation of the insolvency regime, the lack of necessary supporting institutions,[17] together with competing political and ideological viewpoints[18] has thus far hindered progress in the drafting of a new uniform Bankruptcy Law.[19]

Additional Issues

The Beijing team was especially interested in issues involving the insolvency of Hong Kong parties to Beijing FIEs. The members of the Hong Kong group briefed their Mainland counterparts on the legal structure of liquidation and insolvency in Hong Kong, the functions of the Hong Kong Official Receiver's office (the ORO) and the liquidator, the legal protection of employees, the difference between voluntary and compulsory liquidation, the due process of liquidation, the roles played by insolvency professional in the proceedings, and the recent trend of insolvency law reform in Hong Kong.

Other issues which arose in the discussion reflected the following concerns of the Beijing team in regard to liquidation and cross-border insolvency.

What Legal Documents Must a Hong Kong Party to an FIE Produce in Beijing to Prove the Party's Bankruptcy in Hong Kong?

The problem derives from the lack of a judicial assistance agreement on recognition and enforcement of judicial decisions between the Mainland and the Hong Kong SAR, as well as from the lack of any judicial assistance agreements relating to cross-border insolvency. As a result, a bankruptcy or liquidation order of a Hong Kong court may not be recognised in the Mainland. For example, in *Liwan District Construction Co. v Euro-American China Property Ltd.*,[20] a Guangdong People's Court refused to allow the Hong Kong

[17] For instance, a sound social welfare system has not been well established in China. Also, accounting rules, professional services and the judiciary still fail to meet commonly accepted standards of practice in place in other market economies. For a recent discussion, *see* Li Shuguang, *Zhongguo Qiye Chongzu Aozuo Shiwu Quanshu* (*Operational Practice of Enterprise Reorganization in China*) (1998), Vol 1, pp 510–515.

[18] The general application of bankruptcy law to insolvent enterprises under market-based discipline will inevitably adversely affect state-controlled sectors, which, in turn, may cause great social instability. These issues have been seriously debated from the very beginning of the introduction of bankruptcy as a market institution into China and have not yet been finally settled. *See* Cao Siyuan, "The Storm over Bankruptcy (I) and (II)", (Jan / Feb and Mar / Apr 1998) *Chinese Law & Government*, (in instalment).

[19] The drafting process for the new Chinese bankruptcy law began in 1994 and a draft was completed in 1995. The drafting process resumed in 1998 and is now continuing. A new draft has recently been completed and was released in Dec 2000 for comment (the New Chinese Bankruptcy Law). For a recent discussion of the drafting process, *see* Wang Weiguo, *Pochan Fa* (*Bankruptcy Law*) (1999), pp 41–43.

[20] For the case digest, *see Liwan District Construction Co. v Euro-American China Property Ltd.*, reported and commented on by Donald J. Lewis and Charles D. Booth in 6 *China Law & Practice* 27 (1990).

liquidator of a Hong Kong party to a joint venture in Guangdong to represent the Hong Kong party in Mainland legal proceedings involving a contract dispute.[21] On the other hand, liquidators from Hong Kong in many unreported cases have not had difficulty in having their appointment and status recognised in the courts of China, or in commencing and continuing proceedings at various levels of the courts. Apparently, there does not seem to be a consistent basis or approach in recognising foreign liquidators throughout China.

Hence, the problem is not one merely involving the production of documents regarding the declaration of a foreign liquidation or bankruptcy, but rather one of whether a mainland court will recognise a Hong Kong or, more generally, a foreign insolvency order and allow the representative of such proceedings to recover the assets of the Hong Kong / foreign debtor in the Mainland.[22]

This matter extends beyond insolvency. More generally, at present no registration record, official document issued by the Hong Kong government, settlement agreement or judicial decision may be directly enforced in the Mainland, except in limited circumstance.[23] However, they may be introduced in Mainland proceedings through certain attesting procedures. Since the early 1990s, the Ministry of Justice has appointed 251 Hong Kong lawyers as entrusted notary publics to handle the transactions and documentation concerning the Mainland.[24] The documents prepared by these lawyers may

[21] Similarly, in 1995, a People's Court denied the petition of a Japanese creditor for the recognition and enforcement of a debt collection judgment of a Japanese court against the Japanese debtor in China. The basis of the court's decision was the lack of any basis of reciprocity. For the case digest and comments, *see The Case Concerning a Japanese Citizen's Application for Recognition and Enforcement of a Debt Judgment made by a Japanese Court*, in *Chinese Practising Law Institute of the Supreme People's Court* (compiled), *Renmin Fayuan Anli Xuan* (Selected Cases of People's Court, Vol 3 of Civil Law, part B) (2000), pp 2032-6.

[22] Only recently have the Hong Kong courts directly ruled on the issue of whether a mainland bankruptcy order or decision would be recognised and enforced in Hong Kong. In *CCIC Finance Ltd v Guangdong International Trust and Investment Corporation and Guangdong International Trust and Investment Corporation Hong Kong (Holdings) Ltd*, 31 July 2001, HCA 15651 of 1999, Deputy Judge Gill (in Chambers) ruled in respect of CCIC's attempts to get a garnishment order against GITIC. Both sides in the litigation produced expert witnesses from the Mainland to discuss whether Chinese insolvency law is extraterritorial and would extend to GITIC's property in Hong Kong. The judge found that Chinese insolvency law was universal in application and would be given recognition by the court. As a result, the judge refused to allow CCIC to garnish the debt owed to GITIC in Hong Kong.

It is also noteworthy that Hong Kong's Court of Final Appeal recently recognised a Taiwanese bankruptcy order in *Chen Li Hung v Ting Lei Miao* [2000] 1 HKC 461. In unanimously dismissing an appeal from the Court of Appeal, the Court of Final Appeal held that Hong Kong courts would give effect to a bankruptcy order made by a Taiwanese court where the rights covered by the order are private rights and where such recognition is made in accordance with the interests of justice without being inimical to China's sovereign interest or its public policy.

[23] Some divorce judgments of Hong Kong have been recognised in the Mainland.

[24] Thus far, over 500,000 transactions and documentations have been handled by them. The report is available at http://www.chinainfobank.com/Irisbin/text. Visited on 12 Mar 2001.

further need to be sealed by the China Legal Service (HK) Ltd, the "window company" of the Ministry of Justice in Hong Kong.[25]

In such circumstances, certain alternative routes have developed. For example, a recent debt collection case in the Mainland was brought by a Hong Kong creditor to reach some of Hong Kong debtor's assets. On the basis of a Hong Kong judgment, the Intermediate People's Court of Guangzhou ruled in favour of the Hong Kong creditor by directly applying the relevant Hong Kong law as the governing law among the parties concerned. The case is considered a landmark case for not only applying a foreign law in a domestic proceeding, but also for creating a new way to circumvent the existing difficulties involved in directly enforcing a foreign judicial decision.[26]

However, even this development may not guarantee that a future creditor will fully recover on a foreign judgment in the court where the enforcement is sought. This is because the Civil Procedure Law of China includes no rule governing the application of foreign law and there is no guarantee that other domestic courts will follow the approach of the recent Guangdong judgment. In addition, many members of the Mainland judiciary lack the ability and background to completely understand foreign statutes and relevant case law. Thus, there remains an unresolved problem in China as to how to prove and interpret foreign law.

Recognition of a Receiver or Liquidator Appointed in Hong Kong

Under current Mainland law, there is no party who plays a role equivalent to that of a receiver appointed in Hong Kong to realise assets subject to a fixed and / or floating charge. As a result, documents issued by the receiver may have no legal effect in the Mainland and fail to be recognised by both the state authority and the People's Court. Despite recognising a receiver's rights based on the underlying contract and the fact that appointment is generally pursuant to a debenture authorising the receiver to manage the affairs and business of the company, the Beijing team stated that since the receiver would represent only an individual creditor and since in most cases the matter had not led to the commencement of any judicial proceeding, the receiver's function should be limited to a private remedy.

The situation appears more promising for Hong Kong liquidators. Despite the decision in *Liwan District Construction Co. v Euro-American China*

[25] The website of the company is www.chinalegal.com.hk.

[26] For the report of the case and some comments, *see* Xu Mali and Wang Tianxi, "Landmark Case: *Meidaduo Financial Co. Ltd. v Ruichang Real Estate Co. Ltd. et al*" (Aug 2000) *China Law*, pp 102–104. *See also* Zhang Xianchu, "Foreign Law Applied by the People's Court in China", *CCH China Law Update* (Aug 2000), pp 15–16 and 24.

Property Ltd,[27] the Beijing team noted that recognition might be forthcoming for liquidators appointed in some cases. Interestingly, from the remarks made by the Beijing team in the meetings, it appeared that recognition would be more likely in a voluntary liquidation commenced by the company's directors or shareholders than in a court controlled compulsory winding up. This distinction surprised the Hong Kong team, given that the Hong Kong Companies Ordinance provides that the liquidator in either a voluntary or a compulsory liquidation may commence legal proceedings on behalf of the company,[28] and may decide to carry on the business of the company, so far as may be necessary for the beneficial winding up of the company.[29] Apparently, this distinction sterns from the belief of the Beijing team that liquidators appointed "voluntarily" by the company have the endorsement of its shareholders and directors whereas liquidators appointed "involuntarily" are somehow forced upon the company against the wishes of its shareholders and directors.

The Protection of Employees in FIE Liquidation Proceedings in the Mainland

According to the Beijing officials, this is a complicated issue for there is no uniform governing rule for the protection of workers. However, most government decrees and policies providing employees with additional compensation beyond their contractual entitlement are applicable only to workers of SOEs, and not to employees of other types of enterprises such as FIEs. (For example, under a regulation of the Labour Ministry, general employees may be dismissed according to the terms of the employment contract.) Employees dismissed due to the imminent bankruptcy of an SOE shall be entitled to compensation according to the employment contract and the length of their employment with the State. Each year of employment shall entitle them to one month's salary at the time of dismissal, up to a total of 12 months' pay.[30] Moreover, for employees of SOEs, the matters to be dealt with in bankruptcy regarding dismissal include not only the termination of their employment contracts, but also the termination of their social status as state employees. In addition, according to a decree of the State Council issued in 1994, the Government encourages employees of bankrupt SOEs to find jobs by themselves and recommends the payment of severance pay of no more than three times of the average salary of the locality of the previous year.[31]

[27] *See* text accompanying n 20 above.
[28] Companies Ordinance, Cap 32, s 199 (1)(a).
[29] *Ibid.*, s 199 (1)(b).
[30] Arts 5 and 9 of the Economic Compensation Measures of Breaching and Termination of Labour Contracts, promulgated by the Ministry of Labour, 3 Dec 1994.
[31] Item 5 of the Notice of the State Council Concerning Trial Implementation of Bankruptcy of State Owned Enterprises in Certain Cities, 25 Oct 1994.

In practice, some foreign investors have failed to understand that these special rules apply only to SOE employees. Other foreign investors have wrongly thought that if an FIE ceases its business operations and the employees stop working, the workers may no longer deserve any payment. However, under Chinese law, employment relations continue as long as the employees are not formally dismissed. Thus, in a few liquidation cases, the foreign investors failed to realise that although the enterprises stopped their production and operations for a long time, the employees' compensation payable to the idle workers continued to accrue. In addition, many foreign investors have failed to realise that the arrangement for dismissed employees who have been transferred from an SOE to a FIE joint venture is also governed by the agreement between them and their former SOEs. Their employment period in the joint ventures shall be added to their SOE employment time in calculating the sum of their deserved compensation.[32]

Conclusion

The Beijing meeting was timely, given the ongoing drafting of the new Chinese Bankruptcy Law and China's imminent accession into the WTO. Moreover, the Guangdong International Trust and Investment Company (GITIC) bankruptcy has demonstrated the need for greater co-operation in cross-border insolvencies. Although some scholars have vigorously advocated the need for China to formulate clear rules for cross-border insolvency,[33] the December 2000 draft of the New Chinese Bankruptcy Law remains silent on this issue. On the one hand, the lack of national legislative guidance may create some room for local measures to play a role; on the other hand, the function of local measures will be limited only to their respective jurisdictions.

It is too early to see how the Beijing cross-border initiative will fit within the overall national system. Going forward, it would prove quite difficult and inefficient for the Hong Kong SAR to have to deal separately with each region of the Mainland in negotiating the applicable rules for the resolution of cross-border insolvency matters. In our view, it would be best for China to

[32] The Reply of the General Office of the Ministry of Labour Concerning Implementing Regulations on Foreign Investment Enterprise Labour Administration, 14 July 1995.

[33] For some arguments, see Shi Jingxia, *Kuaguo Pochan de Falu Wenti Yanjiu* (*Studies on Legal Issues in Cross-border Insolvency*) (1999), particularly pp 65–74; Roman Tomasic, "Insolvency Law Principles and the Draft Bankruptcy Law of the People's Republic of China" (1998) 3 *Australia Journal of Corporate Law* 211, pp 230–231; and Xu Liangdong (ed), *Pochan Anjian Shenli Chengxu* (*Bankruptcy Case Procedures*) (1997), pp 119–121.

adopt a national solution to cross-border insolvency issues.[34] A national approach would be most likely to ensure the development of a uniform, coherent approach to cross-border insolvency. Such a provision could ideally be inserted into the New Chinese Bankruptcy Law. However, in the short term, perhaps it would be helpful for the Mainland to allow a few regions to enter into trial schemes of cross-border insolvency co-operation with the Hong Kong SAR. Beijing and the Shenzhen Special Economic Zone (the Shenzhen SEZ) would be the logical regions in which to begin, given their advanced development status and close ties with the Hong Kong SAR.[35]

Against this background, the solution to insolvency issues should also be considered in the larger context of cross-border judicial assistance. Under the Basic Law,[36] the Hong Kong SAR may maintain relations with the judicial organs of the other regions of the Mainland through consultation and in accordance with the law, and each side may render assistance to the other. However, since the reunification in 1997, judicial assistance has been slow-paced. In civil and commercial matters, the legal vacuum regarding the service of judicial documents and the mutual enforcement of arbitral awards was not filled until 1999.[37] In addition, no agreement has been reached regarding a time frame for concluding the accords by both sides as to obtaining evidence in the other's jurisdiction and as to the recognition and enforcement of judicial decisions. As a result, for the time being, greater co-operation between the Hong Kong SAR and the Mainland on cross-border matters lacks a necessary underlying legal basis. At present, neither a Hong Kong court nor a People's Court in the Mainland is under a legal obligation to recognise and enforce the other side's bankruptcy orders and liquidation decisions.[38]

In addition to these legal infrastructure problems, a lack of understanding by the Mainland courts of common law legal concepts applied in Hong Kong also complicates the problem. As noted above, there is no equivalent in the Mainland to a receiver appointed pursuant to a debenture in Hong Kong.

[34] In this regard, the approach and rules of the UNCITRAL Model Law on Cross-Border Insolvency should at least be referenced to in the new law, if the conditions for their entire adoption are not yet ripe. The Model Law is published with a guide to enactment as a UN Publication, with Sales No E 99. V3 (1999).

[35] For further discussion of cross-border insolvency issues involving the Hong Kong SAR and the Shenzhen SEZ, *see* Xianchu Zhang and Charles D. Booth, n 16 above.

[36] Art 95 of the Basic Law of the Hong Kong SAR.

[37] The Arrangement on Service of Judicial Documents in Civil and Commercial Matters and the Arrangements for Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong SAR became effective on 30 Mar 1999 and 1 Feb 2000 respectively.

[38] *See* eg, the recent decision by the Guangzhou court in *Meidaduo*, discussed in the text accompanying n 26 above.

This kind of technical divergence is a good example of the problems that may arise in regard to fostering cross-border co-operation within the "one country, two systems" model.

Lastly, another interesting point worth watching is the Beijing government's role in this initiative. During the Beijing meeting, the Beijing team noted that if cross-border co-operative measures could be agreed, the Beijing Commission would entrust the implementation of a foreign-related bankruptcy liaison scheme to a locally-based law firm that has handled a considerable number of FIE bankruptcy cases.[39] Given the infancy of market development in the Mainland, it is not surprising that the Beijing government would wish to commence an initiative in an area as important and complex as this with only one law firm. However, as professionalism in the insolvency area continues to develop, it would be helpful if other legal and accounting firms were permitted to assist in cross-border insolvencies involving FIEs. Moreover, cross-border co-operation in insolvencies in general would be greatly facilitated if the Chinese judiciary on a national basis were more actively involved in the process. Their involvement would help ensure the development of uniform procedures and effective enforcement.

[39] The introductory materials of the law firm include detailed information in this regard, on file with the authors.