

Promoting Cross-Border Insolvency Cooperation: Is China's "Belt and Road" Initiative an Opportunity?

"One Belt, One Road" Initiative (the Initiative) is one of the most important foreign policies that the Chinese government has been actively promoting since 2013. "One Belt" refers to the "Silk Road Economic Belt", which was based on the historical trade routes through Eurasia region. "One Road" refers to the Maritime Silk Road, which focuses on linking China with Europe through the Pacific Ocean. The areas proposed by the Initiative would cover about 70% of world population and 55% of global GDP.¹ With the expansion of the Initiative, cross-border legal issues have attracted more attention. This article is trying to explore the cross-border insolvency issues associated with the development of the Initiative and argued it is necessary to develop a multilateral guidance for effectively solving cross-border insolvency issues among participating countries.

1. The Nature of the Initiative

The proposed initiative is trying to encourage international cooperation in different areas, including trading, investment, infrastructure and energy. The uniqueness of the Initiative is that it does not try to achieve geopolitical integration among countries; the cooperation is based on policy communication and objectives coordination, so it will be an open and flexible process.² More importantly, the Chinese government also made it clear that, in order to benefit wider areas, the ambitious plan is not limited to the area of Silk Road, and opens to all the countries and international and regional organisations for engagement.³

Specifically, the Initiative focuses on five tasks, which are policy communication, the connectivity of infrastructure construction, facilitating investment and trading, improving financial cooperation integration and people-to-people communication.

¹ World Economic Forum, "What can the New Silk Road do for global trade?" (22 September 2015) <https://www.weforum.org/agenda/2015/09/what-can-the-new-silk-road-do-for-global-trade/> <accessed 10 November 2017 >.

² Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road (Action Plan), jointly published by the National Development and Reform Commission, the Ministry of Foreign Affairs and the Ministry of Commerce (<https://www.yidaiyilu.gov.cn/yw/qwfb/604.htm>).

³ Ibid.

One difficulty that many western commentators are facing is how to define the Initiative proposed by China.⁴ Especially from the legal point of view, it is difficult to give it an appropriate conceptual analysis.⁵ Some argued that the purpose of Chinese government is to build a regional economic integration.⁶ However, the action plan also emphasised that the free flow would be achieved through in-depth regional economic cooperation and policy coordination; so it would be an open and flexible economic system balancing different countries' benefits.⁷ The fact that the Initiative is open to all countries or organisations to join also illustrates it is beyond regional or any boundaries. Additionally, there are no conventional arrangements or conventions for countries to sign under the initiative, and in-depth governmental cooperation would be achieved through making full use of existing agreements at bilateral, regional or multilateral levels. Based on those special factors, "One Belt, One Road" Initiative should be defined as a new model of global governance.⁸ This new model explores new methods of international cooperation at a more integrated level.⁹

2. The Development of Cross-Border Insolvency Law in China

The legislation on cross-border insolvency issues was a total blank before the introduction of the EBL 2006. The bankruptcy chapter under the Civil Procedure Law may apply to a foreign-related legal person, but it did not address any detailed issues.¹⁰ Other regulations on the enterprise with foreign elements were also quiet in this area. Traditionally, the Chinese courts conducted the territoriality approach when facing inbound cross-border insolvency issues.¹¹ In an early case, *Liwen District*

⁴ Philippe du Fresnay, "The new Silk Road: Economic Initiative or Geopolitical Alternative?" (2016) *International Business Law Journal* 575 .

⁵ Zeng Lingliang, "Conceptual Analysis of China's Belt and Road Initiative: A Road towards a Regional Community of Common Destiny" (2016) 15 *Chinese Journal of International Law* 517.

⁶ Kar-yiu Wong, "The "Belt and Road" Initiative and Economic Integration" In Banik A., Barai M., Suzuki Y. (eds) *Towards A Common Future* (Palgrave Macmillan, 2016).

⁷ See above note 2.

⁸ See above note 5.

⁹ *Ibid.*

¹⁰ Jingxia Shi, 'Chinese Cross-Border Insolvencies: Current Issues and Future Developments' (2001) 10 *International Insolvency Review* 33.

¹¹ Charles Booth, 'The 2006 PRC Enterprise Bankruptcy Law: The Wait Is Finally Over' (2008) 20 *Singapore Academy of Law Journal* 275, 313.

Construction Company,¹² the Chinese court refused to recognise the appointment of a Hong Kong representative, and as he could not represent the Hong Kong company in the Chinese proceeding, so the representative could not be granted powers that a liquidation committee would have had under EBL 1986. The intention was to protect Chinese parties' rights and control the assets located within China, which reflects the protective tradition for dealing with international issues in Chinese courts.

Regarding outbound transactions, the first effort to address the problem with foreign elements at the national level was conducted by the Supreme People's Court in 2002.¹³ The judicial interpretation was passed to clarify uncertainties of insolvency provisions under various national laws, and to avoid possible conflicts in insolvency proceedings.¹⁴ Article 73 simply stated that a liquidation team would be appointed to pursue the assets of insolvent Chinese debtors that were located outside the borders of China, which confirmed the extraterritorial power of the Chinese law. But, there was no detailed explanation about how the system would work. Although the document was the official interpretation of the EBL 1986, there was no matching Article about extraterritorial effect under the law. In practice, the recovery of foreign assets would have to depend on the application of foreign law, so the effect of this article was in doubt. The intention of article 73 was to be a facilitating assistant article for Chinese liquidators recovering overseas assets, and was an early demonstration that the government had noticed the issues of cross-border insolvency.¹⁵ Nevertheless, those traditional attitudes and territorial approaches to solving inbound and outbound cases have been inherited in the development of the cross-border insolvency law under the new bankruptcy system.

Interestingly, the early development of the cross-border insolvency law started at the provincial level, after the government introduced an opening-up policy and established

¹² *Liwan District Construction Company v Euro-America China Property Ltd*, see Donald J Lewis and Charles D Booth, 'Case Digest' (1990) 6 *China Law and Practice* 27.

¹³ Provisions of the on Some Issues Concerning the Trial of Enterprise Bankruptcy Cases, interpretation No 23 [2002] by the Supreme People's Court.

¹⁴ The aim of the document was set in the first paragraph, which was to assist the Corporate Bankruptcy Law 1986.

¹⁵ Charles Booth, 'The 2006 PRC Enterprise Bankruptcy Law: The Wait Is Finally Over' (2008) 20 *Singapore Academy of Law Journal* 275, 311.

Special Economic Zones. Those regional approaches and regulations reflected the features of protectionism and territorialism mentioned above. There was one article addressing the issue of foreign-related enterprises in the Bankruptcy Regulation of the Shenzhen Special Economic Zone which stated that the intermediate people's courts of Shenzhen province had jurisdiction over any assets of foreign debtor located within the area, and bankruptcy proceedings opened by Chinese courts within the area should have jurisdiction over all the assets of the debtor, wherever they are situated.

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Article 5 of China Enterprise Bankruptcy Law 2006

“Article 5:

Once the procedure for bankruptcy is initiated according to this Law, it shall come into effect in respect of the debtor’s property outside of the territory of the People’s Republic of China.

Where a legally effective judgment or ruling made in a bankruptcy case by a court of another country involves a debtor’s property within the territory of the People’s Republic of China and the said court applies with or requests the people’s court to recognise and enforce it, the people’s court shall, according to the relevant international treaties that China has concluded or acceded to or on the basis of the principle of reciprocity, conduct an examination thereof and, when believing that the said judgment or ruling does not violate the basic principles of the laws of the People’s Republic of China, does not jeopardize the sovereignty and security of the State or public interests, does not undermine the legitimate rights and interests of the creditors within the territory of the People’s Republic of China, decide to recognise and enforce the judgement or ruling.”¹⁷

Article 5 under EBL 2006 is a gap-filling law in Chinese bankruptcy law history, and which addresses legal issues for both inbound and outbound bankruptcy cases. The understanding of cross-border insolvency in Chinese legal society has been mainly

¹⁶ Article 5, Bankruptcy Regulations of Shenzhen Special Economic Zone on Companies with Foreign Investment 1986 (China).

¹⁷ Article 5, Enterprise Bankruptcy Law 2006 (EBL 2006) (China).

influenced by advanced jurisdictions, and Chinese scholars have agreed that most multinational insolvency cases involve two main issues: the recognition and repayment of foreign creditors' claims; and the management of debtors' foreign assets. In general, the wording of Article 5 seems to pay more attention to the issue of foreign assets. The first paragraph deals with the extraterritorial effect of Chinese bankruptcy law over the foreign assets of the debtor under Chinese proceeding, and the second regulates the conditions that foreign proceedings need to satisfy in order to get control of foreign debtors' assets located within China's border.

The first draft of the new bankruptcy law was submitted to the National Congress in 1995, but it did not pass because of a lack of supplementary regulations and an effective social insurance system.¹⁸ Under this draft, there was one simple sentence addressing cross-border insolvency, which stated the bankruptcy proceedings initiated in foreign jurisdictions should have no effect on the debtor's assets located in China, and the bankruptcy proceeding commenced by Chinese Courts shall have an effect on the debtor's assets located outside of the territory of China.¹⁹ This proposed article sticks to the purely territorial approach, and the straightforward language reflects the lack of understanding of complicated problems linked to cross-border insolvency.²⁰

With recommendations from advanced jurisdictions and international organisations, it was suggested that a territorial approach was not consistent with the international trend. Hence, the article on cross-border insolvency received more attention after 2000. The 2002 draft adopted certain principles of universalism. Article 8 of the 2002 draft kept the extraterritorial effect of the Chinese law, which provided that the new law would apply to debtors' assets outside of China too.²¹ Relying on this effect, the

¹⁸ Zhijie Jia, 'Explanatory Notes of the Draft of the Enterprise Bankruptcy Law: the 10th National People's Congress of China on 21st June 2004', Explanatory Notes to the National People's Congress <http://www.npc.gov.cn/wxzl/gongbao/2006-09/26/content_5354979.htm> accessed 10 October 2017>.

¹⁹ Article 7, Enterprise Bankruptcy Law of PRC (draft) 1995.

²⁰ Immanuel Gebhardt and Kerstin Olbrich, 'New Developments of Chinese Bankruptcy Law Reform', in Shaoping Zhu and Jun Ge (ed.), *The Bankruptcy Law of the People's Republic of China: Materials on the Drafting Process 2000* (CITIC Publishing House 2000).

²¹ Article 8, Enterprise Bankruptcy Law of PRC (draft) 2002; Jingxia Shi, 'A Summary of Positions on Cross-Border Insolvency in China' (International Insolvency Institute) <http://www.iiiglobal.org/sites/default/files/8-_China_on_Cross.pdf> accessed 12 September 2017.

Chinese representatives would have a legal basis in seeking recognition and cooperation overseas.²² The article has been discussed and re-drafted several times during the process of the reform of Chinese bankruptcy law, so the lawmakers have put enough political and legal considerations into the final form. Since the underlying policy of the law is to boost the Chinese market economy and encourage capital flow into China,²³ it is necessary to analyse the legal principles behind the language of Article 5 to see whether a single article could provide a certain and effective cross-border bankruptcy system.

Firstly, for any insolvency proceedings opened in Chinese courts, the law will be applied to all the debtor's assets, both within and outside of the territory of China. Since the law did not give a detailed procedure for managing foreign assets, following the logic of dealing with domestic cases, the article implies that, after the Chinese court accepts the bankruptcy application: all the insolvent assets should be put into the pool of assets for distribution based on Chinese law; individual actions against the debtors' assets shall be stopped; and other civil actions or arbitrations related to the debtor that have not been concluded should be discontinued until the administrator takes over the assets. Moreover, it also means that the repayment to individual creditors made by the debtor using foreign assets after acceptance in the Chinese court should be invalidated.²⁴ The demonstration of the Chinese bankruptcy law's extraterritorial effect reflects the basic concepts of universalism in regulating cross-border insolvency. The similar effect also can be found under the US Bankruptcy Code. The definition of bankruptcy estate includes all the assets within the US or abroad, wherever they may be located.²⁵ Although the realisation of such an effect usually involves recognition and assistance based on the law of the foreign jurisdictions related, it provides a legal basis for Chinese administrators seeking assistance and cooperation abroad.²⁶ However, unlike the US bankruptcy system which has adopted the UNCITRAL Model

²² Charles Booth, 'The 2006 PRC Enterprise Bankruptcy Law: The Wait Is Finally Over' (2008) 20 Singapore Academy of Law Journal 275, 313.

²³ Article 1, EBL 2006.

²⁴ Article 16-19, EBL 2006, which mainly about the legal effects of the acceptance of insolvency cases

²⁵ § 541 Property of the estate, U.S. Code Chapter 11 (the US).

²⁶ Charles Booth, 'The 2006 PRC Enterprise Bankruptcy Law: The Wait Is Finally Over' (2008) 20 Singapore Academy of Law Journal 275, 310-312.

Law, which offers detailed procedures for seeking foreign cooperation, Chinese law is silent on this matter.

Following the spirit of universalism, the second paragraph of Article 5 states that foreign insolvency judgments can be recognised and enforced based on an examination conducted by Chinese courts. There are two types of examination implied by the language of Article 5, and a successful recognition requires the satisfaction of both.²⁷ The primary examination should be on the grounds of existing international treaties or the principle of reciprocity between China and the involved jurisdiction. Since China has not entered any international agreement or conventions on cross-border insolvency or judicial assistance, international treaties here mainly refer to bilateral treaties on judicial assistance in civil and commercial matters. Additionally, the principle of reciprocity has often been included in bilateral agreements in civil and commercial matters. Therefore, it means that if there is no such agreement, it would be very difficult for a foreign insolvency judgment to get recognition in China as Chinese courts usually apply passive attitudes toward the application of reciprocity. After it has been proved there is an international treaty or reciprocity between two countries, the examination will be moved into the second stage. The courts need to make sure the recognition or enforcement of a foreign judgment would not violate the basic principles of Chinese law: sovereignty, public interests and the Chinese creditors' legal rights. This part has been criticised for being vague and imprecise because it allows for broad discretionary powers, despite the article having been redrafted several times to limit such powers.²⁸

3. The Initiative and Cross-Border Insolvency

As noted by the Supreme People's Court in Opinions on Providing Judicial Services and Safeguards for the Construction of the "Belt and Road", "to establish the international cooperation system, rule by law is an important safeguard and judicial assistance is indispensable."²⁹ Specifically, since one of the priority is to facilitate

²⁷ Steven J. Arsenault, 'Leaping over the Great Wall: Examining Cross-Border Insolvency in China Under the Chinese Corporate Bankruptcy Law' (2011) 21 *Ind. Int'l & Comp. L. Rev.*, 2.

²⁸ Qingxiu Bu, 'China's enterprise Bankruptcy Law (EBL 2006): Cross-Border Perspective' (2009) 18 *Int. Insolv. Rev.* 187.

²⁹ Alexandr Svetlicinii, "Publication Review : Legal Dimensions of China's Belt and Road Initiative by Lutz-Chtistian Wolff and Chao Xi" (2017) *International Trade Law & Regulation* 109; The Supreme

investment and trade among involved countries, it is foreseeable that commercial and investment activities would experience a significant growth with conditions such as lower trading barriers and better supporting policies. As a result, the demand for cross-border dispute solutions is bound to increase. Therefore, the Supreme Court further noted that building an effective system for solving cross-border legal issues is essential for the Initiative, which should eliminate legal uncertainties and promote commercial stability.³⁰

Currently, most Asian countries are still applying the traditional territorial approach to solve cross-border insolvency issues. Some countries have addressed cross-border issues under domestic insolvency system, but those laws usually have some limitations in practice. For instance, under Chinese insolvency system, the recognition of foreign proceedings will be decided based on the existence of the principle of reciprocity or bilateral agreement between China and the foreign country.³¹ However, among those countries covered by the Initiative, only one-third of them has signed bilateral agreement on judicial assistance and judgment recognition with China and some of those agreements do not cover insolvency issues.³² The application of reciprocity largely depends on whether the foreign courts have recognised similar Chinese cases before. Those bilateral approaches only can provide solutions for issues between two countries, so it does not have any regional or international effects. Since the Initiative is trying to develop a free trading network among involved countries, it needs an effective and harmonious cross-border insolvency standard that could be accepted by participating jurisdictions. The Chinese Supreme Court recommended that, in order to create a better trading environment, China should be more active to establish and promote relevant international rules.³³

It would be a challenging job to develop an international cross-border insolvency regime since such system needs to balance all different legal systems and legal cultures. So far, the most successful international experiences for establishing cross-

People's Court, "Several Opinions on Providing Judicial Services and Safeguards for the Construction of the "Belt and Road"" (the Opinions) (2017) <https://www.yidaiyilu.gov.cn/zchj/zcfg/2401.htm> <accessed 02 November 2017>.

³⁰ Ibid.

³¹ Article 5, the Enterprise Bankruptcy Law of China 2006 (China).

³² The Supreme People's Court, "Typical Cases for the Construction of the "Belt and Road"" (2017) <http://www.court.gov.cn/zixun-xiangqing-44722.html> <accessed 15 November 2017>.

³³ Ibid, para 13.

border insolvency system are the UNCITRAL Model Law on Cross-Border Insolvency and the EU Regulation.³⁴ Both regimes were established based on the concept of modified universalism. The UNCITRAL Model Law has been recognised as an effective and acceptable system that can be adopted by different legal systems.³⁵ However, the Law has not been very popular among Asian countries. Currently only three Asian countries (Japan, South Korea and Singapore) have adopted the UNCITRAL Model Law.³⁶ Compared with the flexibility of the Model Law, the EU Regulation has more binding features among member states. Under the regulation, the rules for jurisdiction and choice of law are relatively clear, and the automatic recognition among all member states makes multinational insolvency more efficient.

It is no doubt that a multilateral system like Europe's insolvency regime is preferred for economic system proposed by the Initiative. But it would be extremely difficult to achieve such regime among participating countries. Firstly, European Union is a highly-integrated political organisation, so the operation of its insolvency regulation is supported by unified legal and political agreements among all member states. As mentioned above, the Initiative is trying to promote a flexible free trading network and not a common market, and there are no binding agreements to be signed by participants. Secondly, another factor to consider is that most of the Asian countries covered by the Initiative are at very different stage of development in terms of insolvency law. Many of them do not have a well-established insolvency system or experiences dealing with cross-border insolvency cases. So the diversities would be too huge to operate a unified law.

Since both of the international regimes cannot be directly applied to the Initiative, it is suggested that a **Cross-Border Insolvency Guidance** should be developed to establish main principles for effectively solving cross-border insolvency issues. The nature of the guidance would be a soft legal tool to facilitate multinational insolvency among countries covered by the Initiative. The contents of the guidance should include

³⁴United Nations Commission on International Trade Law, Model Law on Cross-Border Insolvency (1997); Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast).

³⁵ S. Chandra MOHAN, "Cross-border Insolvency Problems: Is the UNCITRAL Model Law the Answer?" (2012) 21 (3) International Insolvency Review 199.

³⁶ UNCITRAL, "Status" http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html <accessed 16 November 2017>.

series of legal principles and suggestions, which should be borrowed from the UNCITRAL Model Law and the EU Regulation. For example, the general solution should be established based on modified universalism, and it should focus on recognition of foreign proceedings and cooperation among relevant parties and courts. In order to achieve that, the concept of centre of main interests (COMI) should be introduced to define different types of insolvency proceedings. The ways of communication and assistance among courts also should be included. Also, a court decision made based on those principles should be respected by other participating countries' courts. The soft nature of the guidance is consistent with the objective of the Initiative. If a country is willing to join the Initiative for the purpose of seeking common benefits, it would also be willing to follow the legal guidance.