

Navigating Legal Complexities: Enhancing Cross-Border Bankruptcy Cooperation between Mainland China and Hong Kong

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Abstract

This paper critically evaluates the current framework of China's Enterprise Bankruptcy Law in the context of cross-border bankruptcy, highlighting its limitations in addressing the complex and evolving nature of international bankruptcy practices. The introduction of the "Pilot Opinions" is analyzed as a significant step in bridging the institutional gap in cross-border bankruptcy cooperation between Mainland China and Hong Kong. The study identifies key challenges, such as the lack of legal system integration, discrepancies in the determination of the center of main interests (COMI), and the ambiguity in bankruptcy effectiveness and enforcement, which hinder deeper cooperation. To address these issues, the paper proposes a legal optimisation strategy that includes refining legal rules and clarifying identification standards to provide a more definitive legal basis for cross-border bankruptcy cooperation. It also emphasises the importance of broadening cooperation pathways, enhancing information sharing, and fostering communication between judicial authorities. The aim is to align legal frameworks with practical needs, reduce the risks and costs associated with cross-border bankruptcy cases, and create a stable and predictable legal environment conducive to economic cooperation between Mainland China and Hong Kong. The paper concludes by underscoring the need for a robust and responsive legal framework that can effectively support the evolving demands of cross-border bankruptcy cases.

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1. Introduction

In the era of a deeply integrated global economy, the dynamic growth of cross-border investment and business activities has emerged as a critical driver for regional and global economic expansion. Serving as an international financial center, Hong Kong's economic exchanges with the Chinese Mainland have intensified, drawing a significant number of Mainland companies to undertake cross-border investments, establish operations, and even go public. Yet, the Chinese Mainland and Hong Kong, being part of separate legal systems, exhibit substantial differences in their legal frameworks, principles, and judicial practices². This disparity across legal systems represents a significant objective barrier and a potential source of complications in the cooperation regarding cross-border bankruptcy matters.³ Against this backdrop, the establishment of a cross-border bankruptcy cooperation and coordination mechanism by the Chinese Mainland and Hong Kong is of paramount importance. It is not only crucial for the stability of the economic order in both regions but also represents a significant exploration in the realm of international judicial cooperation. To address the challenges posed by cross-border bankruptcy, the Supreme People's Court and the Government of the Hong Kong Special Administrative Region issued the "Minutes of the Talks between the Supreme People's Court and the Government of the Hong Kong Special Administrative Region on Mutual Recognition and Assistance of Bankruptcy Proceedings between the Chinese Mainland and the Hong Kong Special Administrative Region Courts" (hereinafter referred to as the "Minutes of the Meeting") and the "Opinions on Carrying out a Pilot Program of Recognition and Assistance of Bankruptcy Proceedings in the Hong Kong Special Administrative Region" (hereinafter referred to as the "Pilot Opinions") in 2021. These documents signify a historic advancement in the mutual recognition and assistance of cross-border bankruptcy between the Chinese Mainland and Hong Kong. They provide an institutional

² See Stefan H. C. Lo, Kevin Kwok-yin Cheng, Wing Hong Chui, *The Hong Kong Legal System*, 2nd edn., Cambridge University Press (2020).

³ See Shi Jingxia and Huang Yuanyuan, 'On the cross-border bankruptcy cooperation between the Chinese Mainland and Hong Kong: empirical analysis and suggestions based on cases' (2018) 5 *Modern Law Science* (现代法学) 170; see also Guo, Shuai. 2022. "Cross-Border Insolvency between Chinese Mainland and Hong Kong: The Past, the Present, and the Future." *Asia Pacific Law Review* 30 (1): 70–92.

framework for managing cross-border bankruptcy cases and herald a new era in judicial cooperation between the two jurisdictions.

Hong Kong has also taken steps by issuing the "Practical Guidelines on the Procedures for Chinese Mainland Bankruptcy Administrators to Apply for Recognition and Assistance from the Hong Kong Special Administrative Region Courts" (hereinafter referred to as the "Practical Guidelines"), which offer detailed operational procedures and document templates for Mainland bankruptcy administrators, further facilitating the implementation of the cooperation mechanism. Since the inception of this mechanism, the courts of both regions have achieved preliminary success in handling cross-border bankruptcy cases, enhancing the efficiency and fairness of case management through information sharing and procedural coordination.

Despite these initial successes, there remain challenges and areas for improvement in cross-border bankruptcy cooperation. Firstly, the differences in legal systems between the two regions create certain institutional barriers in the identification of bankruptcy procedures and asset disposal. Secondly, the cross-border information sharing mechanism is still underdeveloped, impacting the efficiency and effectiveness of case handling. Lastly, the complexity and diversity of cross-border bankruptcy cases demand a more sophisticated cooperation mechanism, necessitating continuous innovation and optimisation of the cooperation model and coordination mechanism by the courts of both regions..⁴

2. Logic and Evolution of Cross-Border Bankruptcy Cooperation: A Focus on Mainland China and Hong Kong

With the ongoing development of the Guangdong-Hong Kong-Macao Greater Bay Area, the demand for robust legal frameworks in the bankruptcy field for commercial entities in the Chinese Mainland and Hong Kong is also growing.⁵ However, this cross-

4 See Locatelli F, 'International Trade and Insolvency Law: Is the UNCITRAL Model Law on Cross-Border Insolvency an Answer for Brazil' (2008) *Law and Business Review* 313.

5 See Yuan Quan, 'Prospects for the Cross-border Bankruptcy Cooperation Mechanism between the Chinese Mainland and Hong Kong' (2022) 3 *Science of Law (Journal of Northwest University of Political Science and Law)* 法律科学(西北政法大学学报) 173; see also Adams ES and Fincke JK, 'Coordinating Cross-Border Bankruptcy: How Territorialism Saves Universalism' (2009) 15 *Columbia Journal of European Law* 43.

regional economic integration comes with risks, particularly when enterprises encounter bankruptcy challenges. Cross-border bankruptcy issues have emerged as a pressing global problem that requires urgent resolution.

As two vital components of China's economic system, cross-border bankruptcy cooperation between the Chinese Mainland and Hong Kong is not only crucial for the stability and growth of the economies in both regions but also represents a significant practice in exploring international cross-border bankruptcy cooperation mechanisms. Effective collaboration in this area is essential for managing the complexities of bankruptcy across jurisdictions and for ensuring the smooth operation of businesses within the Greater Bay Area. It also contributes to the broader goal of enhancing legal cooperation and economic integration on a global scale.⁶ By exploring the logic of the coordinated development of cross-border bankruptcy cooperation between the Chinese Mainland and Hong Kong, this paper conducts an analysis from three dimensions: first, focusing on the refined evolution of cross-border bankruptcy recognition and assistance standards, this process represents an important transformation from the initial vague definitions to the gradual clarification and refinement.⁷ It not only provides clearer and more actionable guidelines for handling cross-border bankruptcy cases but also signifies a notable enhancement in the level of judicial cooperation between the two regions. Second, building on the successful experience of pilot courts, the vision of cooperation is further expanded, promoting cross-border bankruptcy cooperation to a broader range and a more profound level. Lastly, the consistency of the liquidator's powers and the proactive stance of the Hong Kong courts in cooperation form the solid foundation of cross-border bankruptcy collaboration. Both elements are crucial not only to the efficiency and fairness of the bankruptcy process but also to establishing mutual trust and deepening cooperation.

2.1 From vagueness to clarity: the refined evolution of cross-border bankruptcy recognition and assistance standards

6 See Anderson K, 'The Cross-Border Insolvency Paradigm: A Defence of the Modified Universal Approach Considering the Japanese Experience' (2000) 21 (4) *Journal of International Economic Law* 679.

7 See Andrade G. and Kaplan SN, 'How Costly is Financial (Not Economic) Distress? Evidence from Highly Leveraged Transactions that Became Distressed' (1998) 53 *Journal of Finance* 1443.

Since the Supreme People's Court and the Hong Kong Special Administrative Region reached a historic agreement on mutual recognition and assistance in cross-border bankruptcy proceedings in May 2021, the legal practice in this field for both parties has taken a significant step forward, heralding an era of standardisation and refinement. Previously, while there were numerous cross-border bankruptcy cases between Hong Kong and the Chinese Mainland, such as the Huaxin case, the Hengfu case, and the *Zhongzhi v. Guangxin* case, the handling of these cases was largely dependent on flexible judgments under common law principles due to the absence of specific cooperation regulations or provisions. Notably, the *Zhongzhi v. Guangxin* case stands as a milestone, being the first time a Hong Kong court recognised a Chinese Mainland cross-border bankruptcy case.⁸ The legal logic underlying this decision primarily adheres to the four common law principles established in cases like the *Guangdong Overseas Construction Company and the HNA Company* case: collectivity, center of main interests, necessity, and compliance with public policy.

With the formal signing of the cooperation agreement in 2021, the standards for cross-border bankruptcy recognition and assistance have made a qualitative leap. When hearing relevant cases, the Hong Kong High Court focuses more on two core issues: one is the necessity of applying for recognition and assistance, that is, whether the applicant can effectively possess or control its assets in both jurisdictions to better perform its liquidation duties; the other is whether the application meets the recognition and assistance conditions clearly stipulated in the "Arrangement between the Chinese Mainland and the Hong Kong Special Administrative Region on Mutual Recognition and Enforcement of Judgments in Civil and Commercial Cases Under the Jurisdiction of Parties' Agreement" (hereinafter referred to as the "Pilot Opinion"). This change not only reflects a precise understanding of the specific functional needs of the applicant but also ensures that the cross-border bankruptcy procedure is carried out in an orderly manner within the legal framework.

It is particularly noteworthy that the introduction of the "Pilot Opinion" provides a clearer and more specific operational guide for cross-border bankruptcy recognition

⁸ *CCIC Finance Ltd v Guangdong International Trust and Investment Corp & Guangdong International Trust and Investment Corp Hong Kong (Holdings) Ltd (Garnishee)* [2005] HKEC 1180.

and assistance.⁹ It requires that the applicant must be a company liquidator, conduct voluntary liquidation in Hong Kong, apply to the pilot court, and explicitly seek recognition of its liquidator status by the Chinese Mainland court and assistance in performing liquidation duties. At the same time, the company's main interest center must be located in Hong Kong and last for more than six months. These conditions together constitute the "golden key" for cross-border bankruptcy recognition and assistance, effectively improving identification efficiency and promoting international cooperation and unification of cross-border bankruptcy procedures. Judge Harris's views in the Huaxin case deeply reveal the ultimate goal of cross-border bankruptcy recognition and assistance - that is, to achieve global integration and effective management of bankrupt enterprise assets and ensure that creditors' rights and interests are maximised in a single bankruptcy procedure. The deepening of cooperation between the Chinese Mainland and Hong Kong not only provides a solid legal basis for the handling of cross-border bankruptcy cases, but also sets an example for global cross-border bankruptcy cooperation and demonstrates a new path for standardisation and efficiency.¹⁰

2.2 Beyond the scope of assistance: new horizons for cooperation beyond the pilot courts

Under the established framework of the Pilot Opinions and the Minutes of the Talks, Shanghai, Xiamen, and Shenzhen were explicitly designated as pilot courts for cross-border bankruptcy recognition and assistance with Hong Kong. However, legal practice often transcends the limitations of the text. When handling applications from non-pilot courts, the Hong Kong courts have shown a high degree of flexibility and inclusiveness. This phenomenon was fully reflected in the Guangdong Overseas Construction Company case and the HNA Group Co., Ltd. case. Judges Linda Chan and Jonathan Harris both emphasised that when deciding whether to grant recognition and assistance, the Hong Kong courts did not confine themselves to the scope of the pilot defined by the Pilot Opinions but independently assessed whether the application met the standards

9 See Arsenault SJ, '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.* 1.

10 See Li A, 'China: Bankruptcy and Insolvency Law and Policy' (2006) *The Law of International Insolvency and Debt Restructurings* 127.

of recognition and assistance based on common law principles.¹¹ Judge Linda Chan's insights were particularly profound. She pointed out that although the Pilot Opinions set a clear framework for cross-border bankruptcy recognition and assistance, the power of the courts originated from the common law and did not grant exclusive jurisdiction to specific courts.¹² Therefore, the Hong Kong courts still have full discretion when reviewing applications from non-pilot courts. This position not only reflects the flexibility of legal application, but also indicates broad space for the future development of the cross-border bankruptcy cooperation mechanism.

For the further development of cross-border bankruptcy assistance requests between non-pilot courts that may arise in the future, although the Minutes of the Talks and the Pilot Opinions clearly specify the pilot courts, their statements do not absolutely exclude the possibility of non-pilot courts participating in the cooperation. On the contrary, the wording in the documents, such as “the administrator of the bankruptcy proceedings in the Chinese Mainland” instead of “the administrator of the bankruptcy proceedings in the pilot courts in the Chinese Mainland,” and the clauses encouraging the two courts to actively communicate and cooperate, and to expand the scope of the pilot, all reveal that the Supreme Court is open and encouraging of cross-border bankruptcy cooperation. Based on this, it can be anticipated that with the in-depth development of cross-border bankruptcy cooperation practices, the expansion of the scope of the pilot will become an inevitable trend.¹³ When handling cross-border bankruptcy assistance requests issued by non-pilot courts, it is recommended to refer to the relevant standards of the Pilot Opinions and, at the same time, flexibly apply common law principles in conjunction with the specific circumstances of each case. This approach ensures the fairness, efficiency, and uniformity of cross-border bankruptcy procedures. By doing so, it can not only foster deeper cooperation between the Chinese Mainland and Hong Kong in the field of cross-border bankruptcy but also offer valuable experience and a reference for global cross-border bankruptcy cooperation.

11 See Bai C, Lu J and Tao Z, ‘The Multitask Theory of State Enterprise Reform: Empirical Evidence from China’ (2006) 96 *The American Economic Review* 353.

12 [2023] HKCFI 1340, at 11 .

13 See Bei S, ‘Bankruptcy Law’s Special Attention to Corporate Group’ (2007) *China Law* 109.

2.3 Fusion and Trust: Building a Synergy Mechanism in Cross-Border Legal Cooperation between Mainland China and Hong Kong

Although there are significant differences in the legal systems between Hong Kong and the Chinese Mainland, the two sides have demonstrated remarkable consensus and complementarity in the field of bankruptcy law. This consensus not only forms the basis for the successful establishment of a cross-border bankruptcy recognition and assistance cooperation mechanism but also serves as an important driving force for the continuous deepening of the mechanism.¹⁴ Judge Jonathan Harris's profound insight reveals the close connection and correspondence between China's Enterprise Bankruptcy Law and Hong Kong's bankruptcy regulations, particularly in terms of the powers of the bankruptcy administrator (or liquidator), the suspension of preservation and enforcement measures after the acceptance of the bankruptcy application, and the order of distribution of the debtor's assets. The laws of the two places have shown a high degree of similarity and consistency.¹⁵ This legal commonality provides a natural bridge for cross-border bankruptcy cooperation. In the process of building a cooperation mechanism, not only are the specific standards for cross-border bankruptcy recognition clarified, but the scope of duties that the liquidator or administrator can exercise after being assisted is also detailed, ensuring the smooth connection and efficient operation of cross-border bankruptcy procedures between the two places. The "Pilot Opinions" and the practical guidelines issued by the Hong Kong High Court, as important documents guiding cross-border bankruptcy cooperation, provide comprehensive and detailed regulations on the duties of administrators or liquidators, including key links such as asset investigation, information disclosure, and property disposal, offering clear operational guidelines for the implementation of cross-border bankruptcy procedures.¹⁶

It is particularly worth mentioning that the Hong Kong courts have shown a positive attitude and willingness to cooperate in promoting cross-border bankruptcy assistance.

14 See Bendapudi R, 'People's Republic of China Bankruptcy Law' (2008) 6 *Santa Clara Journal of International Law* 205.

15 [2020] HKCFI 167, pp. 12-13 .

16 See Berends AJ, 'The UNCITRAL Model Law on Cross Border Insolvency: A Comprehensive Review' (1998) 6 *Tulane Journal of International Comparative Law* 309.

By examining relevant cases in the Hong Kong Supreme Court, it is evident that in typical cases such as the Samson Paper Co., Ltd. case, the Zhaoheng Hydropower Co., Ltd. case, and the Shell Technology Co., Ltd. case, the Hong Kong High Court judges attached similar commitment clauses when making the request letters. Taking the Zhaoheng Hydropower Co., Ltd. case as an example, the judge clearly stated that the Hong Kong courts will recognise and assist the request letters of the Chinese Mainland pilot courts in similar circumstances and when exercising their inherent jurisdiction, which fully demonstrates the Hong Kong courts' firm support and positive attitude towards cross-border bankruptcy cooperation.¹⁷ This positive attitude not only enhances the trust and willingness of the Chinese Mainland pilot courts to cooperate with the request letters of recognition and assistance issued by Hong Kong but also lays a solid foundation for the further expansion and deepening of the cross-border bankruptcy cooperation mechanism in the future. It shows that in the field of cross-border bankruptcy, the courts of the two places can transcend the differences in legal systems, jointly respond to challenges with an open and inclusive attitude, and work together to promote the fairness, efficiency, and unification of cross-border bankruptcy procedures. This spirit of cooperation and positive attitude will undoubtedly set a new model and benchmark for global cross-border bankruptcy cooperation.

3. Negotiating Tides of Change: Navigating Cross-Currents in Mainland and Hong Kong Bankruptcy Cooperation

Although the Minutes of the Talks and the Pilot Opinions have taken groundbreaking steps in promoting cross-border bankruptcy cooperation between the Chinese Mainland and Hong Kong, laying an important foundation for collaboration between the two jurisdictions, their nature as normative judicial documents limits the breadth and depth of their institutional innovation.¹⁸ Such documents cannot directly create new procedures that are not yet stipulated in the current legal system, and their scope of effectiveness is strictly confined to the refinement and interpretation of existing rules.

¹⁷ [2022] HKCFI 248, at 22 .

¹⁸ See Yu Ruolan , 'Cross-border Bankruptcy Cooperation Mechanism between the Chinese Mainland and Hong Kong: Practical Evolution and Rule Adjustment' (2024) 12 *Communication of Finance and Accounting* (财会通讯) 16.

This institutional constraint has, to a certain extent, restricted the pace of the cross-border bankruptcy cooperation pilot, preventing it from fully realising its efficiency, and thus impacting the speed and timeliness of handling cross-border bankruptcy cases.¹⁹ Moreover, the bankruptcy risks inherent in business operations have set higher standards for cross-border bankruptcy cooperation. As two closely connected economies within the Chinese economic system, the Chinese Mainland and Hong Kong have conducted numerous explorations and practices in cross-border bankruptcy cooperation, achieving certain results. However, in practice, bankruptcy cooperation and coordination between the two regions still face many difficulties and challenges. These not only impede the smooth handling of cross-border bankruptcy cases but also affect the in-depth development of economic cooperation between the two areas.

3.1 The synergy dilemma and institutional deficiencies between the Enterprise Bankruptcy Law and the Pilot Opinions

At present, China's Bankruptcy Law only provides for the extraterritorial effect of bankruptcy proceedings in principle in Article 5, and there are no other provisions. On the issue of extraterritorial effect, China adopts the principle of universalism for the extraterritorial effect of its own bankruptcy proceedings ; it adopts modified universalism for extraterritorial bankruptcy proceedings, and may only recognise the extraterritorial effect of extraterritorial bankruptcy proceedings on the premise that they do not harm sovereignty, security, social public interests and the legitimate interests of domestic creditors.²⁰The "Pilot Opinions" will refine the circumstances for refusing to recognise and assist Hong Kong bankruptcy proceedings into six circumstances: the debtor's main interest center has been in Hong Kong for less than six months or is not in Hong Kong, does not comply with the provisions of Article 2 of China's Bankruptcy Law, treats Chinese Mainland creditors unfairly, fraud, other circumstances, and recognition or assistance violates the basic principles of law or public order and good morals. China will refuse to recognise and assist in these six circumstances . Among them, violation of the basic principles of Chinese Mainland law or public order and

19 See Booth CD, 'Hong Kong Insolvency Law Reform: Preparing for the Next Millennium' (2001) *Journal of Business Law* 126.

20 See Booth CD, 'Living in Uncertain Times: The Need to Strengthen Hong Kong Transnational Insolvency Law' (1996) 34 *Columbia Journal of Transnational Law* 389.

good morals is still a general reason for refusing recognition and assistance. It is generally believed that such provisions are called "public policy exception clauses", and generally all countries have provisions. On the one hand, such provisions can better maintain the stability of the country's jurisdictional security and economic policies; on the other hand, due to the differences in legal systems, political and economic conditions of various countries, the concept of this clause is relatively vague, and there is no unified definition of its connotation. Different countries have different understandings and applications of it, which can easily lead to countries using it as a shield to refuse to recognise and assist in overseas bankruptcy procedures.²¹ Therefore, although the expressions of the Enterprise Bankruptcy Law and the Pilot Opinions are not exactly the same, their connotations have a certain degree of inclusion.

In addition, "judgments and rulings of bankruptcy cases made by foreign courts that have legal effect" is the expression of recognition of foreign judgments and rulings in Article 5 of the Enterprise Bankruptcy Law. From this provision, it can be seen that my country has not made a special distinction between the effectiveness of ordinary civil and commercial cases and cross-border bankruptcy procedures, but the recognition and assistance of the effectiveness of cross-border bankruptcy procedures are not exactly the same as the recognition and assistance of ordinary civil and commercial cases. The scope of recognition stipulated in this clause is not clear enough. The "Pilot Opinions" are arrangements made to promote the mutual recognition of bankruptcy procedures between the Chinese Mainland and Hong Kong. At present, due to the lack of provisions on cross-border bankruptcy in the Enterprise Bankruptcy Law, there are no provisions for various lawsuits or relief that may occur in the performance of duties in the Chinese Mainland by the administrator who has obtained recognition in accordance with the pilot opinions. Article 19 of the "Pilot Opinions" stipulates that exchanges and cooperation should be maintained for lawsuits filed by the same bankrupt debtor in the two places, but the Enterprise Bankruptcy Law and the "Pilot Opinions" do not stipulate how to strengthen and communicate. According to the "Pilot Opinions", when the debtor's main interest center is not in Hong Kong, my country will not recognise and

21 See Booth CD, 'The Transnational Aspects of Hong Kong Insolvency Law' (1995) 2 *Sw.J.L. & Trade Am.*1.

assist it, but if the company still has business in the Chinese Mainland, it will make it difficult for the liquidator to investigate and collect the debtor's assets located in the Chinese Mainland. At the same time, in addition to the place of registration, when determining the center of main interests, the company's office, where it mainly conducts business, and where the company's main property is located need to be considered. From this point of view, the jurisdiction standard for overseas bankruptcy proceedings stipulated in the "Pilot Opinions" is broader than the residence standard stipulated in the Enterprise Bankruptcy Law.²² Therefore, whether to distinguish between main and non-main proceedings and treat overseas bankruptcy proceedings differently, and how to coordinate the operation of China's bankruptcy law and the "Pilot Opinions" are issues that urgently need to be improved and stipulated in the Enterprise Bankruptcy Law in the future.²³

3.2 Differences between the two places in the criteria for determining “centre of main interests”

Given the complexity of the bankruptcy system and its profound nature of being closely linked to the economic system, judicial cooperation between the two places in the field of bankruptcy law has long faced many challenges and has been difficult to make significant progress. This has, to a certain extent, become a bottleneck restricting the deep integration and coordinated development of the business environment of the two places.²⁴ The introduction of the "center of main interests" (COMI) standard is a major innovation in the traditional bankruptcy jurisdiction review mechanism. It goes beyond the limitations of the single registration place standard, takes into account the overall distribution of the interests of the debtor more comprehensively, and ensures the closest interest connection between the bankruptcy procedure and the debtor. The establishment of this standard not only conforms to the collective characteristics of cross-border bankruptcy cases, but is also an inevitable product of the development

22 See Kong Q, 'Enforcement of Hong Kong SAR court Judgment in the People's Republic of China' (2000) 49 (4) *International & Comparative Law Quarterly* 867.

23 See Zhang Ling, 'Improvement of China's Cross-border Bankruptcy Law Legislation: Objectives, Framework and Rules' (2021) 1 *Journal of Minzu University of China (Philosophy and Social Sciences Edition)* 中央民族大学学报(哲学社会科学版) 150.

24 See Yue Yanni, Tang Shan, and Wang Fang, 'Practical Exploration of Cross-border Bankruptcy between the Chinese Mainland and Hong Kong' (2020) 25 *People's Justice (人民司法)* 4.

trend of international bankruptcy law . It has been widely adopted by international legislation such as the "Model Law on Cross-Border Insolvency" and the "EU Insolvency Rules". In the context of cross-border bankruptcy cooperation, the identification standard of the "center of main interests" has become a key point of divergence in the judicial practice between the Chinese Mainland and Hong Kong. Although both places are committed to adopting the COMI standard to reflect the overall interests of the debtor, there are significant differences in specific identification. Hong Kong courts have long used the place of company registration as the basis for judgment, while the Chinese Mainland has clarified more comprehensive considerations through the "Pilot Opinions", including the place of registration, the location of the main office, the main place of business and the location of the main property. ²⁵This difference is not only due to the differences in the legal systems and judicial practices of the two places, but also reflects the different emphases of each place in handling cross-border bankruptcy cases. It may cause the same debtor to face completely different COMI recognition results in the two places, which in turn leads to jurisdiction conflicts and procedural uncertainties, increases the complexity and cost of cross-border bankruptcy cases, and also poses a potential threat to the legitimate rights and interests of creditors. Furthermore, the inconsistency between the Chinese Mainland and Hong Kong in the recognition standards of "center of main interests" also highlights the institutional obstacles in cross-border bankruptcy cooperation. ²⁶The differences in the legal systems of the two places make it difficult to unify the recognition standards of COMI, which not only affects the smooth progress of cross-border bankruptcy procedures, but also restricts the deepening development of cross-border bankruptcy cooperation. With the advancement of global economic integration, cross-border bankruptcy cases are increasing. How to effectively resolve the differences in COMI recognition standards has become an urgent issue faced by the Chinese Mainland, Hong Kong and even the international community.

For example, in the case of Huaxin , the Hong Kong court showed a relatively single

²⁵ See Jackson TH, 'Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain' (1982) 91 *Yale Law Journal* 857.

²⁶ See Cao L, 'The Cat that Catches Mice: China's Challenge to the Dominant Private Model' (1995) 21 *Brooklyn Journal of International Law* 97.

standard tendency in recognising and judging the "center of main interests", mainly relying on its case law system to deal with the challenges of cross-border bankruptcy cooperation between the Chinese Mainland and Hong Kong.²⁷ This practice, to a certain extent, reflects the traditional path of Hong Kong's judicial practice in the field of cross-border bankruptcy. With the introduction and adoption of the "main bankruptcy procedure" and "center of main interests system" in the Chinese Mainland, the trial and cooperation mechanism of cross-border bankruptcy cases has ushered in major changes. However, this institutional change has a clear tension between its effectiveness and expectations when facing certain types of cross-border bankruptcy cases, such as some enterprises registered in offshore financial centers but whose decision-making bodies, core business operations, major assets, accounting books, etc. are substantially located in the Chinese Mainland.²⁸ Specifically, when the Chinese Mainland court appoints a bankruptcy administrator based on the "center of main interests" standard, the administrator may encounter a review challenge from the Hong Kong court based on the principle of appointment by a non-registered court when the administrator attempts to seek recognition and assistance from the Hong Kong court. The Hong Kong court may question the appointment of the Chinese Mainland court and the qualifications of the bankruptcy administrator on the grounds that the bankruptcy administrator is not appointed by the court of the debtor's place of registration, and may even refuse to recognise its status and power.

3.3 Conflict of bankruptcy effectiveness and ambiguity of enforcement procedures

In terms of the definition of the scope of recognition and assistance in handling cross-border bankruptcy cases, the Pilot Opinions have undoubtedly opened up a new path for judicial cooperation between the Chinese Mainland and Hong Kong, but at the same time, they have also revealed the inherent complexity and uncertainty in this field. This uncertainty is not only due to the significant differences in the legal systems of the two

27 Re The Joint and Several Liquidators of CEFC Shanghai International Group Limited (in Liquidation in the Mainland of the People's Republic of China) [2020] HKCFI 167.

28 See Zhang Shuo, 'From the "Guangxin Case" to the "Huaxin Case": New Developments in Hong Kong's Recognition and Assistance for Cross-border Bankruptcy Liquidation of Chinese Mainland Companies' (2020) 14 *Journal of Law Application* (法律适用) 41.

places, but is also deeply rooted in the essential characteristics of the special legal field of cross-border bankruptcy.²⁹ On the one hand, regarding the definition of the effectiveness of bankruptcy property, although the Pilot Opinions clearly define the preservation measures that Hong Kong administrators can take before and after the Chinese Mainland court recognises the bankruptcy procedure and the effectiveness of not being able to pay off individually, this is only a starting point. In cross-border bankruptcy cases, the cross-border distribution of property and the differences in the recognition of property rights between different jurisdictions make the identification, evaluation and distribution of bankruptcy property full of variables. Especially when it comes to complex financial derivatives, intangible assets or multinational corporate group structures, how to ensure that bankruptcy property is managed comprehensively, fairly and effectively is still an urgent problem to be solved.³⁰

On the other hand, at the level of execution of bankruptcy procedures, although the Pilot Opinions provide two assistance modes - namely, direct performance of duties by Hong Kong administrators and designated takeover by Chinese Mainland administrators, each mode is accompanied by its inherent uncertainty. The former is limited by the narrow scope of the intersection of the laws of the two places, which may lead to many key matters being deadlocked due to the inability to find a clear legal basis; the latter may cause new coordination difficulties due to the differences in the duties, powers and operating procedures of bankruptcy administrators between the Chinese Mainland and Hong Kong. In addition, the introduction of the "separate assistance" principle, although it provides the court with greater flexibility and discretion, also means that each assistance may become an independent legal judgment process, increasing the uncertainty of the results. On a deeper level, the legal conflict in cross-border bankruptcy cases is not only a conflict between provisions, but also a difference between legal concepts, value judgments and judicial practices. This difference is particularly significant in the process of recognition and assistance in execution, because every decision may touch the sensitive nerves of the legal systems of the two

29 See Chan MK, 'Imperfect Legacy: Defeats in the British Legal System in Colonial Hong Kong' (1997) 18 *Journal of International Law* 133.

30 See Huang D, 'The Analysis of the Relationship between Socialist Market Economy and Legal Culture' (2004) 9 *Information Review* 149.

places. Although the "Pilot Opinions" attempts to seek cooperation while respecting the legal differences between the two parties through the "coupling of the generalisation mechanism and separation assistance", this coupling mechanism itself requires constant debugging and running-in to ensure that it can effectively deal with the complexity of cross-border bankruptcy and maintain the independence and integrity of the legal systems of the two places.³¹

4. Deepening cross-border bankruptcy cooperation between the Chinese Mainland and Hong Kong: Optimising the legal coordination path and looking forward

As cross-border commercial activities become more frequent, cross-border bankruptcy issues have also become prominent, becoming an important area to test the adaptability of the legal system and the depth of international cooperation. Although my country's Enterprise Bankruptcy Law provides a basic framework for the bankruptcy of domestic enterprises, the specific provisions in the field of cross-border bankruptcy are still weak, making it difficult to fully respond to the complex and ever-changing challenges of cross-border bankruptcy. To this end, the timely release of the "Pilot Opinions" marks a key step forward in my country's cross-border bankruptcy cooperation, which not only fills the gap in cross-border bankruptcy rules between the Chinese Mainland and Hong Kong, but also lays a solid foundation for subsequent legal practice and international cooperation. The implementation of the "Pilot Opinions" is like a bridge that connects the institutional gap between the Chinese Mainland and Hong Kong in cross-border bankruptcy judicial assistance, and provides the courts of the two places with clearer operational guidelines when handling cross-border bankruptcy cases. This process not only promotes the standardisation and transparency of cross-border bankruptcy case handling, but also accumulates valuable experience through practice, providing fresh cases and profound inspiration for the improvement of my country's cross-border bankruptcy trial system. It is particularly worth mentioning that Hong Kong's open and cooperative attitude and its recognition and assistance mechanism that is not based on a reciprocal relationship demonstrate its legal inclusiveness and sincerity as an international financial center, setting an example for cross-border bankruptcy cooperation between the two places and even more broadly.³²

31 See Cho SS, 'Continuing Economic Reform in the People's Republic of China: Bankruptcy Legislation Leads the Way' (1994) 19 *Hastings Int'l & Comp. L. Rev.* 739.

32 See Harmer RW, 'Insolvency Law and Reform in the People's Republic of China' (1996) 64 (6)

4.1 Eliminating the constraints of ambiguous clauses and bridging the gap between system and practice

In the judicial practice of cross-border bankruptcy cooperation between the Chinese Mainland and Hong Kong, due to the lack of a legal framework for cross-border bankruptcy, China has long considered the "public policy exception clause" and the principle of reciprocity as important considerations for recognising and assisting bankruptcy proceedings in other countries (regions). Although this practice is reasonable under a specific historical background, its limitations are becoming increasingly prominent as the economic integration between the two places deepens and the number of cross-border bankruptcy cases increases. ³³For example, in the bankruptcy case of Beitai Holdings in 2009, the Supreme Court refused to recognise and assist the bankruptcy proceedings of the Hong Kong court due to the lack of clear legal basis between the two places, although the Hong Kong court had previously demonstrated its willingness to recognise and assist bankruptcy proceedings in the Chinese Mainland in the case of *Zhongzhi Company v. Guangxin Company*. Therefore, in order to clarify the standards for recognition and assistance of cross-border bankruptcy proceedings and reduce the ambiguity of the "public policy exception clause", it is recommended that the Enterprise Bankruptcy Law be revised to add a special chapter to refine the relevant provisions of cross-border bankruptcy. Specifically, it may include clarifying the specific conditions, procedures and legal consequences of recognition and assistance of the effectiveness of cross-border bankruptcy proceedings, distinguishing the recognition and assistance mechanism of ordinary civil and commercial cases from cross-border bankruptcy proceedings, and ensuring the professionalism and pertinence of cross-border bankruptcy case handling. At the same time, the specific connotation of the "public policy exception clause" should be further defined to reduce its uncertainty and avoid it becoming an improper reason for refusing cooperation. On this basis, the "Pilot Opinions" can serve as implementation details to refine the operational procedures and provide more operational guidance for cross-

Fordham Law Review 2563.

³³ See Clarke DC, 'What's Law Got to Do with It? Legal Institutions and Economic Reform in China' (1991) 20 *UCLA PAC Basin LJ* 51.

border bankruptcy cooperation between the Chinese Mainland and Hong Kong.³⁴ Second, in view of specific issues such as the performance of duties by administrators, litigation coordination and identification of the main interest center in cross-border bankruptcy cooperation, it is recommended to clarify the legal status, rights and obligations of administrators in performing their duties in the Chinese Mainland in accordance with the "Pilot Opinions", including the specific provisions of the procedures for initiating litigation, participating in litigation, and applying for property preservation in the Chinese Mainland, so as to ensure that administrators can effectively perform their duties and maintain the smooth progress of bankruptcy procedures. At the same time, the connection between the Enterprise Bankruptcy Law and the "Pilot Opinions" in litigation coordination should be strengthened, and a communication and cooperation mechanism between the two courts in cross-border bankruptcy cases, such as information sharing and case coordination meetings, should be established to promote the coordination and efficient advancement of case handling.³⁵ By clarifying the cooperation standards and procedures, it can ensure that both parties maintain a high degree of consistency in the process of recognition and assistance, effectively save judicial resources, and improve the efficiency and fairness of cross-border bankruptcy case handling. As for the identification standards of the main interest center, they should be clarified in the "Enterprise Bankruptcy Law", and refer to international practices, comprehensively consider factors such as the company's place of registration, main place of business, and property location, so as to ensure the objectivity and fairness of the identification. Explore the establishment of a mechanism to distinguish between main procedures and non-main procedures, and provide a legal basis for the differentiated treatment of cross-border bankruptcy procedures, so as to better balance the interests of all parties and promote the in-depth development of cross-border bankruptcy cooperation.

4.2. Broaden the channels for cross-border bankruptcy cooperation and

34 See Guzman AT, 'International Bankruptcy: In Defense of Universalism' (2000) 98 *Michigan Law Review* 2177.

35 See Clift J, 'UNCITRAL Model Law on Cross-Border Insolvency - A Legislative Framework to Facilitate Coordination and Cooperation in Cross-Border Insolvency' (2004) 12 *Tul. J. Int'l & Comp. L.* 307.

coordinate differentiated COMI recognition standards

At present, the "Pilot Opinions," as a keystone in cross-border bankruptcy cooperation between the Chinese Mainland and Hong Kong, have established clear provisions regarding the scope of application, conditions, administrators' duties, and the legal consequences of recognition and assistance. However, when confronted with the intricacies and shifting nature of cross-border bankruptcy practices, particularly in peripheral scenarios such as where the centre of main interests is not in Hong Kong or when Hong Kong courts seek assistance from non-pilot courts, the current regulations are still found wanting. In light of this, the spirit of proactive communication and cooperation underscored in the "Memorandum of Talks" is especially crucial. As the integration of the Guangdong-Hong Kong-Macao Greater Bay Area progresses, the region emerges as an optimal testing ground for exploring innovative models of cross-border bankruptcy cooperation. Building upon the "Pilot Opinions," there should be bold exploration and a continuous expansion and deepening of the breadth and depth of cross-border bankruptcy judicial cooperation in the Greater Bay Area through ongoing collaborative practices.³⁶ To address the issue of parallel bankruptcies, the Greater Bay Area can draw on international best practices and introduce a mechanism to differentiate between main and non-main proceedings, flexibly and while respecting the existing legal framework, to effectively tackle the challenges of cross-border parallel bankruptcies.³⁷ This model aims to ensure that both main and non-main proceedings can perform their respective roles and coordinate with one another by clarifying jurisdictional origins, thereby jointly facilitating the efficient processing of cross-border bankruptcy cases.

Furthermore, the dual administrator model, a highlight of the "Pilot Opinions," offers a significant platform for collaboration between Mainland and Hong Kong administrators. On this foundation, further discussions and consultations can lead to a more nuanced cooperation agreement that delineates the division of responsibilities for dual administrators in various situations, especially when dealing with non-main interest

36 See Deng L, 'The Research on the legislation for Insolvency of Multinational Corporate Group' (2013) *Politics and Law* 5.

37 See Cornford A, 'The Failure of Cross-border Financial Firms: New Thinking in the Aftermath of the Financial Crisis' (2010) *Observatoire del la Finance*.

centres outside of Hong Kong or parallel bankruptcy cases, ensuring seamless and efficient collaboration between both parties.

Additionally, the successful use of cross-border bankruptcy agreements in the reorganisation case of Maxwell Communications provides valuable inspiration for China. The Chinese Mainland and Hong Kong can draw from this experience and pioneer a pilot of cross-border bankruptcy agreements in the Greater Bay Area, reaching consensus on key issues such as the management of company assets, debts, and jurisdiction allocation through voluntary negotiation. The three regions can collaboratively devise a cross-border bankruptcy agreement guide to offer clear direction for bankruptcy administrators, with bankruptcy courts reviewing and sanctioning the agreements to affirm their legality and efficacy.³⁸ This approach can not only remedy the "Pilot Opinions" shortcomings in managing complex cross-border bankruptcy cases but also serve as a paradigm for cross-border bankruptcy cooperation between the two regions and potentially beyond.

4.3. Bridging the gap between effectiveness and procedure, and strengthening the dual path of rules and information sharing

Cross-border bankruptcy cases encompass the legal systems, judicial procedures, and economic interests of multiple jurisdictions, and their outcomes often have a profound impact on the rights and welfare of numerous stakeholders. Consequently, enhancing cross-border bankruptcy cooperation and achieving harmonisation and integration of legal systems have become pressing issues for the international community.³⁹ Given the many uncertainties arising from differences in legal systems, conflicts in bankruptcy efficacy, and ambiguities in execution procedures between the Chinese Mainland and Hong Kong in cross-border bankruptcy cooperation, attention should be directed towards the clarification of rules and the establishment of information-sharing mechanisms. Firstly, at the level of rules, it is essential to further refine and elucidate the "Pilot Opinions" to forge a clear and coherent legal framework for cross-border bankruptcy cases. This includes, but is not limited to, the explicit definition of pivotal

38 See Deane F and Mason R, 'The UNCITRAL Model Law on Cross-Border Insolvency and the Rule of Law' (2016) 25 (2) *International Insolvency Review* 139.

39 See Dawson AB, 'The Problem of Local Methods in Cross-Border Insolvencies' (2015) 12 (1) *Berkeley Business Law Journal* 46.

elements such as identification of bankruptcy assets, the responsibilities and powers of administrators, and models of cross-border execution assistance, ensuring that cross-border bankruptcy procedures can locate a transparent applicable basis within the legal systems of both jurisdictions. Through such rule development, the aim is to diminish legal application ambiguities and furnish robust institutional support for cross-border bankruptcy cooperation. Secondly, to more effectively navigate the uncertainty, concerted efforts should be made to construct a standardised information-sharing and communication platform. This platform will act as a conduit between the legal communities, judicial bodies, and bankruptcy administrators of both regions, fostering real-time exchange of cross-border bankruptcy information, experience, and case analyses. Via this platform, both parties can collaborate more closely to jointly tackle the challenges posed by cross-border bankruptcy and advance the continuous refinement and innovation of the cooperation mechanism. Additionally, the platform can offer practical guidance for cross-border bankruptcy cases, assisting participants in more accurately forecasting case trajectories and mitigating the risks associated with parallel bankruptcy proceedings stemming from information discrepancies.⁴⁰

5. Conclusion

Although the Guangdong-Hong Kong-Macao Greater Bay Area operates under the unique "one country, two systems" framework,⁴¹ this institutional arrangement not only provides flexibility for regional development but also presents new challenges in cross-border legal coordination.⁴² As the country's highest legislative body, the National People's Congress and its Standing Committee possess the ultimate authority to interpret the Basic Law, which offers a robust constitutional and legal foundation for managing cross-border legal matters. In promoting the coordinated legislation of the

⁴⁰ G. S. Willemaers, *The EU Issuer-Disclosure Regime: Objectives and Proposals for Reform* (Amsterdam: Kluwer Law International (2011) 21

⁴¹ The "one country, two systems" framework is a constitutional principle formulated by the People's Republic of China to address the reunification of China, particularly in the context of Hong Kong and Macau. See Wang, Zhenmin. *Relationship Between the Chinese Central Authorities and Regional Governments of Hong Kong and Macao: A Legal Perspective*, (Springer, 2018)

⁴² See Ye Yizhou, 'Preliminary Discussion on the Construction of Collaborative Legislative Mechanism in the Guangdong-Hong Kong-Macao Greater Bay Area' (2018) 4 *Local Legislation Journal* (地方立法研究) 37.

Chinese Mainland, Hong Kong, and Macao in the Guangdong-Hong Kong-Macao Greater Bay Area, particularly in key economic areas such as cross-border bankruptcy, the central government plays an irreplaceable role. Its strategic guidance and coordinated promotion are crucial for breaking down barriers and fostering the integration of rules. Within the legal framework of China, the Enterprise Bankruptcy Law and the collective debt liquidation procedures implemented by the Hong Kong courts exhibit significant institutional similarities. This commonality has laid a solid foundation for the formulation of the "Pilot Opinions."⁴³

The "Pilot Opinions" not only ingeniously integrate the essence of the Chinese Mainland and Hong Kong in the field of bankruptcy law but also aim to explore a feasible path for the promotion of a cross-border bankruptcy cooperation mechanism nationwide through the practice of pilot areas such as Shenzhen. With the increasing number and complexity of cross-border bankruptcy cases, the scope of cooperation has expanded beyond the boundaries of Shenzhen and Hong Kong, reaching courts in Guangzhou, Beijing, Hainan, and other locations. This expansion has formed a multi-directional, interactive cross-border bankruptcy cooperation network with Hong Kong. This trend not only reflects the extensiveness and necessity of cross-border bankruptcy cooperation but also lays a solid foundation for future in-depth cooperation between China and Hong Kong in the field of cross-border bankruptcy. The development of this network signifies a commitment to enhancing legal coordination and efficiency in handling cross-border bankruptcy cases, which is essential for the stability and growth of the Greater Bay Area's economy.

43 See Donald Earl Childress III, 'Comity as Conflict: Resituating International Comity as Conflict of Laws' (2010) 44 *UC Davis Law Review* 13.