Cross-Border Insolvency Regime in China: Finding the Most Pragmatic Interim Solution for Globalized Companies under Localized Practices

by

*Didi Hu**

As home to some U.S.-listed companies, such as Alibaba and Sina, China has been enjoying constant and sound growth in its emerging socialist market economy past decades. It has also been offering a steadily improving regulatory regime. However, China has been slow to offer a mature market-exit solution to failing businesses at home and abroad. Nor has it enacted the UNCITRAL Model Law on Cross-Border Insolvency. Article 5 of China's Enterprise Bankruptcy Law, which went into effect in 2007, is the only provision addressing the extraterritorial effect of Chinese court decisions that wind up companies situated in China and the inbound petitions seeking recognition of foreign bankruptcy orders.

While article 5 provides a welcome start toward achieving greater cooperation in cross-border insolvencies, Chinese law must go further still. Under article 5, Chinese courts are only willing to recognize a foreign bankruptcy proceeding as a static fact, and are not prepared to participate in the dynamic process to optimize creditor protection and corporate rescues across borders. Moreover, article 5 uses vaguely formulated concepts of "reciprocity" and "public policy," which give Chinese courts considerable leeway to decline recognition of foreign bankruptcy proceedings.

This article highlights the present limitations in Chinese law and practice. Ultimately, China needs to replace article 5 with the Model Law. However, it is more likely to achieve that final step if it first takes baby steps toward ex-

*JD Candidate, Melbourne Law School, Australia. Many thanks to the editors of the *American Bankruptcy Law Journal* for their helpful comments and suggestions. Special thanks to Professor Yanxia Yao at the School of Law of Beijing Foreign Studies University for her constant encouragement in my LLB studies, and to Professor Haizheng Zhang for his illuminating guidance in carrying through this research. Any error remains mine.

panding article 5. This article suggests changes of a more moderate nature to foster the evolution of Chinese law in addressing cross-border insolvencies.

INTRODUCTION

In 2006, China introduced its new Enterprise Bankruptcy Law ("EBL 2006").[1] The new law represents a major breakthrough, as it expands eligibility for bankruptcy to all corporate debtors,[2] and recognizes the cross-border effect of some bankruptcy cases.[3] Article 5 of EBL 2006, which governs cross-border insolvency cases, is a tentative attempt to honor China's commitment to the World Trade Organization ("WTO")[4] and to transition from command to market economy.[5] Article 5(1) accords Chinese courts' bankruptcy proceeding with extraterritorial effect, and article 5(2) sets out the basic criteria to be met for foreign bankruptcies to be recognized:

> (1) Bankruptcy *proceedings* initiated in accordance with this Law shall have effect upon the debtor's assets outside of China.
> (2) Where a legally effective *judgment* or ruling made on a bankruptcy case by a court of another country involves a debtor's *assets* within the territory of China, and a petition or request is filed with the people's court to recognize and enforce the said judgment or ruling, the people's court shall conduct examination thereof, in accordance with the relevant international treaties that China has concluded or acceded to, or on the basis of the principle of *reciprocity*, and shall make the ruling to recognize and enforce the said judgment or ruling upon finding that the said judgment or ruling does not violate the *basic principles of the laws* of China, does not jeopardize *state sovereignty*, *national security*, or

---

[1]Except when the context implies otherwise, "China," the "People's Republic of China," and the "P.R.C." are used interchangeably throughout this article to refer to "Mainland China," excluding the Taiwan region and the Special Administrative Regions of Hong Kong and Macao. This usage is intended purely to denote geographical and jurisdictional areas.

[2]Qiye Pochan Fa (企业破产法) [Enterprise Bankruptcy Law] (promulgated by the Standing Comm. Nat'l People's Cong. ("N.P.C."), Aug. 27, 2006, effective June 1, 2007), art. 2, CLI.1.78895(EN) (Lawinfochina) [hereinafter EBL 2006]; *cf.* Qiye Pochan Fa (Shixing) (企业破产法(试行)) [Enterprise Bankruptcy Law (for Trial Implementation)] (promulgated by the Standing Comm. N.P.C., Dec. 2, 1986, effective Nov. 1988), art. 2, *translated in* http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383940.htm (last visited July 8, 2018) [hereinafter EBL 1986].

[3]EBL 2006, *supra* note 2, art. 5. EBL 1986 had no counterpart for cross border insolvencies.

[4]Qingxiu Bu, *China's Enterprise Bankruptcy Law (EBL 2006): Cross-Border Perspectives*, 18 INT'L INSOLVENCY REV. 187, 189 (2009); Minkang Gu, *A Superior Win and An Inferior Loss: New Developments in Chinese Bankruptcy Laws and Regulations*, 1 INT'L J. PRIV. L. 110 (2008).

[5]Charles D. Booth, *Drafting Bankruptcy Laws in Socialist Market Economies: Recent Developments in China and Vietnam*, 18 COLUM. J. ASIAN L. 93, 94 (2004); Bu, *supra* note 4, at 188.

> *public interests*, and does not undermine the *legitimate rights and interests of the creditors within the territory of China.*[6]

Unfortunately, the long-awaited EBL 2006 has had far less application than previously expected. As a country heavily influenced by Confucianism and historically emerged in natural economy,[7] China has a relatively short history of dealing with bankruptcies. Its courts have limited experience, despite the passing of EBL 2006;[8] but the need exists to gain this experience and expand its laws governing bankruptcies. China's economy has greatly expanded.[9] Companies conducting substantial business in China also increasingly used offshore structures. These offshore companies are often incorporated in tax havens and listed on major stock markets.[10] In recent years, bankruptcy proceedings initiated against these companies have increased. Examples include the liquidation of the formerly NASDAQ-listed Ambow Education by the Caymans court[11] and the delisting litigation initiated by the U.S. Securities and Exchange Commission against Global Education.[12]

In theory, a debtor has many options as to where it may initiate bankruptcy proceedings. These include: (1) its state of incorporation, (2) the loca-

---

[6]This is the author's translation, with emphasis and section numbers added. For the official translation released by China's national legislature, the N.P.C., see http://www.npc.gov.cn/englishnpc/Law/2008-01/02/content_1388019.htm (last visited July 8, 2018) [hereinafter Official Translation of EBL 2006]. It is this author's view that the official translation misses the Chinese text' original meaning in part. Accordingly, the discussion in this article will be based on the author's translation unless otherwise stated.

[7]CHINA'S NEW ENTERPRISE BANKRUPTCY LAW: CONTEXT, INTERPRETATION AND APPLICATION 4 (Rebecca Parry, Yongqian Xu & Haizheng Zhang eds., Routledge, 2010).

[8]From 2007 when EBL 2006 came into effect to the end of 2012, the amount of bankruptcy cases accepted by Chinese courts decreased at an annual average rate of 12.23%. In 2012, there were 735,000 domestic enterprises that were deregistered or cancelled by administrative bureaus, but only 20.52% of those entities underwent judicial bankruptcy proceedings. In contrast, in the prior decade when EBL 2006's predecessor was in force, the rate was 17.09% higher. *See* Ma Jian (马剑), Zuigao Renmin Fayuan Yanjiu Shi (最高人民法院研究室) [Research Center of Supreme People's Court], *2003-2012 Nian Renmin Fayuan Shenli Pochan Anjian de Tongji Fenxi* (2003-2012 年人民法院审理破产案件的统计分析) [*Statistical Analysis on Insolvency Cases Accepted by People's Court from 2003 to 2012*], LEGAL DAILY (Mar. 26, 2014, 4:58 PM), http://www.legaldaily.com.cn/zbzk/content/2014-03/26/content_5401182.htm?node=25497.

[9]China has witnessed "three decades of extraordinary economic development," though presently "shifting to a lower but still rapid and likely more sustainable growth path." ORG. ECON. COOPERATION AND DEV., *OECD Economic Surveys: China (Mar. 2015)*, http://www.oecd.org/eco/surveys/China-2015-overview.pdf (last visited July 8, 2018).

[10]As of December 31, 2015, only eleven U.S.-listed companies are incorporated in China. *See* SEC. EXCHANGE COMMISSION ("SEC"), *Foreign Companies Registered and Reporting with the U.S. Securities and Exchange Commission (Geographic Listing by Country of Incorporation)*, https://www.sec.gov/divisions/corpfin/internatl/foreigngeographic2015.pdf (last visited July 8, 2018). Compare this to the number of companies incorporated in Cayman Islands listed in the same table.

[11]*See* SEC, *Ambow Education Holding Ltd. Announces Appointment of Joint Provisional Liquidators by the Grand Court of The Cayman Islands* (June 10, 2013), https://www.sec.gov/Archives/edgar/data/1494558/000110465913048008/a13-14692_1ex99d1.htm.

[12]Sec. Exch. Comm'n v. All Know Holdings Ltd., 949 F. Supp. 2d 714 (N.D. Ill. June 10, 2013).

tion of its headquarter, (3) the jurisdiction where the company holds substantially all of its employees and day-to-day operations, and (4) the locale in which the debtor's primary assets are located.[13] Many of these possible venues would suggest filing in China, but few debtors so far have opted to do so.[14] This can be attributed partly to the debtors' distrust for China's bankruptcy regime,[15] and partly to the uncertainty created by the structure of variable interest entities ("VIEs"). Many of the offshore companies and listed companies utilize the VIE structure to circumvent regulatory and market-access restrictions in sensitive investment fields in China.[16] With fewer bankruptcy filings or recognition petitions, Chinese courts have little opportunity to clarify existing legal uncertainties, thereby creating a vicious circle.

Although it serves as a positive step towards cross-border cooperation in bankruptcy cases, article 5 of EBL 2006 does not go far enough to address all the problems involved in the initiation and recognition of bankruptcy cases with foreign elements. Even if China enacted the UNCITRAL Model Law on Cross-Border Insolvency ("Model Law") as its domestic legal regime, it would still be some time before the international community trusted China's new system. Under these circumstances, it is ill-advised to complain about either Chinese courts' conservative stance in handling inbound recognition petitions, or the underlying legal flaws and loopholes. Rather, international practitioners and Chinese legal framers should step out of the purely theoretical debates between territorialism and universalism, and unveil the most pragmatic interim solution for practical problems in China's cross-border insolvency regimes.

This article begins by examining China's current cross-border insolvency rules and ends with suggestions for necessary changes to provide a more consistent and enforceable bankruptcy legal system in China. Part I conducts a textual comparison of several drafts for China's rules on cross-border insolvencies, tracing the progressive path towards international cooperation and coordination. Parts II through IV address the three main issues in the existing cross-border insolvency regime. Part II analyzes the distinction between recognizing foreign bankruptcy *proceedings* under the Model Law, and

---

[13]Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, 98 MICH. L. REV. 2216, 2226-27 (2000).

[14]One of the few exceptions is Zhejiang Topoint Photovoltaic Co, Ltd., which was wound up by Hai'ning Intermediate People's Court in China's Zhejiang Province in 2014. The proceeding was recognized as a foreign main proceeding in the United States in 2016. *See In re* Zhejiang Topoint Photovoltaic Co., Ltd., No. 14-24549-GMB (Bankr. D.N.J. May 12, 2015).

[15]*See, e.g.*, *In re* Suntech Power Holdings Co., Ltd., 520 B.R. 399, 405-06, 419 (Bankr. S.D.N.Y. 2014) ("The Creditor rejected the possibility of a restructuring in China. The Chinese court's jurisdiction was in doubt, and China has different concepts of the rules of law and creditors' rights compared to those in the Cayman Islands and the United States; it is the last place that one would go.").

[16]*See infra* Part IV.A.

recognizing foreign bankruptcy *judgments* (as envisaged in the current version in article 5), and emphasizes the negative implication stemming from this distinction. Part III inquires whether it is a politic choice to include the reciprocity requirement in handling cross-border insolvencies. Part IV investigates the public policy concerns, with special attention given to the legal risks involved in offshore listings and the VIE structure. Part V examines the success rate for outbound and inbound recognition petitions, briefly discussing U.S. and English case law, and identifies the Chinese equivalent of the center of main interest ("COMI"). Part VI concludes with proposed changes to China's bankruptcy rules.

I. EVOLUTION OF ARTICLE 5 OF EBL 2006: A PROGRESSIVE PATH

The drafting of EBL 2006 began as early as 1995. Its final adoption represents a hard-won result.[17] Notwithstanding, article 5 is far from being unanimously accepted.[18] In the initial 1995 version, the drafters clearly took a territorial stance. "No procedure of liquidation, composition, or reorganization initiated outside the territory of China shall have any effect upon the debtor's assets located within China's territory."[19] At the turn of the century, China was willing to offer a more cooperative and open stance.[20] Among the various suggested versions, the one that the Chinese legislature finally adopted is the most favorable for foreign bankruptcy proceedings. The difference in possible approaches can be seen through a comparison of article 5 in a draft proposed by Professor Shi Jingxia in 2000 ("Professor Shi's Draft")[21] and the provision in the Draft Enterprise Bankruptcy Law ("Draft EBL 2004").[22] In relevant part, Professor Shi's Draft read:

> The liquidation, reorganization, composition and similar proceedings commenced outside Mainland China (including Hong Kong, Macao and Taiwan) shall not in principle have

---

[17]Jingxia Shi, *Chinese Cross-Border Insolvencies: Current Issues and Future Developments*, 10 INT'L INSOLVENCY REV. 33, 48 (2001); Booth, *supra* note 5, at 95-96; Charles D. Booth, *Chinese Insolvency Law: Developing an Insolvency Infrastructure*, 13 INTER PAC. B. ASS'N J. 13 (2001).

[18]N.P.C., *Bufen Zhuanjia Dui Qiye Pochan Fa (Cao'an) de Yijian* (部分专家对企业破产法（草案）的意见) [*Some Experts' Suggestions for Enterprise Bankruptcy Law (Draft)*], § 7.2 (2004), CLI.DL.2217 (Chinalawinfo) [hereinafter *Expert Suggestions for Draft EBL 2004*].

[19]Shi, *supra* note 17, at 49 n.103.

[20]A 2001 draft for China's bankruptcy law incorporated a provision on cross-border insolvency, but the text of this draft is not publicly available. Booth, *supra* note 5, at 143.

[21]Jingxia Shi, *Chinese Cross-Border Insolvencies: Current Issues and Future Developments*, 10 INT'L INSOLVENCY REV. 33, 49 n.104 (2001) [hereinafter Professor Shi's 2000 Draft]. Minor changes are made to signpost the article's paragraphs.

[22]N.P.C., *Qiye Pochan Fa (Cao'an)* (企业破产法（草案）) [*Enterprise Bankruptcy Law (Draft)*], art. 8(2) (June 21, 2004), CLI.DL.867 (Chinalawinfo) [hereinafter Draft EBL 2004].

> effect upon the debtor's assets located within Mainland China. But the [p]eople's [c]ourt may recognize the effect of foreign proceeding commenced by the debtor's domiciliary court upon the assets located within Mainland China should this proceeding satisfy the following conditions:
>
> (a) Chinese creditors will be given fair and equitable treatment if they participate in this proceeding;
>
> (b) There are no significant differences among the substantive provisions embodied in the insolvency law of the relevant jurisdiction and this law;
>
> (c) The recognition of this foreign proceeding will not violate the public interest of China; and
>
> (d) Other considerations deemed necessary by the People's Court . . .

Its counterpart in the Draft EBL 2004 proposed:

> The bankruptcy proceeding commenced outside of the territory of People's republic of China, after people's court's ruling thereof, shall have effect upon the debtor's property within China's territory. People's court, however, shall rule that the said bankruptcy proceeding will not be accorded effect within China's territory if any one of the following situations exists:
>
> (a) the foreign country or territory in which the said bankruptcy proceeding was commenced has neither treaty nor reciprocity relationship with China;
>
> (b) the said bankruptcy proceeding violates China's public policy; or
>
> (c) the said bankruptcy proceeding will undermine the legitimate rights and interests of creditors within the territory of China.

In delineating when the Chinese courts will recognize a foreign bankruptcy proceeding, Professor Shi's Draft takes a comparatively defensive position, adopting four affirmative conditions, all of which must be satisfied to allow recognition. For the protection of domestic creditors, Professor Shi's Draft prescribes "fair and equitable treatment" for Chinese creditors and proscribes "significant differences" in substantive provisions between foreign and domestic laws. In contrast, both the Draft EBL 2004 and EBL 2006 presume that the foreign bankruptcy proceeding does not offend the legitimate rights and interests of creditors within China's territory, unless it is

shown otherwise.[23] This reflects Chinese policymakers' embrace of the notion that a mere difference in distribution order should not necessarily lead to the non-recognition of a foreign bankruptcy proceeding.[24]

Additionally, Professor Shi's Draft grants recognition of bankruptcy proceedings commenced only by the domiciliary court. The Draft EBL 2004 abandons this restriction and widens the door for foreign proceedings seeking recognition in China. Further, the safety net provision in Professor Shi's Draft—that Chinese courts have broad discretion to decline to recognize a foreign proceeding[25]—fails the tests of transparency and predictability.[26] This discretionary approach was severely curtained in subsequent drafts and in EBL 2006.[27]

However, the Draft EBL 2004 also inserts a requirement of reciprocity.[28] Doing so essentially aligns the bankruptcy rules with those of general rules of civil procedure,[29] leading one to question the need for a separate rule for recognizing bankruptcy rule at all. In fact, some scholars did argue for the application of the general civil recognition rule in the field of bankruptcy.[30]

A reciprocity requirement undermines the consistency and predictability of China's bankruptcy rules. In the past, Chinese courts relied on the lack of reciprocity to decline recognition.[31] Article 5 of EBL 2006 advances a fairly recognition-friendly process. It is markedly different form Professor Shi's Draft, which viewing recognition of a foreign bankruptcy proceeding as an

---

[23]*Cf.* Draft EBL 2004, *supra* note 22, art. 8(2)(c); *see also* EBL 2006, *supra* note 2, art. 5(2).

[24]Xinxin Wang (王新欣) & Jianbin Wang (王健彬), *Woguo Chengren Waiguo Pochan Chengxu Yuwai Xiaoli Zhidu de Jiexi ji Wanshan* (我国承认外国破产程序域外效力制度的解析及完善) [*Analysis on China's System of Recognizing the Extraterritorial Effect of Foreign Bankruptcy Proceeding and the Improvements Thereof*], 2008(6) FAXUE ZAZHI (法学杂志) [LAW SCIENCE MAGAZINE] 10, 12.

[25]Professor Shi's 2000 Draft, *supra* note 21, art. 7(d).

[26]The same can be said of the now repealed section 304 of the U.S. Bankruptcy Code, which like the Draft EBL 2004, allowed great judicial discretion instead of mandating predictable relief. John J. Chung, *The Retrogressive Flaw of Chapter 15 of the Bankruptcy Code: A Lesson from Maritime Law*, 17 DUKE J. COMP. & INT'L L. 253, 256-57 (2007).

[27]Booth, *supra* note 5, at 143.

[28]Draft EBL 2004, *supra* note 22, art. 8(2)(a).

[29]*Cf.* Minshi Susong Fa (民事诉讼法) [Civil Procedure Law] (promulgated by the N.P.C., Apr. 9, 1991, effective Apr. 9, 1991), art. 282, CLI.1.183386(EN) (Lawinfochina).

[30]*See, e.g.*, *Expert Suggestions for Draft EBL 2004*, *supra* note 18, § 7.2 ("[S]ome experts pointed out that since the Civil Procedure Law has provisions concerning the legal effect of foreign judgments and rulings, article 8(2) of the Draft EBL 2004 on the effect of foreign bankruptcy proceedings can be deleted.").

[31]An example is the contract dispute between Hua An Funds Management Co. Ltd. ("Hua An Funds") and Lehman Brothers International Europe ("LBIE") before Shanghai High People's Court. Negotiation between the parties continued despite the fact that, before the Court accepted the case filing on September 27, 2008, LBIE and its parent, Lehman Brothers Holding Inc. had filed for bankruptcy protection on September 15, 2008. The dispute ended in a settlement between the parties in 2011. *See generally* Xinyi Gong, *To Recognize or Not to Recognize? Comparative Study of Lehman Brothers Cases in Mainland China and Taiwan*, 10(4) INT'L CORP. RESCUE 240 (2013).

exception to the general rule of non-recognition.[32] The Draft EBL 2004 also employed a general rule of non-recognition.[33] EBL 2006, however, takes the completely opposite stance and treats recognition of a foreign proceeding as the general rule.[34] In an effort to strengthen the transparency and predictability of China's bankruptcy regime, the legislature specifies three categories of public policy exceptions.[35] In transitioning from complete territorialism to modified universalism, China is working progressively towards international cooperation and coordination in the cross-border insolvency regime. By specifying and modernizing its bankruptcy rules, China is seeking to procure international recognition.

II. RECOGNITION OF BANKRUPTCY JUDGMENTS OR PROCEEDINGS

A. JUDGMENT OR PROCEEDING: AN INTENTIONAL DIFFERENTIATION

Chinese legislators differentiate between "bankruptcy proceedings" in article 5(1) of EBL 2006 and "bankruptcy judgments and rulings"[36] covered in article 5(2). Under a strict application of these two paragraphs, bankruptcy proceedings initiated by Chinese courts become effective upon a court's initial commencement ruling. In contrast, a foreign court must issue a legally effective judgment or ruling with respect to a bankruptcy case before a Chinese court will recognize it. Neither Professor Shi's Draft nor the Draft EBL 2004 distinguished between domestic and foreign bankruptcy cases.[37] Thus, this distinction embodied in EBL 2006 cannot be attributed to the legislators' inadvertent use of words.

The key scholar who assisted in the drafting of EBL 2006, Professor Wang Xinxin, proposed that the phrase "effective judgment or ruling" referenced in article 5(2) should encompass a foreign court's order to open a liqui-

---

[32]Professor Shi's 2000 Draft, *supra* note 21, art. 7(2) ("The . . . proceedings commenced outside Mainland China . . . shall not in principle have effect upon the debtor's assets located within Mainland China . . . .").

[33]Draft EBL 2004, *supra* note 22, art. 8(2) ("[T]he said bankruptcy proceeding *will not* be accorded effect within China's territory *if any one* of the following situations exists . . . ." (emphasis added)).

[34]Article 5(2) of EBL 2006 provides that the foreign judgment and rulings shall be recognized unless certain proscriptive provisions are invoked. As one commentator noticed when reviewing section 304 of the U.S. Bankruptcy Code, the permissively arranged language of the statute "greatly stunted results" and "produced a wide variety of decisions." Chung, *supra* note 26, at 256-57.

[35]*But cf.* Charles D. Booth, *The 2006 PRC Enterprise Bankruptcy Law: The Wait is Finally Over*, 20 SING. ACAD. L.J. 275, 313 (2008) (finding the language of EBL 2006 is more restrictive than that of the Draft EBL 2004, as the "public interest test" is more general than the "basic principles of the PRC law test.").

[36]In China, judicial determinations on issues in bankruptcy proceedings, whether of substantive or procedural nature, are in the form of "rulings" instead of "judgments." *See also* Civil Procedure Law, *supra* note 29, art. 154(1).

[37]*Cf.* Professor Shi's 2000 Draft, *supra* note 21, art. 7; Draft EBL 2004, *supra* note 22, art. 8.

dation or reorganization proceeding, thereby making recognition of a foreign bankruptcy judgment under article 5(2) the same as recognition of any ongoing foreign proceeding under China's general civil procedure rules. In support of this proposition, it might be argued that the differentiation between "bankruptcy proceeding" and "judgment" in article 5 is merely an attempt to maintain consistency with the general rules in China's Civil Procedure Law governing the recognition of foreign judgments.[38] However, such an approach in the bankruptcy field compromises enforcement efficiency and cross-border coordination. The requirement of a "judgment or ruling" as qualified by the modifier "legally effective" gives Chinese courts great leeway or, more bluntly, a convenient excuse to decline recognition of a foreign court's ruling commencing a bankruptcy proceeding, thus enabling the debtor's continued preferential treatment within China's territory despite the ongoing foreign proceedings.

On the other hand, equating "bankruptcy proceedings" with "bankruptcy judgments," as proposed by Professor Wang, might only entail a mere "declaration of status of the debtor."[39] Since 2014, UNCITRAL Working Group V has been devising model legislative provisions for recognizing and enforcing insolvency-related judgments.[40] The implementation of recognition and enforcement provisions reveals the difference between "bankruptcy proceedings" and "bankruptcy judgments," and an illustrative example is found in the recognition petition submitted by B&T Ceramic to Foshan Intermediate People's Court in Guangdong Province ("Foshan Court") in 2001—the first recognition petition before Chinese courts involving a foreign bankruptcy proceeding.[41]

On October 24, 1997, a Milan court declared E.N. Group bankrupt. On September 30, 1999, the Italian Milan Civil and Criminal Court ordered that all of E.N. Group's assets be transferred to B&T Ceramic, an Italian-based company that had acquired the bankrupt E.N. Group on May 5, 1999. Immediately prior to the acquisition, however, on May 2, 1999, E.N. Group transferred its 98% shareholder interest in China-based Nanhai Machinery to the

---

[38]*Cf.* Civil Procedure Law, *supra* note 29, art. 282 (requiring a foreign *judgment or ruling* seeking recognition in China to be *effective* (emphasis added)).

[39]U.N. COMMISSION ON INT'L TRADE L. ("UNCITRAL"), LEGISLATIVE GUIDE ON INSOLVENCY LAW, at 310 ¶ 16, U.N. Sales No E.05.V.10 (2005).

[40]UNCITRAL Working Group V (Insolvency L.), *Cross-Border Recognition and Enforcement of Insolvency-Related Judgments*, U.N. Doc. A/CN.9/WG.V/WP.130, ¶ 1 (Mar. 12, 2015).

[41]B&T Ceramic Group s.r.l. Youxian Gongsi Shenqing Chengren he Zhixing Yidali Fayuan Pochan Panjue An (B&T Ceramic Group s.r.l. 有限公司申请承认和执行意大利法院破产判决案) [Petition made by B&T Ceramic Group s.r.l. to Recognize and Enforce the Italian Court's Bankruptcy Judgments], CHINALAWINFO CLI.C.829134 (Foshan Interm. People's Ct. 2000). *See also* Jianhong Liu, *A Case on Application for Recognition and Enforcement of Italian Court Ruling on Bankruptcy*, 2003(6) ZHONGGUO FALV (中国法律) [CHINA LAW] 95.

China-based Longxuan International. B&T Ceramic then petitioned the Foshan Court to *recognize and enforce* the two Milan court orders, which adjudicated E.N. Group as bankrupt and ordered the transfer of its assets to B&T Ceramic, including 98% shareholder interest in Nanhai Machinery. The Foshan Court recognized the Milan orders in accordance with the bilateral treaty on judicial assistance between China and Italy. Given the prior transfer of the shares to Longxuan International, however, the Court declined to address the ownership of these shares and merely affirmed that B&T Ceramic may initiate a plenary proceeding to determine ownership rights. Importantly, the Foshan Court recognized the bankrupt status of the foreign debtor, E.N. Group, and afforded the relevant Italian court orders the same legal effect as a Chinese court ruling.[42]

The Foshan Court tactically and successfully evaded the legislative gaps in China's cross-border insolvency rules. One wonders what the outcome would have been if the Foshan Court had opted to enforce the bankruptcy judgment and found that Longxuan International had obtained the shares with actual knowledge of the E.N. Group's bankruptcy. Would the transactions have been avoided? If so, which country's avoidance law would have applied? Would the Chinese bankruptcy proceeding have been ancillary to the pending case in Italy? What if the Italian bankruptcy proceeding had ended? This line of questioning essentially centers on two issues: the applicable choice of law and whether retroactive effect should be given by Chinese courts' when recognizing foreign bankruptcy judgments or proceedings.

By asking the stakeholders to initiate a new proceeding in a competent Chinese court, the Foshan Court implicitly held that Chinese avoidance law would apply. As to retroactive application of foreign judgments or proceedings, this author believes that foreign bankruptcy judgments, once recognized by Chinese courts, should be afforded retroactive legal effect. However, a property transfer, effectuated in good faith, within China's jurisdiction, remains valid if it occurs during the period between the delivery of the foreign judgment and the Chinese court's ruling on recognition. This represents a compromise between protecting bona fide domestic creditors and fostering substantial international cooperation in the enforcement of bankruptcy rulings. Moreover, this approach incentivizes foreign bankruptcy representatives to timely initiate recognition petitions in the Chinese courts.

---

[42]Zhonghua Renmin Gonghe Guo he Tu'erqi Gonghe Guo Guanyu Minshi, Shangshi he Xingshi Sifa Xiezhu de Xieding (中华人民共和国和土耳其共和国关于民事、商事和刑事司法协助的协定) [Treaty on Judicial Assistance in Civil, Commercial and Criminal Matters between the P.R.C. and the Republic of Turkey], Sept. 28, 1992, art. 26, CLI.T.224 (Chinalawinfo).

B. Implications of Recognizing Foreign Bankruptcy Judgments

A complicating factor in recognizing foreign bankruptcy judgments involves determining whether the foreign court had the proper jurisdiction to render its ruling. Even UNCITRAL's draft model law concerning bankruptcy judgment recognition requires the petitioned court to review the jurisdiction of the court that rendered the bankruptcy judgment and provides that a lack of jurisdiction is a suitable basis for denying recognition.[43] In China, the foreign bankruptcy judgment must have been delivered by a "competent court,"[44] even though article 5 of EBL 2006 does not specifically impose this jurisdictional-review requirement. Determining proper jurisdiction is necessary for coordination among various foreign and domestic bankruptcy judgments. For instance, suppose that courts in two different countries rendered competing foreign bankruptcy judgments against the same debtor, both of which sought recognition from a Chinese court. Both judgments might satisfy the conditions of article 5 of EBL 2006. If the two judgments are contrary to one another, which judgment should the Chinese court recognize? Should it be the first judgment entered?

To date, recognition decisions by Chinese courts are made mainly on the basis of bilateral judicial assistance treaties.[45] With the exception of China's bilateral treaty with Singapore, which excludes the recognition of bankruptcy judgments, all other treaties include "proper jurisdiction" as a prerequisite for recognition. If Chinese courts, following article 5 literally, were to grant recognition without reviewing whether the foreign court had proper jurisdiction, this would lead to a paradox wherein bankruptcy judgments rendered in countries with which China has judicial assistance treaties would undergo stricter scrutiny compared to those rendered in countries with which China has no judicial assistance relationship. This result is inconsistent with the goals of mutual trust and favorable treatment that the bilateral judicial assistance treaties seek to achieve.[46]

---

[43]UNCITRAL Working Group V (Insolvency L.), *Draft Model Law on the Recognition and Enforcement of Insolvency-Related Judgments*, art. 10(i), U.N. Doc. A/CN.9/WG.V/WP.130 (Mar. 12, 2015). *See also* U.N. Doc. A/CN.9/WG.V/WP. 135.

[44]Shaffer v. Heitner, 433 U.S. 186 (1977); Hague Conf. on Priv. Int'l L., *Report of the Fourth Meeting of the Working Group on the Judgments Project (3-6 February 2015) and Preliminary Draft Text Resulting from the Meeting*, art. 5.3, https://assets.hcch.net/upload/wop/gap2015pd07b_en.pdf (last visited July 8, 2018).

[45]As of February 2018, China has judicial assistance relationship with 71 countries. Ministry of Foreign Affairs of the P.R.C., *Woguo Duiwai Dijie Sifa Xiezhu ji Yindu Tiaoyue Qingkuang* (我国对外缔结司法协助及引渡条约情况) [*Summary of the Treaties Entered into by China for Judicial Assistance and Extradition*], http://www.fmprc.gov.cn/web/ziliao_674904/tytj_674911/wgdwdjdsfhzty_674917/t1215630.shtml (last visited July 8, 2018).

[46]Wenliang Zhang, *Recognition and Enforcement of Foreign Judgments in China: A Call for Special Attention to Both the "Due Service Requirement" and the "Principle of Reciprocity"*, 12 Chinese J. Int'l L.

As it stands now, China does not have a legislative equivalent of the Model Law; in other words, a bankruptcy *proceeding* pending in a foreign country might not be recognized in China, unless a uniformly lenient interpretation of "bankruptcy judgment" is followed by Chinese courts. Meanwhile, even if a foreign judgment opening a bankruptcy proceeding meets all the statutory requirements under article 5 of EBL 2006, the judgment might still fail the implicit jurisdictional requirement. Further, even if recognition is granted, it may not operate retroactively. However, for the remainder of this article, this author adopts the premise that Chinese courts will recognize "bankruptcy proceedings" in the same way that they would recognize "bankruptcy judgments."[47]

III. RECIPROCITY: A *DE FACTO* RATHER THAN *DE JURE* REQUIREMENT

A. APPLICATION OF RECIPROCITY REQUIREMENT: REASONABLE AND PRACTICAL

Absent treaty obligations, reciprocity is the last resort for foreign courts or representatives to get foreign proceedings recognized in China.[48] Reciprocity was raised on several occasions in the drafting phases of the Model Law, but was opposed by several countries led by the United States. Ultimately, by overwhelming consensus, the Model Law did not base recognition on reciprocity.[49] The requirement of reciprocity in EBL 2006 can be attributed partly to the attempt to maintain consistency with China's civil procedure rule of law.[50]

More importantly, in the author's view, including a requirement of reciprocity was, and remains, the most practical option for China, considering the primitive development of China's cross-border insolvency regime. Both the United States and the United Kingdom have utilized reciprocity in the past to shield their domestic creditors. Indeed, before the era of chapter 15, reciprocity was an express prerequisite for U.S. courts to recognize foreign bank-

143, 151 (". . . bilateral treaties are intended to provide more favorable treatments than the domestic rules.") (2013).

[47]This will only be the case when Chinese courts accord substantial legal effect to foreign courts' *rulings* commencing a bankruptcy case.

[48]If a petition for recognition of a foreign bankruptcy proceedings is denied, the interested parties might file new claims in the appropriate court. However, foreign bankruptcy representatives might not be able to appear as legal representatives in these proceedings. *See* Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gonghe Guo Minshi Susongf Fa de Jieshi (最高人民法院关于适用《中华人民共和国民事诉讼法》的解释) [Interpretation by the Supreme People's Court ("S.P.C.") on the Application of the Civil Procedure Law of the P.R.C.] (promulgated by the Judicial Comm. S.P.C., Dec. 18, 2014, effective Feb. 4, 2015), arts. 528, 544(2), CLI.3.242703 (Chinalawinfo) [hereinafter Civil Procedure Law Interpretation].

[49]H.R. REP. No. 109-31, pt. 1, at 113 (2005).

[50]*Cf.* Civil Procedure Law, *supra* note 29, art. 276(1).

ruptcy proceedings.[51] For example, the Bankruptcy Court for the Eastern District of Michigan once declined to recognize a Canadian proceeding on the ground that a similar bankruptcy proceeding commenced in the United States had not gained recognition in Canada.[52] Even after the introduction of the Model Law and its adoption by major cross-border insolvency participating states,[53] the U.K. Parliament, when enacting the Model Law into its Cross-Border Insolvency Regulations 2006, witnessed serious debates on whether to add the requirement of reciprocity. As observed by both Houses of Parliament, recognizing foreign bankruptcy proceedings on a non-reciprocal basis poses issues of fairness, and might impede the protection of domestic creditors.[54] Based on similar concerns, the British Virgin Islands, Mauritius, Mexico, Romania, and South Africa, when incorporating the Model Law into their own bankruptcy regimes, provided that reciprocity was one of the prerequisites for foreign bankruptcy recognition.[55]

Given these circumstances, it is neither practical nor reasonable to require China to abandon its reciprocity requirement, especially when this route has not been taken by other jurisdictions with a deep-rooted "rescue culture" in their initial incorporation of cross-border insolvency rules. Rather, the author posits that the most feasible approach for China is a policy that first clearly specifies what constitutes reciprocity and then applies that rule consistently.

B. *De Facto* Reciprocity: Intention and Practice

Unfortunately, reciprocity is one of the two most frequent bases on which Chinese courts deny recognition petitions.[56] Due to the lack of a clear legislative definition of reciprocity and the dearth of judicial practices addressing recognition of foreign judgments,[57] reciprocity is a concept that is

---

[51]11 U.S.C.A. § 304 (Supp. 2004) (repealed 2005).

[52]*In re* of Toga Manufacturing Limited, 28 B.R. 165, 170 (Bankr. E.D. Mich. 1983).

[53]Japan, British Virgin Islands, and the United States adopted the Model Law in 2000, 2003, and 2005 respectively.

[54]20 Mar. 2006, Par Deb HC (2006) col. 5 ("[I]n light of the [U.K.] Government's high profile failings in the non-reciprocity of our extradition arrangements with the United States, can the Minister clarify that no such similar situation will be caused under the legislation? If a country's citizens can wind up a British company, it is only fair that our citizens should have the same right in that country."); 22 Mar. 2006, Par Deb HL (2006) col. GC138 ("Although I understand that there is already precedent under Section 426 of the Insolvency Act . . . for such a non-reciprocal situation[,] it would not appear to be particularly fair on our own businesses . . . .").

[55]*See generally* Look Chan Ho, *Overview*, *in* Cross-Border Insolvency: A Commentary on the UNCITRAL Model Law 7, 8 (Look Chan Ho ed., 3rd ed. 2012).

[56]The other recourse most frequently resorted to is the due process service requirement. *See* Yongping Xiao & Zhengxin Huo, *Ordre Public in China's Private International Law*, 53 Am. J. Comp. L. 653, 654 (2005).

[57]Zhang, *supra* note 46, at 144 ("China has been notorious in the field of [recognizing and enforcing foreign judgments]."); *see also* Mo Zhang, *Civil Litigation in China: A Practical Analysis of the Chinese*

loosely applied by Chinese courts. There is little guidance as to what constitutes satisfaction of the reciprocity requirement in recognition petitions.[58]

This lack of clarity has not discouraged Chinese courts from invoking the lack of reciprocity when they decline to grant recognition. In many cases, upon finding that there is neither a treaty nor convention obligations to serve as a basis for recognition, the courts denied recognition due to a lack of reciprocity.[59] In other cases, courts looked beyond the lack of a treaty or convention obligation to consider whether the foreign court had refused to grant recognition to one or more Chinese judgments in the past.[60] In fact, scholars are nearly unanimous in their view that *de facto* reciprocity (reciprocity as shown in actual reciprocal practice by the foreign court) is a primary factor in determining whether reciprocity exists and provides a basis for recognition.[61] In some cases, the party opposing recognition equated the lack of a reciprocal relationship with the lack of a bilateral judicial assistance treaty. This contention, while lacking jurisprudential reasonableness, was not discredited by the courts.[62] Such prevalent practices regrettably signal the non-cooperative attitudes and "parochial stances" of Chinese courts.[63] Meanwhile, since China has yet to enter into bilateral judicial assistance treaties with major economies or cross-border insolvency jurisdictions,[64] it seems that denial of recognition due to lack of reciprocity may presently be the general rule. Breaking away from this pattern will require courts to take the initiative and

---

Judicial System, 25 B.C. INT'L & COMP. L. REV. 59 (2002); Patricia J. Blazey & Peter S. Gillies, *Recognition and Enforcement of Foreign Judgments in China*, 1 INT'L J. PRIV. L. 333 (2008).

[58]Zhang, *supra* note 46, at 170.

[59]Guangjian Tu, *Forum Non Conveniens in the People's Republic of China*, 11 CHINESE J. INT'L L. 341, 362 (2012); Song Lu, *The EOS Engineering Corporation Case and the Nemo Debet Bis Vexari Pro Una et Eadem Causa Principle in China*, 7 CHINESE J. INT'L L. 143, 156 (2008).

[60]*See, e.g.*, Shenqing Ren Dong Bin Shenqing Chengren yu Zhixing Waiguo Fayuan Minshi Panjue Jiufen An (申请人董斌申请承认与执行外国法院民事判决纠纷案) [In re Bin Dong's Application for Recognizing and Enforcing A Civil Judgment by A Foreign Court], CHINALAWINFO CLI.C.16663044 (Xiangtan Interm. People's Ct. Apr. 22, 2015) [hereinafter Dong's Application for Recognizing Canadian Court Judgment]; Eluosi Guojia Jiaoxiang Yuetuan, Atemengte Youxian Zeren Gongsi Shenqing Chengren YIngguo Gaodeng Fayuan Panjue An (俄罗斯国家交响乐团、阿特蒙特有限责任公司申请承认英国高等法院判决案) [In re Russian National Symphony Orchestra and Art Mont Co. Ltd.'s Application for Recognizing and Enforcing A Judgment by the High Court of England and Wales], CHINALAWINFO CLI.C.86947 (Beijing No. 2 Interm. People's Ct. Dec. 19, 2005) [hereinafter Russian National Symphony Orchestra's Application for Recognizing English Court Judgment].

[61]*See, e.g.*, Lin Qian (林倩), *Zailun Chengren yu Zhixing Waiguo Fayuan Panjue Zhong de Huhui Yuanze* (再论承认与执行外国法院判决中的互惠原则) [*Rethinking on the Principle of Reciprocity in Recognizing and Enforcing Foreign Judgments*], 2007(11) FAZHI YU SHEHUI (法制与社会) [LEGAL SYSTEM AND SOCIETY] 760, 761.

[62]*See, e.g.*, Dong's Application for Recognizing Canadian Court Judgment, *supra* note 60; Russian National Symphony Orchestra's Application for Recognizing English Court Judgment, *supra* note 60.

[63]Zhang, *supra* note 46, at 153.

[64]China has no judicial assistance treaties with Australia, Germany, Japan, Switzerland, the United Kingdom, or the United States.

make a friendly gesture,[65] even at some risk that the gesture will not be returned.[66] Chinese courts' equating the reciprocity principle with the existence of reciprocal practices might invite similarly unfriendly responses by their foreign counterparts.[67]

In the bankruptcy field, Chinese courts' recognition of foreign bankruptcy proceedings vacillates between two extremes: either a swift denial of recognition due to the lack of reciprocal practices or a nearly unconditional recognition based on bilateral treaties. Some scholars have advocated that Chinese courts should treat the lack of reciprocity as only a rebuttable presumption; upon finding that the foreign state where the petitioning bankruptcy proceeding was initiated has similar or lower standards for recognizing foreign bankruptcy proceedings, the presumption should be rebutted and reciprocity should be established.[68] The author favors this approach. There are so few instances of bankruptcy proceedings initiated by Chinese courts seeking recognition in foreign courts, that the lack of practices by foreign courts to recognize Chinese proceedings and judgments should not hold Chinese courts back from extending recognition.

Noticeably, the current recognition rule in article 5 of EBL 2006 is silent as to which party bears the burden of proof regarding reciprocity, or whether the court should investigate whether reciprocity exists. In this author's view, the party opposing recognition should bear the burden of proof that "there is substantial doubt" that the courts of the originating state would grant recognition to "comparable judgments" of Chinese courts.[69] This is

---

[65]*See, e.g.*, Bu, *supra* note 4, at 197 (in an unreported case, an English court accorded a Norwegian bankruptcy proceeding with foreign main proceeding status, despite the fact that there had been no prior recognition of English bankruptcy proceedings on the part of Norwegian courts, and that Norway had not adopted the Model Law).

[66]In 2006, the Court of Appeal of Berlin recognized a judgment rendered by China's Wuxi Intermediate People's Court in Jiangsu Province. Specifically, the German Court found that it was worthwhile for Germany to take the initiative in recognizing Chinese judgments, so that Chinese courts might give reciprocal treatment to German judgments in the future. *See* Zhang, *supra* note 46, at 168-70. In 2003, out of similar reasons, the Singapore High Court enforced a Chinese judgment. *See generally* Ik Wei Chong & Andrew Rourke, CLYDE & CO, *Singapore's High Court Enforces Chinese Judgment* (Sept. 2013), http://clydeco.com/uploads/Files/Publications/2013/Singapore%E2%80%99s_High_Court_enforces_Chinese_judgment_02.09.13.pdf.

[67]A Japanese court once refused to recognize and enforce a judgment by Shandong High People's Court because in 1994 the Dalian Intermediate People's Court in China's Liaoning Province refused to grant recognition to a Japanese judgment. For the Dalian Court's decision, see Case on the Application of Gomi Akira (A Japanese Citizen) to Chinese Court for Recognition and Enforcement of Japanese Judicial Decision, LAWINFOCHINA CLI.C.66791(EN) (Nov. 5, 1994). *See generally* Lin, *supra* note 61, at 761; *cf.* CCIC Finance Ltd. v. Guangdong Int'l Trust & Inv. Corp. & Anot., [2005] 2 H.K.C. 589 (H.C.) (finding that China's bankruptcy law then applicable was universal in scope and accordingly granted recognition).

[68]Wang & Wang, *supra* note 24, at 12.

[69]A similar approach was taken by the American Law Institute ("ALI") in proposing general rules for recognizing foreign judgments. *See* A.L.I., RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE, § 7(b) cmt. b (2006); *see also* The Courage Co. LLC v.

consistent with treating non-reciprocity as a rebuttable presumption, and might incentivize foreign courts to recognize bankruptcy judgments rendered by their Chinese counterparts.[70] Further, considering Chinese courts' relatively conservative stance in recognizing foreign judgments, the task of delineating the proof burden might better fall on the legislature. The reciprocity requirement urges China to modernize and streamline its cross-border insolvency rule, as "reciprocity exemplified by similar rule of law" is still prevalent globally.[71] Making the rule readily accessible to foreign practitioners and foreign courts is a preliminary step towards mutual understanding.

IV. PUBLIC POLICY: IS SPECIFICATION MUCH ADO ABOUT NOTHING?

There is a well-recognized exception to recognition of a foreign judgment or proceeding due to "public policy" considerations. According to the Model Law, it is supposed to be invoked only when recognition "would be manifestly contrary to the public policy."[72] This exception appears in many provisions setting the rules for foreign judgment recognition.[73] Although parties opposing recognition frequently refer to public policy,[74] the exception is rarely applied by the courts reviewing recognition petitions.[75] The same holds true for Chinese courts' examination of inbound recognition petitions

---

The ChemShare Corp., 93 S.W.3d 323, 331 (Tex. App. 2002); UNIFORM FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT (NAT'L CONF. COMM'R ON UNIFORM STATE L. 2005), § 4(d) cmt. 13, http://www.uniformlaws.org/shared/docs/registration%20of%20foreign%20judgments/UFCMJRA_Final_05.pdf.

[70]In commenting on the federal statute proposed by ALI for recognizing and enforcing foreign judgments, one commentator noticed that "[t]he reciprocity requirement was included in the ALI project 'not to make it more difficult to secure recognition and enforcement of foreign judgments, but rather to create an incentive to foreign countries to commit to recognition and enforcement of judgments rendered in the United States." Ronald Brand, FEDERAL JUDICIAL CENTER, *Recognition and Enforcement of Foreign Judgments* (Apr. 2012), at 12, https://www.fjc.gov/sites/default/files/2012/BrandEnforce.pdf (last visited July 8, 2018).

[71]*See, e.g., supra* note 14.

[72]UNCITRAL, UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION, 52 art. 6, U.N. Sales No. E.14.V.2 (2014) [hereinafter MODEL LAW]; *see also* 11 U.S.C.A. § 1506 (2005 Supp.).

[73]*See, e.g.*, Commission Regulation 593/2008 of June 17, 2008, on the Law Applicable to Contractual Obligations (Rome I) 2008 O.J. (L 177) 6, 15 art. 21 (EC); Application of the Convention of 1902 Governing the Guardianship of Infants (Neth. v. Swed.), 1958 I.C.J. Rep. 55 (Nov. 28); UNIFORM FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT, *supra* note 69, § 4(c)(3); HAGUE CONF. ON PRIV. INT'L L., *supra* note 44, art. 5.1(c); *see also generally* Alex Mills, *The Dimensions of Public Policy in Private International Law*, 4 J. PRIV. INT'L L. 201 (2008).

[74]*Cf.* Lanfang Fei, *Enforcement of Awards between Hong Kong and Mainland China: A Successful Model?*, 8 CHINESE J. INT'L L. 621, 631 (2009).

[75]Selinda A Melnik, *United States*, *in* CROSS-BORDER INSOLVENCY: A COMMENTARY ON THE UNCITRAL MODEL LAW, *supra* note 55, at 437, 443.

for bankruptcy proceedings.[76] However, despite its infrequent use or perhaps because of it, this exception is largely undefined and when it is used it reflects the unpredictable attitudes held by Chinese courts in their judicial practices.

A. Necessary Safety Valve

The continued existence of public policy exceptions in bankruptcy recognition petitions is a necessary evil, the effect of which has been minimized by U.S. and U.K. courts. Cross-border insolvency provisions and practices in the United States are in keeping with the spirit of the Model Law where this exception is only invoked in rare circumstances. First, the mere existence of conflict between foreign and domestic law —whether it be procedural or substantive— is insufficient to invoke the public policy exception.[77] This practice reflects the growing trend towards disregarding reciprocal practices in the field of cross-border insolvency,[78] and exemplifies the international community's greater tolerance of differences in the law.[79] For example, U.S. bankruptcy courts have held that the differences between domestic and foreign laws in terms of creditor priorities do not trigger a public policy exception.[80] In the same vein, the mere fact that certain domestic creditors would receive less in the foreign proceeding than they would in the local proceeding does not suffice to deny recognition of a foreign proceeding.[81]

U.S. courts deny recognition only when the foreign proceeding's procedural fairness is in doubt,[82] when recognition of the foreign proceedings frustrates a U.S. court's ability to administer and coordinate the foreign and ancillary proceedings,[83] or when such recognition impinges severely a U.S.

---

[76]*See generally* Xiao & Huo, *supra* note 56; Zhang, *supra* note 46.

[77]*In re* Ephedra Products Liability Litigation, 349 B.R. 333, 335-37 (S.D.N.Y. 2006) (noting that the creditor's inability to have a jury trial in Canada, to which the same creditor would have been entitled in the United States, does not justify the denial of recognition of the Canadian proceeding); *In re* Metcalfe & Mansfield Alternative Investment, 421 B.R. 685 (Bankr. S.D.N.Y. 2010) (observing that the mere fact that the U.S. court's recognition of a foreign proceeding would result in enforcing foreign insolvency orders, which would not be granted in a chapter 11 case, does not justify the denial of recognition). More generally, "[m]ere differences between the foreign and U.S. forums in policy or procedure will not normally rise to the level of public policy concern required to deny recognition." Brand, *supra* note 70, at 21.

[78]*See also* Look Chan Ho, *England*, *in* Cross-Border Insolvency: A Commentary on the UNCITRAL Model Law, *supra* note 55, at 141, 188.

[79]*Cf.* Jos Kösters, *Public Policy in Private International Law*, 29 Yale L.J. 745.

[80]*In re* Qimonda AG Bankr. Litig., 433 B.R. 547, 570 (E.D. Va. 2010).

[81]*In re* Ernst & Young, Inc., 383 B.R. 773, 776 (Bankr. D. Colo. 2008).

[82]*In re* Qimonda AG Bankr. Litig., 433 B.R. 547, 570 (E.D. Va. 2010).

[83]*In re* Gold & Honey, 410 B.R. 357 (Bankr. E.D.N.Y. 2009) (determining that the creditor violated the automatic stay when the foreign proceeding was seeking recognition); *In re* SNP Boat Serv. SA, 453 B.R. 446 (Bankr. S.D. Fla. 2011) (noting that failure to comply with an order by the U.S. court might revoke the court's prior recognition of the foreign proceeding); *cf. In re* ABC Learning Ctr. Ltd., 445 B.R. 318 (Bankr. D. Del. 2010) (stating that the fact that the granting of the chapter 15 relief would lead to an automatic stay affecting the course of the U.S. litigation to the benefit of the debtor would not in itself trigger the public policy exception).

constitutional or statutory right.[84] In the United Kingdom, due to the scarce invocation of the Cross-border Insolvency Regulations 2006,[85] the public policy exception is also rarely applied. However, in the U.K. the exception is intended to act as a safety valve against "non-friendly" countries or the "abuse of power," the existence of which is necessary and understandable when reciprocity is expressly excluded as a precondition for recognition.[86]

B. Public Policy Through the Lens of the VIE Structure

In the United States and the United Kingdom, where the "rescue culture" is prevalent,[87] the purview of the public policy exception is largely undefined. In China, the legislators have indicated that it is to be invoked when the foreign judgment or proceeding (1) violates Chinese laws' basic principles, (2) jeopardizes state sovereignty, (3) endangers national security or public interests, or (4) undermines domestic creditors' legitimate rights and interests. Admittedly, these factors remain vague and susceptible to varying interpretations. And with the decrease in bankruptcy filings, there is a dearth of judicial decisions interpreting these factors.[88] In the few decisions that have interpreted these exceptions, Chinese courts have shown a tendency to apply them broadly. For example, in theory, the notion of "basic principles of laws" should be interpreted more narrowly than the "mandatory rule of national law."[89] Unfortunately, Chinese local courts tend to apply this limb of the public policy exception rather broadly,[90] and equate basic law principles with specific mandatory rules.[91]

The risk of a Chinese court invoking the public policy exception is greater when the failing business employs a VIE structure.

---

[84]*In re* Toft, 453 B.R. 186 (Bankr. S.D.N.Y. 2011) (the recognition of the foreign proceeding violated the protection against email disclosure by internet service providers).

[85]20 Mar. 2006, Par Deb HC (2006) col. 5 ("It should be noted that in the past there have been relatively few cases of cross-border insolvency proceedings involving U.K. entities and, presumably, larger groups. Therefore, use of the regulations in proceedings is expected to be low. . . ."); *see also* 22 Mar. 2006, Par Deb HL (2006) col. GC138 ("[I]n the past, there have not been many instances of cross-border insolvency proceedings involving U.K. entities. In the future, too, utilization of the regulations is expected to be infrequent.").

[86]20 Mar. 2006, Par Deb HC (2006) col. 6; 22 Mar. 2006, Par Deb HL (2006) col. GC139.

[87]Roy Goode, Principles of Corporate Insolvency Law §§ 1-32, 2-23, 11-03 (Sweet & Maxwell, 4th ed. 2011).

[88]Noticeably, bankruptcy case filings after the implementation of EBL 2006 assumed a downward trend. *See supra* note 8.

[89]Model Law, *supra* note 72, at 52 ¶ 102.

[90]Fei, *supra* note 74, at 631 ¶ 24; *see also* Lanfang Fei, *Public Policy as a Bar to Enforcement of International Arbitral Awards: A Review of the Chinese Approach*, 26 Arb. Int'l 301 (2010).

[91]*See, e.g.*, S.P.C., *Guanyu Xianggang Hengjin Liangyou Shipin Youxian Gongsi Shenqing Zhixing Xiangang Guoji Zhongcai Zhongxin Zhongcai Caijue An de Fuhan* (关于香港亨进粮油食品有限公司申请执行香港国际仲裁中心仲裁裁决案的复函) [*Reply Regarding the Application by Hong Kong Hengjin Cereal & Oil Food Co., Ltd. to Enforce Hong Kong International Arbitration Centre's Arbitral Award*] (Nov. 14, 2003), Chinalawinfo CLI.3.105248.

> The accounting definition of [VIE] means an entity in which an investor holds a controlling interest that is not based on owning the majority of voting rights. To non-accountants, the VIE structure is a business structure that is widely used by Chinese companies in certain 'sensitive' or 'strategic' business sectors that have restrictions on foreign investment under the 2015 Foreign Investment Industrial Guidance Catalogue . . . .
>
> The simplest VIE structure includes [three entities:] a foreign holding company which is usually an exempt limited company in the Cayman Islands, a [Chinese] wholly foreign owned enterprise (WFOE) and a [Chinese] domestic operating company owned only by Chinese nationals. The founders, foreign investors and other shareholders hold equity in the Caymans holding company, which in turn owns a 100% equity interest in the WFOE. The operating company is a purely [Chinese] domestic company that is licensed to operate in the restricted industry in China. The key point of the VIE structure is that the WFOE exercises de facto control over the operating company through a series of contractual arrangements entered [into] between the WFOE and the operating company. . . . The Chinese founders of the domestic company borrow funds from the WFOE and pledge their shares in the operating company as collateral under the loan agreement. The WFOE usually provides technical services to the operating company and is compensated for its services. The financial statements of the Cayman holding company are consolidated with the WFOE and VIE which makes the holding company financeable.[92]

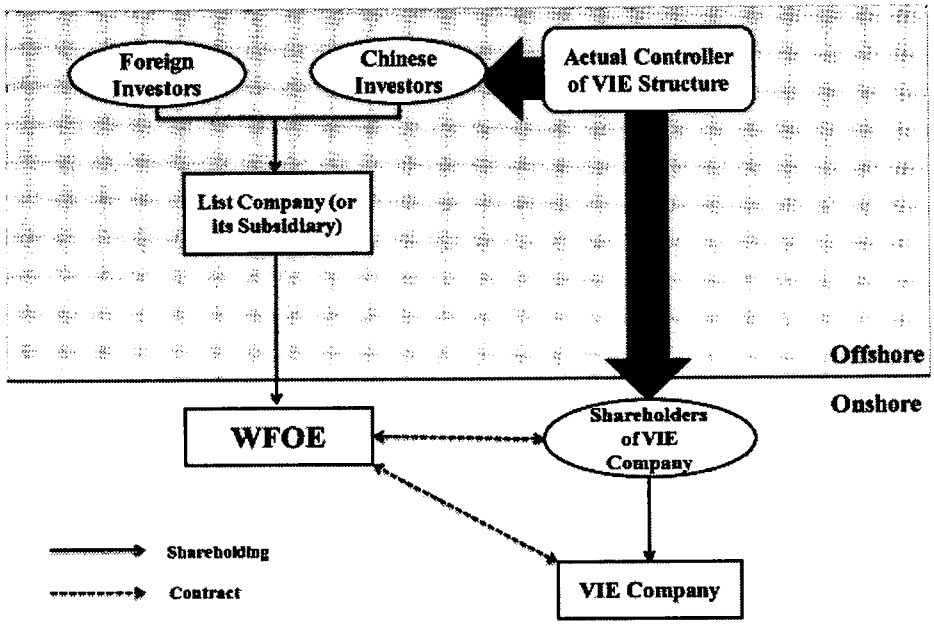
The following chart illustrates the relationships between the three entities.[93] The offshore holding company is denominated as the "List Company" in this chart.

---

[92]Fred Greguras, *The China VIE Structure is Vlunerable - So Why is it Still Used?*, ROYSE LAW (Nov. 18, 2016, 1:01 p.m.), https://rroyselaw.com/international-law/ecommerce/the-china-vie-structure-is-vulnerable-so-why-is-it-still-used/.

[93]Rocky T. Lee, *Understanding the VIE Structure: Necessary Elements for Success and the Legal Risks Involved*, LEXOLOGY (Aug. 10, 2011), https://www.lexology.com/library/detail.aspx?g=AA820b96-ff4a-4704-b457-243dce432a81.

Shareholding / Contract Relationship in A China-Based VIE Structure



Chinese policymakers currently hold ambivalent attitudes towards the legality of VIE agreements.[94] These arrangements are employed to evade regulatory policies regarding market access, foreign mergers and acquisitions of Chinese assets, foreign currency control, and administrative review of Chinese corporations' foreign listings.[95] Some view the VIE structure as "an attempt to conceal illegal goals under the disguise of legitimate forms."[96] The structure is also prone to risk as only the contractual agreements,[97] not direct ownership through equity investment, are in place to ensure the whole structure functions properly. When this highly policy-sensitive VIE structure fails,[98] the legitimacy and enforceability of the various agreements securing

[94]Xianwu Zeng & Lihui Bai, KING & WOOD MALLESONS, *Variable Interest Entity Structure in China*, CHINA LAW INSIGHT (Feb. 9, 2012), http://www.chinalawinsight.com/2012/02/articles/corporate/foreign-investment/variable-interest-entity-structure-in-china/; Thomas Y. Man, *Policy Above the Law: VIE and Foreign Investment Regulation in China*, 3 PEKING U. TRANSNAT'L L. REV. 215 (2015).

[95]Wengwei Ma, *The Perils and Prospects of China's Variable Interest Entities: Unraveling the Murky Rules and the Institutional Challenges Posed*, 43 HONG KONG L.J. 1061, 1061-63 (2013).

[96]Min Fa Zongze (民法总则) [General Provisions of Civil Law] (promulgated by the N.P.C., Mar. 15, 2017, effective Oct. 1, 2017), art. 153(1), LAWINFOCHINA CLI.1.291593(EN); Hetong Fa (合同法) [Contract Law] (promulgated by the N.P.C., Mar. 15, 1999, effective Oct. 1, 1999), art 53(c), LAWINFOCHINA CLI.1.21651(EN). *See generally* Man, *supra* note 92, at 217-18; Serena Y. Shi, *Dragon's House of Cards: Perils of Investing in Variable Interest Entities Domiciled in the People's Republic of China and Listed in the United States*, 37 FORDHAM INT'L L.J. 1265, 1294-95.

[97]Zeng & Bai, *supra* note 94.

[98]Chinese issuers with foreign listings must overcome three barriers: China's regulatory restrictions on

the VIE structure may be called into question.[99] As a result, few interested parties are willing to initiate bankruptcy proceedings in China or to seek recognition of foreign proceedings before Chinese courts.

In refining China's cross-border insolvency rules, it is the author's view that the legislature needs to clarify when recognition "endangers national security or public interests" and "undermines domestic creditors' legitimate rights and interests."[100] For example, in the case of a company employing the VIE structure, the actual persons in control of the business hold triplicate roles as: (1) shareholders of the VIE company conducting the substantial business in China; (2) shareholders of the foreign-listed company; and (3) creditors of the WFOE within China. Through the third role, these actual controllers might acquire creditor status against the offshore company. If the offshore company is liquidated in its state of incorporation, and the proceeding seeks a Chinese court's recognition, will the actual controllers—who are most likely Chinese nationals domiciled in China—be deemed as "creditors within China's territory?" This scenario reveals the need for further clarification of the public policy exception.

V. APPLICATION OF THE COMI CONCEPT IN CHINA'S BANKRUPTCY LAW

Article 3 of EBL 2006 confers exclusive jurisdiction for a bankruptcy proceeding on the debtor company's domiciliary court. However, this narrow grant of jurisdiction is insufficient to address the inbound recognition of foreign petitions or to secure foreign recognition of domestic judgments. Some commentators have expressed the view that article 265 of the Civil Procedure Law might fill this gap with respect to a Chinese courts' bankruptcy jurisdiction over offshore companies,[101] based on the presence of assets, a representative office, or the like.[102] If the Chinese courts' jurisdiction is unable to obtain recognition by foreign courts, then the Chinese bankruptcy pro-

foreign investments in certain fields, China's foreign equity caps, and the administrative process for obtaining permission to list overseas. *See* Kelly Gregory, CLIFFORD CHANCE, *VIE Structure in China Faces Scrutiny* (Oct. 6, 2011), http://www.cliffordchance.com/briefings/2011/10/vie_structure_inchinafaces scrutiny.html; Kevin Rosier, U.S.-CHINA ECON. & SEC. REV. COMM'N, *The Risk of China's Internet Companies on U.S. Stock Exchange* (June 18, 2014), https://www.uscc.gov/sites/default/files/Research/The%20Risks%20of%20China%E2%80%99s%20Internet%20Companies%20on%20U.S.%20Stock%20Exchanges%20-%20with%20Addendum.pdf.

[99]Ma, *supra* note 95.

[100]EBL 2006, *supra* note 2, art. 5(2).

[101]Shi, *supra* note 17, at 55 ("[Enterprises] without domicile in China shall . . . be subject to the jurisdiction of Chinese courts on the basis of presence of assets, representative office and subject matter in China."). *But cf.* Wang & Wang, *supra* note 24, at 12 (taking the view that the exclusive jurisdiction of the domiciliary courts in bankruptcy cases precludes the application of provisions in the Civil Procedure Law on jurisdiction in foreign-related cases).

[102]Article 265 of the Civil Procedure Law reads as translated:

ceeding might be rendered meaningless. Therefore, it is this author's view that Chinese courts should borrow the concept of COMI used in major cross-border insolvency cases and determine whether China is the COMI for offshore companies.

In the overwhelming majority of inbound recognition petitions before U.S. and U.K. courts, the identification of COMI is "straightforward" and self-evident. In other cases, the determination of where the COMI lies and which bankruptcy is the foreign main proceeding may be debatable. The means of reaching a conclusion as to COMI status should be both objective and ascertainable,[103] corresponding to the place where the company administers its interests regularly in a manner identifiable by third parties.[104] For example, when the debtor's place of incorporation is not also its center of business, the technical or formal criteria for jurisdiction should give way to the functional realities of the business.[105] To arrive at a determination of this functional reality, UNCITRAL has codified twelve factors covering financial, administrative, and legal considerations.[106]

In practice, U.S. courts give more weight to administrative elements than to the COMI factors that would be more ascertainable by third parties. This remains true irrespective of whether the court equates COMI to "the principal place of business,"[107] or whether it utilizes the factor-based approach.[108]

> Where an action is instituted against a defendant which has no domicile within China's territory for a contract dispute or any other property right or interest dispute, if the contract is signed or performed within China's territory, the subject matter of action is located within China's territory, the defendant has any impoundable property within China's territory, or the defendant has any representative office within China's territory, the people's court at the place where the contract is signed or performed, where the subject matter of action is located, where the impoundable property is located, where the tort occurs or where the representative office is located may have jurisdiction over the action.

Civil Procedures Law, *supra* note 29, art. 265.

[103]Case C-341/04, Eurofood IFSC Ltd., 2006 E.C.R. I-3854, I-3869 ¶¶ 36-37 [hereinafter Eurofood].

[104]MODEL LAW, *supra* note 72, at 44-45 ¶ 84; *see also* UNCITRAL Working Group V (Insolvency L.), *Interpretation and Application of Selected Concepts of the UNCITRAL Model Law on Cross-Border Insolvency Relating to Centre of Main Interests (COMI)*, ¶ 123F, U.N. Doc. A/CN.9/WG.V/WP.112 (finding that in locating the debtor's COMI, the location readily ascertainable by creditors and the location where the central administration of the debtor takes place are two "principal factors" to be considered in the overall analysis) (Feb. 11, 2013) [hereinafter *UNCITRAL COMI Interpretation*].

[105]THE EC REGULATION ON INSOLVENCY PROCEEDINGS: A COMMENTARY AND ANNOTATED GUIDE § 3.11 (Gabriel Moss, Ian F. Fletcher & Stuart Isaacs eds., OUP 2009) ("An inherent aspect of the COMI concept is to ensure that functional realities are capable of displacing purely formal criteria.").

[106]*UNCITRAL COMI Interpretation*, *supra* note 104, at ¶¶ 123G, 123I.

[107]*In re* Suntech Power Holdings Co., Ltd., 520 B.R. 399, 413-15 (Bankr. S.D.N.Y. 2014). The emphasis on the administrative element can be attributed to the essence of "principal place of business" itself, as the U.S. Supreme Court noticed, "if the bulk of a company's business activities *visible* to the public take place in New Jersey, while its top officers *direct* those activities just across the river in New York, the 'principal place of business' is New York." *Hertz Corp. v. Friend*, 559 U.S. 77, 96 (2010) (emphasis added). *But cf. In re* Millennium Global Emerging Credit Master Fund Ltd., 458 B.R. 63, 77-78 (Bankr. S.D.N.Y.

In contrast, U.K. courts and the European Court of Justice address the elements of ascertainability and objectivity on equal footing.[109] The courts across the Atlantic also give different weight to the place of the debtor's registered office. In the context of corporate bankruptcy, U.K. courts give considerable weight to the debtor's registered office.[110] For U.S. courts, however, the registered office's evidentiary value is no more than a proxy probative of COMI,[111] and even without any opposition to recognition, the petitioned court would investigate independently whether all the elements for recognition are met.[112] Ultimately, the two elements of COMI determination balance out, and when a U.S. or U.K. domestic court locates a specific debtor company's COMI on a case-by-case basis, they will probably reach the same conclusion even though they may take different analytical paths.[113]

Currently, China has no domestic equivalent for the Model Law's approach. Even if the Chinese legislature were to immediately incorporate the Model Law, the great majority of Chinese local courts would most likely be unable to handle the problems ensuing from cross-border communication; nor would stakeholders trust China's rule of law system to either initiate bank-

---

2011) (emphasizing specifically the ascertainability element even if principal place of business was taken as a proxy for COMI).

[108]*In re* Betcorp Ltd., 400 B.R. 266, 272 (Bankr. D. Nev. 2009) ("Although Betcorp was involved, through its subsidiaries, in business operations in several countries, Australia remained its administrative and executive nerve center.").

[109]Re Stanford International Bank Ltd. [2009] EWHC 1441 (Ch D) ¶¶ 61, 67 (Mr. Justice Lewison found that none of the factors used by U.S. jurisprudence to locate COMI were qualified by the ascertainability requirement, and that such was not the position taken by the European Court of Justice in *Eurofood*, *supra* note 103), *aff'd*, [2010] EWCA Civ. 137, ¶ 56(4); *see also* Re Daisytek-ISA Ltd. & Ors., [2004] BPIR 30 ¶ 15 (UKHC).

[110]Eurofood, *supra* note 103, at I 3868 ¶ 35. *But cf.* Case C-396/09, Interedil Srl. v. Fallimento Interedil Srl., 2011 E.C.R. I-9939, I-9959 ¶ 59. *See generally* BOB WESSELS, INTERNATIONAL INSOLVENCY LAW § 10570 (Kluwer, 3rd ed. 2012); MIGUEL VIRGOS & FRANCISCO GARCIMARTIN, THE EUROPEAN INSOLVENCY REGULATION: LAW AND PRACTICE 44 (Kluwer, 2004); UNCITRAL, INSOL & WORLD BANK, *11th Multinational Judicial Colloquium on Insolvency*, 4 ¶ 10, UNCITRAL (Mar. 21-22, 2015, San Francisco), http://www.uncitral.org/pdf/english/news/EleventhJC.pdf.

[111]*In re* SPhinX, Ltd., 351 B.R. 103, 117 (S.D.N.Y. 2006); *In re* Tri-Continental Exch. Ltd., 349 B.R. 627, 635 (Bankr. E.D. Cal. 2006); *see generally*, Jay L. Westbrook, *Locating the Eye of the Financial Storm*, 32 BROOK. J. INT'L L. 1019, 1033-34 (2007) ("[T]he Model Law and Chapter 15 give limited weight to the presumption of the jurisdiction of incorporation as the COMI."); Jay L. Westbrook, *Bankruptcy Tourism and FNC*, 3 INT'L J. PROC. L. 159, 163, 165 (2013) [hereinafter *Bankruptcy Tourism*]; Jesse Hallock, *Time Out: The Problematic Temporality of COMI Analysis in Chapter 15 Bankruptcy Cases in the Second Circuit*, 2015 COLUM. BUS. L. REV. 1074, 1083-85 (finding that "chapter 15's legislative history and subsequent court decisions have largely stripped the [registered office] presumption of consequence.").

[112]*In re* British Am. Ins. Co. Ltd., 425 B.R. 884 (Bankr. S.D. Fla. 2010); *In re* Chiang, 437 B.R. 397 (Bankr. C.D. Cal. 2010); *In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd, 374 B.R. 122, 125-26 (Bankr. S.D.N.Y. 2007), *aff'd*, 389 B.R. 325 (S.D.N.Y. 2008; Melnik, *supra* note 75, at 443 ("Even if no interested party objects to recognition, the bankruptcy court has an independent duty, essentially as objector in fact, to review all submissions and make a reasoned determination that all recognition requisites have been satisfied by the petitioner.").

[113]Westbrook, *Bankruptcy Tourism*, *supra* note 111, at 163-65.

ruptcy claims in China or seek recognition of foreign insolvency proceedings in Chinese courts. Therefore, in the interim, what kind of foreign bankruptcy judgments will be recognized by Chinese courts?

Following the collapse of a multinational enterprise, several jurisdictions might initiate parallel bankruptcy proceedings. Facing recognition petitions from different jurisdictions against the same debtor, it is judicially inefficient and impractical for Chinese courts to recognize them all, even if all the elements set forth in article 5 of EBL 2006 are satisfied as to each petition. Moreover, multiple recognitions granted by different courts might run counter to the principle of res judicata.[114] Since article 3 of EBL 2006 confers jurisdiction to open a bankruptcy proceeding exclusively on the debtor company's domiciliary court, it is this author's view that, until the Model Law is enacted in China, Chinese courts should grant recognition only to judgments rendered by the debtor's domiciliary court.[115]

The next question is what constitutes a debtor company's domicile? According to article 10 of China's Company Law, a company is domiciled in the place where it maintains its "main office handling the company's business," or *zhuyao banshi jigou* ("ZBJ") in Chinese.[116] The concept of ZBJ was intended to be the company's "nerve center,"[117] very similar to the concept of COMI. If this notion is carried through in administrative and judicial practices, ZBJ may be equated with the "principal place of business" under U.S. law.[118] Some Chinese scholars find that China's existing bankruptcy rule of ZBJ is equivalent to COMI.[119]

However, too often in practice, a company's registered office is readily accepted as the company's ZBJ, thus tying ZBJ to a mere legal formality, rather than the functional reality of the business. By way of illustration, in 2010, the Shenzhen Intermediate People's Court ("Shenzhen Court") opened the bankruptcy proceeding of Powerise Information Technology Co. Ltd.

---

[114]*See, e.g.*, Civil Procedure Law Interpretation, *supra* note 48, art. 533(2) (providing that upon a Chinese court's recognition of a foreign judgment, Chinese courts shall not accept any case filing by the interested parties concerning the same dispute).

[115]Wang & Wang, *supra* note 24, at 11.

[116]*See also* Civil Procedure Law Interpretation, *supra* note 48, art. 3(1).

[117]Tiaowen Shiyi (条文释义) [Interpretation] of Article 10 of Gongsifa (2005 nian Xiuding) (公司法 (2005年修订)) [Company Law (2005 Amendment)] (promulgated by the Standing Comm. N.P.C., Oct. 27, 2005, effective Jan. 1, 2006), CLI.1.60597 (Chinalawinfo). Article 10 of China's Company Law remains unchanged after the 2013 amendment. *See also* ZHAO XUDONG (赵旭东), XIN GONGSI FA TIAOWEN SHIJIE (新公司条文释解) [ARTICLE-BY-ARTICLE INTERPRETATION OF THE NEW COMPANY LAW] 22 (People's Court Press, 2005) (finding that "'ZBJ' shall be where the company decides and handles its business, and is the organizational agency of nerve center characteristics.").

[118]Hertz Corp. v. Friend et al., 559 U.S. 77, 90, 92-93, 97 (2010).

[119]Bu, *supra* note 4, at 193; He Qisheng (何其生), *Xin Shiyong Zhuyi yu Wanjin Pochan Chongtu Fa de Fazhan* (新实用主义与晚近破产冲突法的发展) [*New Pragmatism and the Recent Development in the Conflict of Laws for Bankruptcy*], 6 FAXUE YANJIU (法学研究) [CHINESE J.L.] 140, 149 (2007).

("Powerise").[120] Although Shenzhen was where Powerise was registered and listed, Powerise's annual report revealed that its ZBJ was in Sichuan Province, where Powerise's major shareholders and employees resided.[121] Accordingly, the Shenzhen Court's jurisdiction to open the bankruptcy proceeding was based on the company's registered office in Shenzhen. Admittedly, the Shenzhen Court is more experienced than its counterpart in Sichuan Province to handle bankruptcy cases and, therefore, neither the debtors or creditors were motivated to challenge its jurisdiction. However, the absence of opposition from interested parties does not justify the Shenzhen Court's seizure of jurisdiction over Powerise's bankruptcy.[122]

Thus, although ZBJ was originally intended to be the company's nerve center, in practice it has been identified with the registered office. The benefit of this practice is that it provides more predictability. Since a company can only have one registered office,[123] venue becomes definite and self-evident. The disadvantage of this practice is equally obvious: a company should be reorganized or liquidated where it has the most substantial contacts.[124] In cases of offshore companies and VIE structures, the nerve center is often somewhere other than the company's registered office.[125] It is this author's view that the original legislative intention should be followed, and ZBJ should be equated with the principal place of business, rather than the registered office. When deciding whether to accept a bankruptcy filing, Chinese courts should determine whether the debtor company's ZBJ is within the jurisdiction where the parties initiated the foreign proceeding.

---

[120]Order to Conduct Reorganization of Powerise Information Technology Co., Ltd. (Shenzhen Interm. People's Ct., May 27, 2011). *See generally* CHUANGZHI XINXI KEJI GUFEN YOUXIAN GONGSI (创智信息科技股份有限公司) [POWERISE INFORMATION TECHNOLOGY CO., LTD. ("POWERISE")], *Chuangzhi Xinxi Keji Gufen Youxian Gongsi Chongzheng Jihua Zhixing Jinzhan Qingkuang de Gongggao* (创智信息科技股份有限公司重整计划执行进展情况的公告) [*Announcement Regarding the Progress in Carrying out the Reorganization Plan of Powerise Information Technology Co., Ltd.*], SHENZHEN SECURITIES EXCHANGE (June 1, 2012), http://disclosure.szse.cn/finalpage/2012-06-01/61073603.PDF.

[121]*See* POWERISE INFORMATION TECHNOLOGY CO., LTD., *Annual Report (2013)* 4-5, NAT'L EQUITIES EXCHANGE & QUOTATIONS (Dec. 24, 2014), http://www.neeq.com.cn/disclosure/2014/1224/64655504.pdf.

[122]Civil Procedure Law, *supra* note 29, art. 36 (providing that after accepting a case filing, a court shall transfer the case to the competent court if it finds itself that it has no jurisdiction to accept the case).

[123]Gongsi Dengji Guanli Tiaoli (公司登记管理条例) [Regulation on the Administration of Company Registration] (promulgated by the St. Council, June 24, 1994, effective July 1, 1994, amended Feb. 6, 2016), art. 12.

[124]Miguel Virgos & Etienne Schmit, *Report to the Council of the European Union on the Convention on Insolvency Proceedings* (May 3, 1996) 51-52 § 75, https://www.r3.org.uk/media/documents/technical_library/Legislation/Virgos-Schmit-Report.pdf.

[125]MPOTEC GmbH, [2006] B.C.C. 681, 681-82, 686 (Commercial Court of Nanterre). *See also* THE EC REGULATION ON INSOLVENCY PROCEEDINGS, *supra* note 105, § 3.11 ("An inherent aspect of the COMI concept is to ensure that functional realities are capable of displacing purely formal criteria.").

VI. SUGGESTIONS FOR MODERNIZING CHINA'S CROSS-BORDER INSOLVENCY RULES

In conclusion, the author wishes to offer six recommendations for changes to China's existing bankruptcy and general civil law provisions in the hope that these suggestions will foster greater cooperation between Chinese and foreign courts in the administration of bankruptcy proceedings.

First, Chinese courts should allow ancillary bankruptcy proceedings in China. If they did, Chinese courts would likely be more willing to recognize foreign bankruptcy judgments because recognition would not deprive the Chinese courts of the jurisdiction to open bankruptcy proceedings against the same debtor. Differentiating between main and ancillary proceedings would enable Chinese courts to optimize Chinese creditors' interests, even with a prior Chinese recognition of foreign bankruptcy judgments. The existence of ancillary proceedings would pave the way to a Chinese equivalent of the Model Law, which in turn would lead to greater cross-border cooperation between China and other nations.

Second, Chinese legislators need to clarify who may petition for recognition of a foreign bankruptcy judgment. Both the *travaux preparatoires* of EBL 2006 and the adopted provision in the Chinese language fail to address this issue. According to the interpretation of the Civil Procedure Law promulgated by China's Supreme Court, only a party to the foreign proceeding may petition for, or the foreign court itself may request, recognition of a legally effective judgment made outside of China's jurisdiction.[126] The same is true with respect to China's bilateral judicial assistance treaties.[127] Therefore, a natural question is whether a foreign representative, who is usually a participant in petitioning recognition in U.S. and U.K. courts, can be deemed "a party to the foreign proceeding" empowered to petition for recognition before Chinese courts. The English translation of EBL 2006, released by the NPC, is confusing. It specifies that only the foreign court rendering the bankruptcy judgment can petition for recognition—a restriction which is significantly adverse to greater cooperation in foreign bankruptcy proceedings.[128] Hope-

---

[126]Civil Procedure Law Interpretation, *supra* note 48, art. 533(1).

[127]*See, e.g.*, Zhonghua Renmin Gonghe Guo he Yidali Gonghe Guo Guanyu Minshi Sifa Xiezhu de Tiaoyue (中华人民共和国和意大利共和国关于民事司法协助的条约) [Treaty on Judicial Assistance in Civil Matters between the P.R.C. and the Republic of Italy], May 20, 1991, art. 23(1), CLI.T.250 (Chinalawinfo); Zhonghua Renmin Gonghe Guo he Falanxi Gonghe Guo Guanyu Minshi, Shangshi Sifa Xiezhu de Xieding (中华人民共和国和法兰西共和国关于民事、商事司法协助的协定) [Treaty on Judicial Assistance in Civil and Commercial Matters between the P.R.C. and the Republic of France], May 4, 1981, art. 20(1), CLI.T.632 (Chinalawinfo).

[128]*See* Official Translation of EBL 2006, *supra* note 6, art. 5(2) ("Where a legally effective judgment or ruling made on 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 recognize and enforce it . . . .").

fully, this provision has only been mistranslated. But it can be misleading to foreign bankruptcy representatives and carries the danger of being misapplied by Chinese courts.

Third, there should be clearer guidance as to which Chinese local court should handle the inbound recognition petition. Following the provisions in China's Civil Procedure Law, the court within whose jurisdiction the foreign debtor has significant assets, a representative office, or material contacts is the competent venue to grant recognition.[129] Moreover, the recognition petition should be presented to the competent intermediate court.[130] In the intellectual property case of *Tsuburaya Productions v. Sompote Saengduenchai*, China's Supreme Court expressly confirmed that the power to recognize foreign judgments and rulings vests *exclusively* with courts at the intermediate level.[131] In cases of multiple filings, the immediate and seemingly convenient solution is to follow the first-to-file rule.[132] However, in the European Union operating under EC Regulation,[133] adherence to this rule, coupled with the possibility of parallel proceedings, might lead to forum shopping and greater legal uncertainty.[134] To avoid repetitive case filings, a clear "hierarchy of choices" should be inserted into China's bankruptcy regime.[135]

Fourth, once a Chinese court grants recognition, it should also impose an automatic stay against any Chinese action against the debtor or its property. As noted above, there may be a long way to go before Chinese courts are capable of cooperating with their foreign counterparts in liquidating or reorganizing a debtor's assets. Neither the legislature nor the judiciary is ready to sort out which country's distribution rules should be applied in enforcing

---

[129]Civil Procedure Law, *supra* note 29, art. 265.

[130]*Id.* art. 281.

[131]S.P.C., *Zuigao Renmin Fayuan Zhishi Chanquan Anjian Niandu Baogao (2013 nian) Zhaiyao* (最高人民法院知识产权案件年度报告（2013年）摘要) [*Summary of the 2013 Annual Report on Intellectual Property Cases of the S.P.C.*], Case No. 38, CHINALAWINFO CLI.C.2231583.

[132]Civil Procedure Law, *supra* note 29, art. 35.

[133]An illustrative case concerns the collapse of the Pamalat group. Eurofood, *supra* note 103; *see also generally* Alesia Ranney-Marinelli, *Overview of Chapter 15 Ancillary and Other Cross-Border Cases*, 82 AM. BANKR. L.J. 269, 294 (2008).

[134]Matteo M. Winkler, *From Whipped Cream to Multibillion Euro Financial Collapse: The European Regulation on Transnational Insolvency in Action*, 26 BERKELEY J. INT'L L. 352, 369, 371 (2008); Alexandra Ragan, *COMI Strikes A Discordant Note: Why U.S. Courts are not in Complete Harmony Despite Chapter 15 Directives*, 27 EMORY BANKR. DEV. J. 117, 139 (2010-2011) ("A race to judgment, however, is not unique to international insolvency. Rather, a race ensues whenever there is parallel litigation, especially when a system automatically recognizes the validity of the first judgment.").

[135] 1 COLLIER ON BANKRUPTCY § 4.04[1] (Alan Resnick & Henry Sommer eds., 16th ed. 2014); *see also* H.R. REP. 109-31, pt. 1, at 119 (2005) ("The venue provisions for cases ancillary to foreign proceedings . . . provide a hierarchy of choices beginning with principal place of business in the United States, if any. If there is no principal place of business in the United States, but there is litigation against a debtor, then the district in which the litigation is pending would be the appropriate venue. In any other case, venue must be determined with reference to the interests of justice and the convenience of the parties.").

foreign bankruptcy judgments. Thus, the true effect of recognizing a foreign court's bankruptcy judgment addressing a debtor's assets within China remains in doubt.[136] However, China should at least show comity to a foreign court's judgment by preventing the debtor from further repaying its Chinese creditors once Chinese courts grant recognition. Making the automatic stay mandatory relief after recognition will provide a greater incentive to filing foreign recognition petitions in China, which in turn will improve the Chinese legal system's credibility around the world.

Fifth, Chinese legislators should clarify whether the jurisdictional provision for foreign-related cases in the Civil Procedure Law allows Chinese courts to open bankruptcy proceedings against offshore companies. Referencing article 4 of EBL 2006,[137] and article 265 of the Civil Procedure Law, some commentators believe that this jurisdiction exists.[138] Yet to reach this conclusion one must adopt a more flexible understanding of the word "procedure" in article 4 of EBL 2006 to also encompass "jurisdiction." If this leniency is accepted, the Civil Procedure Law will complement the jurisdictional provision of EBL 2006, and extend Chinese courts' jurisdictions to non-domiciliary debtors who conduct business within China's territory. Of course, this is essentially a matter of the domestic division of jurisdiction; as long as foreign courts agree that the debtor's COMI is in China, the bankruptcy proceedings against the debtor will be accorded main forum status, irrespective of which Chinese court initiates the proceeding. However, to display refined legislative skills, the applicability of these provisions should be clarified.

Finally, there should be a self-restraint provision in China's law that provides that a Chinese court's recognition of foreign bankruptcy judgments would have legal effect only within China's territory. Such self-imposed jurisdictional restrictions are necessary for the facilitation of cross-border bankruptcy cooperation.[139]

From the formal authorization of the National Bankruptcy Review Commission to address the transnational insolvencies issues to the final adoption of chapter 15, it took the United States eleven years and several rounds of revisions, vetoes, and counterproposals.[140] By inserting a provision confirm-

---

[136]EBL 2006, *supra* note 2, art. 5(2).

[137]Article 4 provides for the application of the Civil Procedure Law in conducting the bankruptcy *procedures* absent specific provisions in EBL 2006.

[138]Shi, *supra* note 17, at 55; Bu, *supra* note 4, at 202-03. *But cf.* Wang & Wang, *supra* note 24, at 12 (taking the view that the exclusive jurisdiction of the domiciliary courts in bankruptcy cases precludes the application of the Civil Procedure Law provisions on jurisdiction in foreign-related cases).

[139]Shi, *supra* note 17, at 55.

[140]*See generally* Judith Benderson, *Introduction: A history of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 54(4) U.S. ATT'Y'S BULL. 1 (2006), http://www.justice.gov/usao/eousa/foia_reading_room/usab5404.pdf (last visited July 8, 2018).

ing that EBL 2006 is extraterritorial in scope, China has taken a giant step forward[141] to overcome the stalemate arising from frequent conflicts in domestic laws.[142] However, the long perceived need to obtain and maintain foreign investment necessitates even bolder steps, as China's current bankruptcy provisions detail neither efficient recognition procedures nor effective mechanisms for enforcement. Cooperation takes time and never arises from unilateral conduct, but Chinese courts should initiate as well as respond to efforts to foster greater cross-border bankruptcy cooperation.

The process to achieve full cooperation will take time, but it would be assisted by greater clarification of Chinese law and adherence to legislative intentions by Chinese courts, while at the same time allowing judicial discretion to tackle practical issues that arise. The prevalent use of the VIE structure has legal implications.[143] China should not, and cannsot, be shielded from international attempts to restructure and liquidate these businesses. The Model Law provides sound mechanisms for coordinating inbound and outbound recognition petitions, as well as efficiently accommodating equitable treatment of domestic and foreign assets.[144] The incorporation of the Model Law into China's bankruptcy regime will undoubtedly take time; until that day, China and the rest of the world will have to meet each other half way.

---

[141]Neil McDonald, *Chinese Bankruptcy: It's About Time*, 25 INT'L FIN. L. REV. 52 (2006); Booth, *supra* note 35, at 312.

[142]Bu, *supra* note 4, at 191-92.

[143]Emily Lee, *Comparing Hong Kong and Chinese Insolvency Laws and Their Cross-Border Complexities*, 9 J. COMP. L. 259, 260-61 (2015).

[144]SAMUEL L. BUFFORD, UNITED STATES INTERNATIONAL INSOLVENCY LAW 2008-2009 194 (OUP, 2009).