

**Xinyi Gong, A Balanced Way for China's Inter-Regional Cross-Border Insolvency Cooperation, Ph.D. University of Leiden, 2016.**

Annex VII

List of Recommendations to CICA (China's Inter-regional Cross-Border Insolvency Arrangement)

**Recommendation 1 -- Guiding Principle**

*Acknowledging lack of cooperation in matters of cross-border insolvency despite of the increasingly closer economic relationship, the guiding principle that embodies the entire arrangement is designed to promote fair and efficient administration of China's inter-regional cross-border insolvency proceedings in a coordinated manner.*

**Recommendation 2 – Overriding Objective**

*Aware of restrictions set by the constitutional arrangements and lack of functioning fundamental principles, the overriding objective of the arrangement is to facilitate recognition of inter-regional cross-border insolvency proceedings.*

**Recommendation 3 – Form and Scope**

(1) *Considering China's complex internal structure and desiring more predictability and more legal certainty at the regional level, an inter-regional cross-border insolvency arrangement (CICA) is to be established.*

(2) *CICA is binding on the Mainland and the two SARs altogether. In accordance with CICA, cross-strait insolvency cooperation between the Mainland and Taiwan is subject to a separate arrangement.*

(3) *CICA applies only to proceedings where the center of the debtor's main interests (COMI) is located within the Mainland and the two SARs.*

(4) *CICA shall apply to public collective proceedings, including interim proceedings, in accordance with laws relating to insolvency in which proceedings the assets and affairs of the debtor are under the control or supervision by a court for the purpose of rescue, reorganization or liquidation.*

(5) *CICA shall not apply to insolvencies concerning natural persons and financial institutions, which are governed by special insolvency regimes in the three regions.*

**Recommendation 4 – Recognition and Reliefs**

(1) *An insolvency proceeding commenced in one region, that with respect to the debtor concerned, has the relevant international jurisdiction should be recognized as main or non-main insolvency proceeding and given appropriate effect under the circumstances in every other region.*

(2) *The courts of one region within the territory of which the center of the debtor's main interests is situated shall have jurisdiction to open main insolvency proceedings.*

(3) *The place of the registered office shall be presumed to be the COMI in the absence of proof to the contrary.*

*It should be possible to rebut this presumption where the debtor's central administration is located in*

*a region other than that of its registered office, and where a comprehensive assessment of all the relevant factors establishes, in a manner that is ascertainable by third parties, that the debtor's actual center of management and supervision and of the management of its interests is located in that other region.*

*The relevant date at which COMI shall be determined is the date of commencement of the main insolvency proceedings.*

*(4) The courts of another region shall have jurisdiction to open a non-main insolvency proceedings against the debtor if it possesses an establishment within the territory of that other region.*

*(5) Establishment means any place of operations where a debtor carries out a non-transitory economic activity with human means and assets.*

*The relevant date at which an establishment of the debtor shall be determined is the date of commencement of the non-main insolvency proceedings.*

*(6) Upon recognition of an insolvency proceeding as a main proceeding:*

*(a) Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed; but the stay does not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor;*

*(b) Execution against the debtor's assets is stayed; and*

*(c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.*

*The scope, modification or termination of those aforementioned reliefs is subject to the law of the region where recognition and reliefs are sought. Those aforementioned reliefs do not affect the right to request the opening of an insolvency proceeding in the region where recognition and reliefs are sought.*

*(7) The following interim reliefs may be granted upon request of the insolvency practitioners in the main or non-main proceedings, from the time of filing an application for recognition until the application is decided upon:*

*(a) Staying execution against the debtor's assets;*

*(b) Entrusting the administration or realization of all or part of the debtor's assets located in the region to the insolvency practitioners in the main or non-main proceedings, in order to protect and preserve the value of assets*

*The interim reliefs can be refused to be granted if they would interfere with the administration of a main insolvency proceeding and unless extended, they terminate when the application for recognition is decided upon.*

*(8) Upon recognition of an insolvency proceeding, whether main or non-main, the court may, at the request of the insolvency practitioners in the main or non-main proceedings, grant any appropriate relief that may be available under the laws of this region where recognition and reliefs are sought.*

## **Recommendation 5 – Public Policy**

*Any region may refuse to recognize insolvency proceedings opened in another region or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that region's public policy, in particular its fundamental principles or the constitutional rights and liberties of its citizens.*

#### **Recommendation 6 – Cooperation and Communication (single debtor and enterprise groups)**

*(1) An insolvency practitioner shall, in the exercise of its functions and subject to the supervision of the court, cooperate and communicate to the maximum extent possible with the courts or insolvency practitioners in other regions.*

*(2) Where insolvency proceedings relate to two or more members of a group of companies, an insolvency practitioner appointed in proceedings concerning a member of the group shall cooperate and communicate with the courts and any insolvency practitioner appointed in proceedings concerning another member of the same group to the maximum extent possible.*

#### **Recommendation 7 – Cross-border Insolvency Agreements**

*(1) In the course of cooperation and communication, insolvency practitioners, who are subject to the jurisdiction of their own courts, can cooperate with each other closely to enter into cross-border insolvency agreements, which shall be approved by the courts.*

*(2) The independence, sovereignty or jurisdiction of the relevant local courts should not be affected by the agreement.*

*(3) The agreement concluded can cover the following basic contents:*

*(a) Allocation of responsibilities between the different courts involved and between insolvency practitioners; including limitations on authority to act without the approval of the other courts or insolvency practitioners;*

*(b) methods of communication, including language, frequency and means;*

*(c) sharing of information on claims lodged, the verification and disputes concerning claims;*

*(d) location, use and disposal of assets;*

*(e) coordination and harmonization of reorganization plans;*

*(f) costs and fees;*

*(g) all other elements that can contribute to efficient coordination of inter-regional insolvency proceedings*

*If the courts or the insolvency practitioners after discussion find something useful to add beyond the aforementioned scope, they shall not be limited as long as it is not inconsistent with the local mandatory rules.*

*(4) In matters of enterprise groups, the agreement can include:*

*(a) means of timely communication of any relevant information concerning the group members subject to insolvency proceedings, provided appropriate arrangements are made to protect confidential information;*

*(b) coordination of the administration and supervision of the affairs of the group members subject to insolvency proceedings;*

*(c) coordination of the proposal and of reorganization plans;*

*(d) allocation of powers or responsibilities between insolvency practitioners*

*(e) costs and fees*

*(f) all other elements that can contribute to efficient coordination of inter-regional group insolvency proceedings*

*If the courts or the insolvency practitioners after discussion find something useful to add beyond the aforementioned scope, they shall not be limited as long as it is not inconsistent with the local mandatory rules*

*(5) Complementary cross-border insolvency agreements shall also be allowed to address some issues upon prompt need on an ad hoc basis.*

#### **Recommendation 8 – Functional Dispute Settlement Mechanism**

*(1) In the course of inter-regional cross-border insolvency proceedings, a court that seeks explanation of the provisions under CICIA shall report to the Supreme Court of that region, which can request a special meeting to be convened.*

*(2) Explanation given by the special meeting on specific provisions of CICIA serves as proper interpretation on the specific issues arising from the individual case, which deserves due respect of the courts concerned. Upon consensus of the Supreme Courts concerned, the explanation shall have binding effect on that individual case. Upon consensus of all the Supreme Courts, the explanation shall have binding effect on the specific provisions under CICIA.*

*(3) In the course of implementing cross-border insolvency agreements, the courts in the concurrent proceedings can report to the Supreme Court from the respective regions, which can jointly request a special meeting to be convened and refer the disputes arising from cross-border insolvency agreements to the special meeting.*

*(4) In matters of the disputes arising from cross-border insolvency agreements, the opinions or part of the opinions come into binding effect to the extent that all the requesting courts involved agree to accept them, which should be expressly written into the judgments. The opinions are only binding on the individual case referred to the special meeting. If one of the requesting courts disagrees with the opinions or part of the opinions given by the special meeting, those opinions are not binding.*

*(5) Each court of the highest-level from the three regions can designate one or two in-house judges to participate in the meeting. After discussion, the participating judges will deliver their joint opinions on the case referred to them.*

*(6) As for Hong Kong, any reference handed down by the special meeting shall not be construed as a direct reference to the courts in Hong Kong SAR except for the disputes concerned or unless the Court of Final Appeal of HKSAR expressly indicates otherwise.*

#### **Recommendation 9 - Inter-regional Case Register**

*(1) Each region should be required to publish relevant information in cross-border insolvency cases in a publicly accessible electronic register.*

*(2) Once a cross-border insolvency proceeding is commenced in one region, the court shall immediately inform the communication authority in its own region. The communication authority must publish the information concerning opening of insolvency proceedings on its e-portal and is also mandatory to inform its counter-part communication authorities concerned in the other regions. Meanwhile, the e-portal of each region should provide interconnection system that links to the registers in other regions.*

*(3) The minimum amount of information is required to be published in the inter-regional insolvency registers, including*

- (a) the date of the opening of insolvency proceedings*
  - (b) the court opening insolvency proceedings and the case reference number, if any;*
  - (c) the debtor's name, registration number, registered office and current correspondence address;*
  - (d) the name, postal address or e-mail address of the insolvency practitioner, if any, appointed in the proceedings*
  - (e) the time limit and place for lodging claims, if any, or a reference to the criteria for calculating that time limit;*
- Additional information subject to the local laws shall not be precluded.*

*(4) The official language for the relevant information shall be Chinese. The information can also be published in English in Hong Kong SAR or Portuguese in Macao SAR but shall always be accompanied with Chinese translation.*

**Recommendation 10 – Independent Intermediaries: Separate Arrangement for Cross-strait Insolvency Cooperation (The Mainland and Taiwan)**

*(1) The cross-strait insolvency proceedings shall be coordinated in the way of appointment of independent intermediaries from both sides.*

*(2) To guarantee the qualification as well as impartiality, the criteria to be appointed as an independent intermediary shall be agreed upon by the both sides. The role and competence of the intermediary can be set out in a protocol or an order of the court.*

*(3) The main duty of the independent intermediaries is to maintain the connection with its counterpart and jointly devise a practical means of conducting cooperation and communication between the courts concerned.*

*(4) Before the appointment of the independent intermediaries, the opinions of the insolvency practitioners should be consulted especially in matters of the way of conducting communication and cooperation. Once appointed, an intermediary should be accountable to the court that appoints him or her and a related protocol can be reached with the approval of the respective courts.*

*(5) The independent intermediaries from the both sides can hold regular meeting either onsite or via e-technological means so that they can keep the courts from the both sides informed of the possible conflicts or problems in the cross-strait insolvency proceedings.*

*(6) Considering the difference of professional qualification criteria in the each side, each side recommends some candidates of independent intermediaries for itself, holding a discussion to select someone both sides can trust and then putting those candidates separately in a closed list so that a consensus can be reached in advance to make sure that the qualifications of the independent intermediaries can be accepted by both sides in the process of coordination.*

*(7) The independent intermediaries should observe the duties in an impartial manner, free from bias, prejudice and any conflicts of interest. If its impartiality is in doubt, the court, after consulting the opinions of the insolvency practitioners of both sides, can dismiss the independent intermediaries appointed by itself or request the counterpart court to dismiss its independent intermediaries with specific reasons upon the request of the independent intermediaries. A new independent intermediary can be selected from the list.*

*(8) The independent intermediaries will be remunerated from the estate of the insolvency proceedings in which the court appointed him or her.*