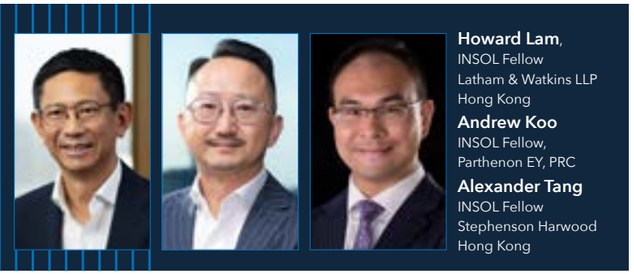
CROSS-BORDER DIALOGUE BETWEEN HONG KONG AND MAINLAND CHINA ON INSOLVENCY LAW



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In January 2025 in Beijing, a delegation of INSOL members led by Andrew Koo (INSOL Fellow) and John Lees (INSOL Past President) together with Hong Kong barrister Michael Lok, Alexander Tang (INSOL Fellow), and Howard Lam (INSOL Fellow), participated in a roundtable on cross-border insolvency topics with a team of prominent PRC bankruptcy experts led by Professor Li Shuguang, China University of Political Science and Law. Given the tremendous growth of the Chinese economy and overseas investments in the past few decades, corporate insolvency law in the PRC has become a priority area for legislative development and collaboration among practitioners both onshore and offshore. This ongoing dialogue between practitioners from two jurisdictions with very different legal traditions offers important opportunities for exchanging views and identifying areas of legal reform to resolve increasingly complex cross-border issues more effectively.

China's bankruptcy law regime: future outlook on cross-border insolvency

China's bankruptcy law has evolved significantly since the PRC Enterprise Bankruptcy Law was enacted in 2006 (2006 Law). However, as the country's economy becomes increasingly complex and globally integrated, the current framework for cross-border issues, primarily governed by Article 5 of the 2006 Law,[1] may be inadequate for today's complex global bankruptcy landscape. The law requires comprehensive updates through a dedicated chapter on cross-border bankruptcy to address current challenges.

The legal uncertainty surrounding claims arising from keepwell deeds in a PRC insolvency can be indicative of the challenges and ambiguities in China's cross-border bankruptcy regime. These deeds, commonly used by Chinese parent companies to support offshore subsidiaries issuing bonds, function as informal credit enhancements rather than formal guarantees under PRC law. While keepwell structures often adopt English law and Hong Kong's exclusive jurisdiction, their enforceability in mainland courts remains unresolved, particularly when debtors are subject to onshore bankruptcy proceedings. For instance, the Hong Kong Court of Appeal overturned a lower court's ruling in *Re Peking University Founder Group*[2] and held the mainland parent liable under a keepwell deed despite its bankruptcy status, ordering compensation to offshore creditors, while under PRC law the enforceability of those keepwell deeds, and therefore the admissibility of claims under those deeds, remains uncertain.

As of the date of authoring this article, the Hong Kong Court of Final Appeal is considering the case. This divergence exemplifies unresolved gaps in cross-border coordination and underscores the risks of conflicting legal interpretations across jurisdictions, which can undermine creditor confidence and complicate cross-border restructuring efforts.

Defining objectives and expanding scope

A key priority of any proposed reform should be to define clear objectives for cross-border bankruptcy provisions, including (i) the extraterritorial effect of PRC insolvency procedure in respect of foreign assets, (ii) the effect of treaties, agreements, or other cross-jurisdiction arrangements in bankruptcy cases, (iii) recognition and assistance of foreign proceedings and administrators, (iv) recognition of foreign bankruptcy and enforcement judgments and (v) the rules on commencing PRC insolvency proceedings in parallel with foreign (main) proceedings.

These objectives should balance alignment with international standards, such as the principles of the UNCITRAL Model Law on Cross-Border Insolvency, with China's specific domestic context. Notably, integrating these principles may entail navigating differences between China's civil law tradition and the common law systems. Judicial cooperation with foreign courts must be carefully developed to ensure it protects the interests of the relevant stakeholders, including domestic creditors and debtors.

Expanding the scope of cross-border bankruptcy provisions is equally important. There should be a broader range of scenarios that are covered, including domestic bankruptcy administrators seeking assistance from foreign courts and foreign courts requesting recognition or cooperation in the PRC. It should also provide mechanisms for coordinating parallel bankruptcy proceedings in multiple jurisdictions, ensuring fair treatment of creditors and other stakeholders.

In line with international norms, the law should incorporate the concept of Center of Main Interests (COMI) to identify the appropriate jurisdiction for insolvency proceedings. While COMI is a widely accepted jurisdictional benchmark, its application requires attention to prevent forum shopping. For example, minimum residency requirements for COMI designation could be introduced.

1 Article 5 of the 2006 Law provides that recognition of bankruptcy judgments issued by foreign courts may be granted, provided they do not violate Chinese laws, national sovereignty, security, or public interests. It also underscores principles of equitable treatment of creditors and timely resolution of bankruptcy proceedings to preserve asset value and minimise economic disruption.

2 [2024] HKCA 445. The case has been appealed to the Hong Kong Court of Final Appeal.

Recognition and assistance of foreign proceedings and administrators

The recognition and assistance of foreign bankruptcy proceedings represent another cornerstone of reform, notwithstanding complications with jurisdictions that have differing legal systems or no established history of cooperation with China. There should be clear guidelines for determining when foreign insolvency cases can be recognised and when judicial assistance can be provided, e.g., when the recognition does not violate Chinese public policy or harm the interests of domestic creditors.

To enhance cooperation with foreign insolvency representatives, the law should also define the procedures for recognising foreign bankruptcy administrators and their authority within China. It is essential to establish clear standards for administrator qualifications, documentation requirements, and the scope of their powers. These measures would not only streamline cross-border insolvency proceedings but also ensure that foreign administrators operate within the bounds of Chinese law and respect domestic interests.

The new chapter may also address the management of ancillary proceedings, which support foreign main insolvency cases. Stakeholders anticipate that the new regime should provide detailed guidance on the initiation and execution of ancillary proceedings, including conditions under which relief measures such as asset freezes or the suspension of creditor actions may be granted.

Regional cooperation in Greater China

Given the unique historic, legal, and economic ties between mainland China and the regions of Hong Kong, Macau, and Taiwan, provisions that address cross-border bankruptcy collaboration in these areas need to be incorporated. Building on existing agreements, such as the 2021 Arrangement between Mainland China and Hong Kong on Mutual Assistance in Cross-Border Bankruptcy Matters (2021 Arrangement), the law should formalise procedures for recognising and assisting insolvency cases originating in these regions. For example, in *Re Samson Paper Co. Ltd*,[3] the Hong Kong court recognised a mainland administrator's authority to recover assets in Hong Kong, marking one of the first applications of the 2021 Arrangement. This case underscores the potential for streamlined asset repatriation and creditor coordination. Expanding similar frameworks to Macau and Taiwan – while respecting jurisdictional distinctions – could harmonise rules on creditor notifications, debt prioritisation, and cross-border enforcement.

Practical and institutional considerations

Domestically, disparities in regional capacity pose challenges. While cities like Shanghai or Shenzhen have specialised bankruptcy tribunals, courts in less developed regions often lack expertise. Systematic training programs for judges on cross-border norms, multilingual case management, and digital platforms for inter-court communication can help facilitate the provision of institutional support on cross-border cases.

Areas of focus in China's bankruptcy law in 2025

Professor Li highlighted significant progress in China's bankruptcy law reforms in 2024. China's bankruptcy regime has received unprecedented policy support from the central government in respect of improvements in corporate exit mechanisms and the feasibility of a personal bankruptcy system. He noted that bankruptcy law is extensively applied in courts across the country, and judges have demonstrated improving expertise, professionalism, and dedication in handling complex cases. Bankruptcy administrators and practitioners, including lawyers, accountants, and restructuring experts are increasingly in demand and the number of professionals engaged in bankruptcy- and restructuring-related work rose. There was also unprecedented academic attention to bankruptcy law, with universities and research institutions across China conducting in-depth studies and producing valuable research papers on this topic.

Professor Li identified five key areas of focus for 2025 in China's bankruptcy landscape:

1. Reorganisation of listed companies as well as small and micro private enterprises;
2. Bankruptcy proceedings of large distressed real estate developers;
3. Increasing number of bankruptcy related litigations with jurisdictional issues impacting bankruptcy procedures and the implementation of reorganisation plans;
4. Cross-border insolvency issues, particularly in respect of Chinese enterprises with both onshore and offshore liquidation processes/creditors;
5. More attention to the accountability of bankruptcy judges and administrators.

Guidelines for reorganising listed companies

The joint announcement on 31 December 2024, issued by the Supreme People's Court and the China Securities Regulatory Commission and known as "*Minutes of the Discussion Meeting on Effectively Adjudicating Listed Company Bankruptcy and Reorganisation Cases*" marked another major development.

The minutes replaced the minutes on restructuring listed companies, which have been in use since 2012. The new minutes provide detailed guidelines on issues such as jurisdiction, application requirements, disclosure obligations, prevention of insider trading, information provided in reorganisation plans, debt to equity swap, and coordination between reorganisation cases of listed companies and their affiliated entities. They also stress the importance of active involvement by local governments in risk monitoring, departmental collaboration, and cash preservation to safeguard stakeholders' interests and to maintain social stability. Furthermore, they highlight the significance of collaboration with securities regulators to maintain transparency and prevent abuse of the reorgansiation process, which harms creditors and investors.

Conclusion

Overall, the roundtable discussions were constructive and the dialogue continues to drive further improvement to the existing legal regimes, especially in the area of cross-border insolvency and restructuring. Clear procedural safeguards, adequate institutional support, and active engagement with international stakeholders will be critical to overcoming obstacles in cross border insolvency and restructuring, and ensuring the successful implementation of the proposed changes to China's Enterprise Bankruptcy Law. By clarifying legal objectives, expanding application scope, and establishing clear rules for jurisdiction, recognition, and judicial cooperation, these developments would contribute to not only improving China's domestic legal environment but also reinforcing its position as a reliable and transparent participant in the global economy.

3 [2021] HKCFI 2151.