What should come after the implementation of the mutual recognition and assistance in cross-border insolvency between mainland China and Hong Kong?

LAW, S.W. and MAK, C.H.W.

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What Should Come After the Implementation of the Mutual Recognition and Assistance in Cross-Border Insolvency Between Mainland China and Hong Kong?

Sau Wai LAW* and Charles Ho Wang MAK**

This article evaluates the new cross-border insolvency cooperation arrangement between Hong Kong and Mainland China from three business perspectives. First, whether it brings a legal effect; second, whether it aids in the identification of a company's assets; and third, its impact to court procedures and potential to facilitate information sharing between two regions.

Introduction:

The Hong Kong Special Administrative Region of the People's Republic of China ('Hong Kong') has recently established a new mutual recognition framework to allow Hong Kong and Mainland China courts to cooperate on cross-border corporate insolvency ('new cross-border insolvency cooperation arrangement'). On 14 May 2021, the Secretary for Justice of Hong Kong and the Vice-President of the Supreme People's Court in the People's Republic of China ('SPC') signed a Record of Meeting of the Supreme People's Court and the Government of the Hong Kong Special Administrative Region on Mutual Recognition of and Assistance to Bankruptcy (Insolvency) Proceedings between the Courts of the Mainland and of the Hong Kong Special Administration Region ('Record of Meeting') in Shenzhen.[1] On the same day, The Supreme People's Court's Opinion on Taking Forward a Pilot Measure in relation to the Recognition of and Assistance to Insolvency Proceedings in the Hong Kong Special Administrative Region ('SPC Opinion') was promogulated.[2] This new mutual recognition

* Sau Wai Law (Samuel) is a Senior Lecturer at Law and Business Department at the Hong Kong Shue Yan University. Before joining Shue Yan University in January 2021, Samuel had over 14 years of banking experience in Hong Kong, taking up roles in credit risk management, private banking and strategic planning. He is also a trainer, a course reviewer, and a panel member of Subject Review Panel at the Hong Kong Institute of Bankers. He has experienced in teaching Economics, Finance, Money and Banking, Risk Management, Compliance, Ethics and Law related subjects. He obtains a PhD on June 2022 in the Faculty of Law at University of Hong Kong in the area of arbitration in global private banking industry. His research interests are Dispute Resolution, Contract Law, Banking Law and Practice, Finance Law, Bank-client relationship, Professional Ethics, Risk & Compliance, Financial inclusion, Virtual Banking

** Charles Ho Wang Mak is a PhD Candidate in law and a Graduate Teaching Assistant at the University of Glasgow, a Fellow of the Centre for Chinese and Comparative Law at the City University of Hong Kong, an Honorary Fellow of the Asian Institute of International Financial Law at the University of Hong Kong, a Research Affiliate at SovereigNet at The Fletcher School, Tufts University, and a Research Associate at China, Law and Development Project at the University of Oxford.

[1] Depart of Justice, 'Record of Meeting of the Supreme People's Court and the Government of the Hong Kong Special Administrative Region on Mutual Recognition of and Assistance to Bankruptcy (Insolvency) Proceedings Between the Courts of the Mainland and of the Hong Kong Special Administrative Region' (Depart of Justice, 2021), https://www.doj.gov.hk/en/mainland_and_macao/pdf/RRECCJ_RoM_en.pdf [Accessed 1 June 2022].

[2] The Supreme People's Court (SPC), 'Opinion on Taking Forward a Pilot Measure in relation to the Recognition of and Assistance to Insolvency Proceedings in the Hong Kong Special Administrative Region (Courtesy English translation)' (Depart of Justice, 2021), https://www.doj.gov.hk/en/mainland_and_macao/pdf/RRECCJ_opinion_en_tc.pdf [Accessed 1 June 2022].

framework signifies a consensus on the mutual recognition of and assistance to insolvency proceedings between the Hong Kong and Mainland China.

This article seeks to critically evaluate whether the new cross-border insolvency cooperation arrangement between Hong Kong and Mainland China has strengthened the status of Hong Kong as an international restructuring hub. Following this introduction, we will provide a brief background and summary of the new cross-border insolvency cooperation arrangement. Then we will evaluate this new cross-border insolvency cooperation arrangement from three angles: first, whether there is a need for statutory provision; second, whether it assists with the identification of the company's assets; and third, whether there should be a requirement to get permission to obtain the benefits of the new arrangement. The evaluation of the new cross-border insolvency cooperation arrangement will shed light on areas for further reform of the arrangement.

Brief Background and Summary of the New Cross-Border Insolvency Cooperation Arrangement:

According to the Record of Meeting, a liquidator or provisional liquidator in Hong Kong insolvency proceedings may apply to the relevant Intermediate People's Court in a pilot area in the Mainland for recognition of compulsory winding up, creditors' voluntary winding up, and corporate debt restructuring proceedings brought by a liquidator or provisional liquidator as sanctioned by a Hong Kong court in accordance with Hong Kong law, for recognition of his office as a liquidator or provisional liquidator.[3] However, the Record of Meeting does not outline the procedures in detail and merely specifies that applications should be submitted in conformity with the laws of the place where recognition and assistance are requested. As mentioned by the Hong Kong Department of Justice Legislative Council Panel on Administration of Justice and Legal Services on 22 June 2020, there is a lack of a mechanism under Mainland law for recognition of and assistance to Hong Kong insolvency proceedings.[4] In response, the SPC has promulgated the SPC Opinion, which provides operational guidance (including twenty-four articles) for Hong Kong insolvency representatives seeking recognition and assistance in Mainland China courts.

The Record of Meeting has been well received by practitioners as it represents a more straightforward channel for Hong Kong courts to appoint liquidators and order other preservation measures which is recognised in Mainland China.[5] In fact, the Hong Kong court

[3] Depart of Justice, 'Record of Meeting of the Supreme People's Court and the Government of the Hong Kong Special Administrative Region on Mutual Recognition of and Assistance to Bankruptcy (Insolvency) Proceedings Between the Courts of the Mainland and of the Hong Kong Special Administrative Region' (Depart of Justice, 2021), https://www.doj.gov.hk/en/mainland_and_macao/pdf/RRECCJ_RoM_en.pdf [Accessed 1 June 2022].

[4] Hong Kong Legislative Council Panel on Administration of Justice and Legal Services, 'Proposed Framework for Co-operation with the Mainland in Corporate Insolvency Matters' (Legislative Council, 2020), https://www.legco.gov.hk/yr19-20/english/panels/ajls/papers/ajls20200622cb4-715-4-e.pdf [Accessed 1 June 2022].

[5] For example, see Debevoise & Plimpton, 'Hong Kong and Mainland China Enter Arrangement on Mutual Recognition of and Assistance to Insolvency Proceedings' (Debevoise & Plimpton, 2021), https://www.debevoise.com/insights/publications/2021/05/hong-kong-and-mainland-china-enter-arrangement [Accessed 2 June 2022].

has started to recognise foreign insolvency proceeding through common law practices for civil law jurisdictions. Notably, Justice Harris of the Hong Kong High Court granted an order for the first-time recognising liquidators from Mainland China and providing necessary judicial assistance in 2021, and summarised the two principles for recognition of foreign insolvency proceedings for civil law jurisdictions: that the foreign insolvency proceedings are collective insolvency proceedings and that they are commenced in the company's country of incorporation[6]. This applies also to the regional courts in Mainland China.[7] The recognition does not stop at bankruptcy. On 16 Sep 2021, the Hong Kong Court recognised proceedings for the reorganisation of HNA Group Co Limited commenced in Mainland China under the Mainland Enterprise Bankruptcy Law.[8] These are regarded as pioneering decisions which should reinforce Hong Kong's status as a leading global financial centre and a gateway to Mainland China.[9] More applications for recognition and assistance by Hong Kong courts of liquidators in Mainland China are expected.[10]

A General Call for a Detailed Plan:

The Record of Meeting is a new initiative but it has already attracted numbers of academic reviews, which generally argue that Hong Kong lacks a legal framework for cross-border insolvency with other countries. Guo identifies that the new cross-border insolvency cooperation arrangement is still an unrefined draft that does not address specific concerns, especially on the arrangements for parallel proceedings, recognition of granting relief, and excessive restriction of circumstances where recognition can be refused.[11] Guo proposes a further enhancement with reference to the European model as this deals with complex problems with 27 different legal systems.[12] However, we believe that this suggestion might have over-simplified the situation and may not serve as an ideal model to fit the China-Hong Kong business and legal relationship. Yung argues that despite the lack of a statutory cross-border insolvency framework, the Hong Kong High Court has been actively improving and enhancing the common law approach in terms of recognition and assistance to foreign insolvency practitioners in order to respond to urgent demands.[13] In creating these principles, the court has sought to accomplish the goals of reconciling the common law principles with the UNCITRAL Model Law on Cross-Border Insolvency and enhancing the mutual recognition framework with

[6] Re CEFC Shanghai International Group Ltd (Mainland liquidation) [2020] 1 HKLRD 676; [2020] HKEC 89; [2020] HKCFI 167, para. 8.
[7] Re Liquidator of Shenzhen Everich Supply Chain Co Ltd [2020] HKCFI 965; [2020] HKEC 1188
[8] Re Jiang Wenyu [2021] HKCFI 2897; [2021] HKEC 4405.
[9] Hill Dickinson, 'First letter of request from Mainland China to Hong Kong for recognition and assistance in cross-border insolvency' (Hill Dickinson, 2021), https://www.hilldickinson.com/insights/articles/first-letter-request-mainland-china-hong-kong-recognition-and-assistance-cross [Accessed 1 June 2022].
[10] Deacons, News and Insights: Hong Kong's first application for recognition of and assistance to liquidators in Mainland China (Deacons, 2021), https://www.deacons.com/2021/08/04/hong-kongs-first-application-for-recognition-of-and-assistance-to-liquidators-in-mainland-china/ [Accessed 1 June 2022].
[11] Shuai Guo, 'Cross-border insolvency between Chinese Mainland and Hong Kong: the past, the present, and the future' (2022) 30 (1) Asia Pacific Law Review 70, 84-88.
[12] Shuai Guo, 'Cross-border insolvency between Chinese Mainland and Hong Kong: the past, the present, and the future' (2022) 30 (1) Asia Pacific Law Review 70, 91-92.
[13] Patrick Yung, 'Cross-border insolvency in Hong Kong: Developments and updates' (2022) International Insolvency Review 1, 19.

Mainland China.[14] Also, there are cautious observations that Hong Kong creditors might be in a disadvantaged position because the usual asset holding structure is through Wholly-Foreign Owned Enterprise structures through offshore companies, and insolvency officeholders of offshore companies will not be able to benefit from the new cross-border insolvency cooperation arrangement as the Record of Meeting relates to Hong Kong Insolvency proceedings, and a company's centre of main interests ('COMI'), which is still vaguely defined, [15] needs to be located in Hong Kong for six consecutive months in order for the new cross-border insolvency cooperation arrangement to apply.[16]

Besides adopting foreign models, specific legal tools might be useful. The Singapore experience might be helpful. In 2017, Singapore also reformed its insolvency regime to expedite restructurings by introducing legal tools, in particular the cross-class cram down mechanism adopted in modified form from Chapter 11 in the United States, which serves to improve the approval process by allowing sanction without approval from dissenting classes of creditors and relaxing the creditor classification requirement.[17] Yet a direct adoption could also cause criticism as there could be domestic issues which should be catered for and resolved by insolvency practitioners of the relevant jurisdictions.[18] This has been reflected in case law in Singapore, where the Hanjin Shipping case indicates that from a practical perspective, if a company in liquidation is also bearing an excessive amount of debt, then the court may not allow a further scheme from a foreign jurisdiction to kick in.[19] There are further unintended consequences, such as complexity in execution, a shift of power from existing creditors to the debtor company, and uncertainty over retrospective recognition.[20]

Nevertheless, efforts to compare continue to be critical and various studies have been made in Hong Kong as well. For example, Naomi et al. compare the difference between Chapter 15 in the United States and the new cross-border insolvency cooperation arrangement. Whilst observing key differences between the two approaches from a procedural perspective,[21] they

[14] Patrick Yung, 'Cross-border insolvency in Hong Kong: Developments and updates' (2022) International Insolvency Review 1, 19.
[15] Patrick Yung, 'Cross-border insolvency in Hong Kong: Developments and updates' (2022) International Insolvency Review 1, 13-14.
[16] Clifford Chance, 'Mutual Recognition and Assistance in Insolvency Proceedings Between Mainland China and Hong Kong', (Clifford Chance, 2021), https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2021/06/mutual-recognition-and-assistance-in-insolvency-proceedings-between-mainland-china-and-hong-kong.pdf [Accessed 1 June 2022].
[17] Ken Teo Chuanzhong, 'A critical evaluation of the new cram-down tool in Singapore's restructuring regime' International Insolvency Review, (2021) 30 (2), 267, 270-271.
[18] Ken Teo Chuanzhong, 'A critical evaluation of the new cram-down tool in Singapore's restructuring regime' International Insolvency Review, (2021) 30 (2), 267, 279.
[19] Minjee Kim, 'Cross-border insolvency and debt restructuring law reform in Singapore: Reflections on the Hanjin shipping case' Australian Journal of Asian Law (2019) 19 (2), 233-245.
[20] Gerard McCormack and Wai Yee Wan, 'Transplanting Chapter 11 of the US Bankruptcy Code into Singapore's restructuring and insolvency laws: opportunities and challenges' Journal of Corporate Law Studies (2019) 19 (1) 69, 102-103.
[21] Naomi Moore, Abid Qureshi, Liz Osborne, Daniel L. Cohen, Jeremy Haywood, and Jingli Jiang, 'The New Cross-Border Arrangement Between Hong Kong and Mainland China on Insolvency and Restructuring Matters—A Comparison with Chapter 15 of the U.S. Bankruptcy Code' Journal of Bankruptcy Law (2022) 18 (1) 39, 42-47.

note that insolvency officeholders still find the new cross-border insolvency cooperation arrangement useful in practice when seeking interim relief, pursuing and preserving intercompany claims and facilitating access to bank accounts and funds.[22] Similar studies lead to a recommendation of the implementation of non-binding soft law, particularly recognizing Hong Kong as the COMI for overseas offshore companies incorporated in countries such as Bermuda.[23]

The lack of a detailed framework and empirical arrangements drive existing literature to suggest possible steps to move the mutual recognition framework forward, and this is achieved through comparing the new cross-border insolvency cooperation arrangement with practices in other countries. We feel the need to contribute to this exploration by offering our observation from a business perspective which reflects how creditors and debtors interact when debtors default, which involves considering business norms, different areas where soft law has been developed outside the court,[24] and the business purpose of engaging the court in the insolvency or debt restructuring process. We argue that one should consider positive practical changes the agreement could introduce before we decide what is the next step to strengthen this long-awaited certainty in cross-border insolvency cooperation between Hong Kong and Mainland China.

Recent Cases Between Hong Kong and Mainland China:

Since the establishment of the new cross-border insolvency cooperation arrangement, there have been two notable cases that are worth looking at in detail. *In Re Samson Paper Co Ltd (In Liq)* [2021] 3 HKLRD 727; [2021] HKCFI 2151, the Court of First Instance stated that this case '*is the first application made in accordance with the Cooperation Mechanism in either Hong Kong or the Mainland*'.[25] In this case, Samson Paper Co Ltd was dissolved by its Hong Kong-based shareholders due to insolvency. The purpose of the liquidators' application was to take possession of the Shenzhen-based assets of the company. In doing so, the liquidators needed to rely on the assistance of the Mainland court. In determining whether to grant a letter of request, the court considered which jurisdiction was the most suitable or convenient for the determination of the issue at hand.[26] Accordingly, the court allowed the request and ordered that '[a] letter of request in the form appended hereto in simplified Chinese be issued to the Shenzhen Intermediate People's Court seeking its assistance in aid of the Company's

[22] Naomi Moore, Abid Qureshi, Liz Osborne, Daniel L. Cohen, Jeremy Haywood, and Jingli Jiang, 'The New Cross-Border Arrangement Between Hong Kong and Mainland China on Insolvency and Restructuring Matters—A Comparison with Chapter 15 of the U.S. Bankruptcy Code' Journal of Bankruptcy Law (2022) 18 (1) 39, 51-52.

[23] Shuai Guo and Bob Wessels, 'Cross-Border Insolvency between Mainland China and Hong Kong: A First Glance from a Global Perspective' International Corporate Rescue (2021) 18 (4), 247, 251.

[24] A notable illustration is the establishment of the UNCIRTRAL Regional Centre for Asia and the Pacific established in 2012. The role of out of court dispute resolution institution is out of scope of this argment. For the latest development in Asia Pacific Region, see Ali, S. F. (2021). *Forming Transnational Dispute Settlement Norms: Soft Law and the Role of UNCITRAL's Regional Centre for Asia and the Pacific*. Edward Elgar Publishing.)

[25] Re Samson Paper Co Ltd (In Liq) [2021] 3 HKLRD 727; [2021] HKCFI 2151, para. 1.

[26] Re Samson Paper Co Ltd (In Liq) [2021] 3 HKLRD 727; [2021] HKCFI 2151, para. 8.

liquidation and its liquidators'.[27] This case is '*the first occasion on which a court in the Mainland has formally recognised and assisted a liquidator appointed under Hong Kong law*'.[28] The Shenzhen Court's decision in this case is helpful in establishing the applicable criteria and providing practical knowledge for Hong Kong liquidators seeking assistance and recognition from Mainland Courts according to the new cross-border insolvency cooperation arrangement. Prior to the introduction of the new arrangement, Hong Kong-appointed liquidators faced several impediments while carrying out their responsibilities in Mainland China. This case demonstrated that, with the assistance and consent of the courts of the two jurisdictions, liquidators may fulfil their responsibilities in the Mainland to realise or maintain a company's assets and safeguard the rights and interests of its creditors more efficiently. This echoes, perhaps implicitly, Article 4 of the SPC Opinion that a Hong Kong liquidator may only seek recognition and assistance if the debtor's centre of main interests has been consistently located in Hong Kong for at least six months,[29] given the facts of the case involved a Hong Kong based company having assets in Mainland China; it is unlikely the Hong Kong court will seek recognition and assistance if this is not the case.

In *Zhaoheng Hydropower (Hong Kong) Limited (In Liquidation)* [2022] HKCFI 248 (the second application under the new cross-border insolvency cooperation arrangement), the judge of the Court of First Instance in Hong Kong, Judge Harris, pointed that '*this is a proper case for a letter of request to be issued by the Hong Kong Court to the Shenzhen Intermediate People's Court requesting that the Shenzhen Intermediate People's Court make an order recognising the Liquidators and providing assistance to them*'.[30] Similar to *Re Samson Paper Co Ltd (In Liq)* [2021] 3 HKLRD 727; [2021] HKCFI 2151, the liquidators in this case required recognition and assistance in the Mainland court to take possession of and deal with the company's substantial assets in the Mainland, which were primarily located in Shenzhen. This would have been a challenging task for the liquidators in the days without the new cross-border insolvency cooperation arrangement. The court considered the responsibilities of the liquidators and reaffirmed the position in *Re Samson Paper Co Ltd (In Liq)* [2021] 3 HKLRD 727; [2021] HKCFI 2151 that it is desirable for the appointment of liquidators to be recognised by the Shenzhen Intermediate People's Court and for that court to assist the liquidators in carrying out their duties.[31] This case is another ruling in favour of the recognition and assistance of cross-border insolvency proceedings between Mainland China and Hong Kong under the new arrangement.

[27] Re Samson Paper Co Ltd (In Liq) [2021] 3 HKLRD 727; [2021] HKCFI 2151, para. 16.
[28] Re Samson Paper Co Ltd (In Liq) [2021] 3 HKLRD 727; [2021] HKCFI 2151, para. 1; see 中华人民共和国广东省深圳市中级人民法院民事裁定书 (2021 粤 03 认港破 1 号 (Civil Ruling of Shenzhen Intermediate People's Court of Guangdong Province, People's Republic of China No. 1).
[29] The Supreme People's Court (SPC), 'Opinion on Taking Forward a Pilot Measure in relation to the Recognition of and Assistance to Insolvency Proceedings in the Hong Kong Special Administrative Region (Courtesy English translation)' (Depart of Justice, 2021), https://www.doj.gov.hk/en/mainland_and_macao/pdf/RRECCJ_opinion_en_tc.pdf [Accessed 1 June 2022].
[30] Zhaoheng Hydropower (Hong Kong) Limited (In Liquidation) [2022] HKCFI 248, para. 17.
[31] Zhaoheng Hydropower (Hong Kong) Limited (In Liquidation) [2022] HKCFI 248, paras. 13 and 17.

One notable issue arising from the above two cases is that they do not seem to explicitly apply any tests to make the decision in favour of such recognition and assistance, it appears that as long as it falls within the scope of liquidator's duty, the Hong Kong court will allow the application and there is no evidence that this only applies to the Mainland.[32] The issue is how the Mainland courts would regard the judgment.

Three Issues to Resolve before codification:

The new cross-border insolvency cooperation arrangement is not a law. The special relationship between Hong Kong and China and the development of the Greater Bay Area mean that some special features must be catered for, including but not limited to the distinct substantive and procedural laws within the same country, different and yet similar cultures, people and business practices, the use of languages, and the legal background and training of judicial officers, lawyers, and judges. This is a unique situation and therefore the cooperation arrangement appears to be the right form as it proceeds on the basis of a moral obligation to recognise the Hong Kong legal jurisdiction under the common law system. Arguably, the principle of recognition already exists, but codifying the practice in this format is a big step forward. However, this landmark step forward does not offer much-needed details that legal practitioners might expect; the practical effect appears to remain unchanged. For example, Mainland China courts can refuse to assist Hong Kong proceedings if the basic principles of the law of Mainland China are violated or public order and good morals are offended. This provision represents a shortcoming of the arrangement as courts would have a legal recourse not to honour the agreement because the definition of public order or morals are different to visualise or prove. The lack of detailed description in the arrangement reveals that there is a need for a backup provision reflecting potential discrepancies in standards of the internal controls, procedures, and corporate governance requirements. The disparity between these requirements should be aligned for a possible next step to move forward on the issue of the new cross-border insolvency cooperation arrangement. For instance, there are different transparency and disclosure requirements.

The first issue to resolve is whether there is a need for statutory provision. Currently, the framework might only be regarded as non-binding soft-law supported by case law or international practice, which is already in practice at least by the Hong Kong courts. It could be regarded as a Memorandum of Understating or Treaty-like agreement between two jurisdictions within the same country. Therefore, incorporating a set of formal laws by reference to the international standard of law may create unnecessary complexity that outweighs the benefits of aligning the arrangement with the approach taken in the rest of the world and offering certainty from international liquidators. However, the adoption and interpretation of these standards by the Mainland courts is still an unknown. The arrangement seems to impact the Mainland courts more as they are now (at least morally) obliged to offer the certainty which is currently lacking when it comes to recognising a Hong Kong judgment. The new arrangement serves the purpose of offering clarity as to how the Mainland courts will react to a Hong Kong judgment, which as we have seen does not involve developed tests and

[32] *See* Joint Administrators of African Minerals Ltd v Madison Pacific Trust Ltd (2014] 4 HKLRD 374.

procedures. A statutory framework may be premature as how this could be integrated with the existing legal procedures of the Mainland is still untested. Incorporating a set of formal laws would affect the communication between the two administrations as their legal basis is different; some prominent examples which have been clearly identified are issues on parallel proceedings, applicable laws, forms of cooperation or group insolvencies.[33] Admittedly, the arrangement may be regarded as a moral obligation which is not legally enforceable, but imposing a formal law may impose rigidity which neither jurisdiction is prepared for – after all, going through court proceeding means investing time and extra money. We are hence of the view that the priority now is to observe how the two courts communicate through this arrangement and whether a moral obligation will suffice without adopting an internationally recognized rule such as the UNCITRAL Model Law on Cross-Border Insolvency.[34]

The second issue is the identification of the company's assets. One vital issue to consider is the location of companies' assets. It would be ideal if the courts had clear guideline to determine whether assets located or registered in Mainland China companies could be subject to the creditors' pool in Hong Kong; and vice versa. Considering that many Chinese companies listed in Hong Kong have their main operation in Mainland China, identifying the COMI may not be helpful because dual locations and corporate identities appear to be the norm. One obvious function of the arrangement, other than the landmark message delivered, is the possibility of expediting the decision-making process, at least from the soft-law side. However, liquidators might need more than speed and a more complete picture of the companies subject to bankruptcy or restructuring. To further develop the details of the agreement, we may consider moving on from the usual procedural considerations to establish a mutual practice for information-sharing channels so that liquidators in Hong Kong would be able to obtain information provided to the courts in Mainland China (if any), and vice versa. Otherwise, there is little benefit to the new arrangement beyond demonstrating the spirit of mutual recognition, as other features of the arrangement could be done within the existing legal system. The usefulness of the new arrangement should be evaluated not only in relation to the grant of recognition but as regards real access to important information involving as few court proceedings as possible. These concerns echo the general observation of having an unclear definition of COMI, which is well discussed but usually from a legal perspective. We are more concerned about what the law means to practitioners as, the practical perspective has not been addressed. In our case, the practical issues with cross-border insolvencies are about access to information to establish the location of the assets, rather than the recognition of orders from different jurisdictions, because ultimately this still requires a hearing in China or Hong Kong. It is unclear whether the new cross-border insolvency cooperation arrangement will make the hearing faster in the first place, as the genuine concern lies elsewhere and is not mentioned in the framework.

[33] Shuai Guo and Bob Wessels, 'Cross-Border Insolvency between Mainland China and Hong Kong: A First Glance from a Global Perspective' International Corporate Rescue (2021) 18 (4), 247-252.
[34] Scott Atkins and Kai Luck, 'Cross-Border Insolvency in Hong Kong: Will the New Cooperation and Coordination Framework with Mainland China Provide the Impetus for Broader Reform?' International Corporate Rescue (2021) 18 (3), 165, 165-167.

The third issue relates to the need to get permission for a grant of recognition. *Re Samson Paper Co Ltd (In Liq)* [2021] 3 HKLRD 727; [2021] HKCFI 2151 has shown that the Hong Kong Court now has inherent jurisdiction to grant a letter of request to Hong Kong liquidators when they need recognition and assistance in another jurisdiction. The new cross-border insolvency cooperation arrangement enables the liquidators to submit the request to the Shenzhen court directly, instead of an administrative section of the Shenzhen court (i.e., the Bankruptcy court).[35] Nevertheless, the process remains the same, liquidators still need to make an application to the Hong Kong court first, and then submit it to the Shenzhen court. It is still unclear how the Shenzhen court will handle the case. The reverse is depicted in Article 3 of the Record of Meeting, which reads *'[a]n administrator in Mainland bankruptcy proceedings may apply to the High Court of the Hong Kong Special Administrative Region for recognition of bankruptcy liquidation, reorganisation and compromise proceedings under the Enterprise Bankruptcy Law of the People's Republic of China, recognition of his office as an administrator, and grant of assistance for discharge of his duties as an administrator'*.[36] Hence, arguably the procedure is identical to the existing arrangements. Also, we note that the initiative appears to be with the court in Mainland China. Article 2 of the Record of Meeting reads, *'[i]ntermediate People's Courts in the pilot areas designated by the Supreme People's Court may initiate cooperation with the courts of the Hong Kong Special Administrative Region on mutual recognition of and assistance to bankruptcy proceedings'*.[37] It is unclear whether the court in Mainland China is legally or only morally obliged to grant a request. In that regard, the new arrangement may not bring imminent change from the Mainland Chinese side, primarily since the application for recognition and assistance would be still handled by the Mainland Chinese side (Article 4 of the Record of Meeting). Therefore, the milestone made may not be as significant in practice as one may suppose.

Recommendation and Conclusion:

The new cross-border insolvency cooperation arrangement is an exciting start between the two regions as the Mainland courts now have a formal and published framework to recognise cross-border insolvency cooperation. The implications are twofold: on the Hong Kong side, what has been recognised by the court is now brought to the jurisdictional and policy level; from the Mainland Chinese side, awareness of the issue and practice can start to build. Three points should be observed here: the cooperation arrangement is not law-making, the impact of the arrangement is on principles rather than enforceable rules and therefore, business partners might have already obtained what they need with the existing arrangement even if it is not a formal law. Hence, the new arrangement should not be regarded as the first draft of the law

[35] Hong Kong Lawyers, 'Re Samson Paper Co Ltd' (Hong Kong Lawyers, 2021) https://www.hk-lawyer.org/content/re-samson-paper-co-ltd [Accessed 8 June 2022].

[36] Depart of Justice, 'Record of Meeting of the Supreme People's Court and the Government of the Hong Kong Special Administrative Region on Mutual Recognition of and Assistance to Bankruptcy (Insolvency) Proceedings Between the Courts of the Mainland and of the Hong Kong Special Administrative Region' (Depart of Justice, 2021), https://www.doj.gov.hk/en/mainland_and_macao/pdf/RRECCJ_RoM_en.pdf [Accessed 8 June 2022].

[37] Depart of Justice, 'Record of Meeting of the Supreme People's Court and the Government of the Hong Kong Special Administrative Region on Mutual Recognition of and Assistance to Bankruptcy (Insolvency) Proceedings Between the Courts of the Mainland and of the Hong Kong Special Administrative Region' (Depart of Justice, 2021), https://www.doj.gov.hk/en/mainland_and_macao/pdf/RRECCJ_RoM_en.pdf [Accessed 8 June 2022].

governing cross-border insolvency or a kick-off draft to align the procedural laws between Hong Kong and Mainland China – as this would risk becoming bogged down in the already complicated private international law issue, especially when companies originate in multiple locations which is exactly the case of Hong Kong. Hong Kong has a good record of recognising Mainland Chinese judgments, whilst the reverse may or may not be accurate. Instead, a substantive change of existing practice should be considered following the agreement: we propose that information sharing is the key to bringing meaning to this arrangement. The real impact would be seen if we could see a growing number of Hong Kong liquidators going back to Mainland China to seek redress through this framework. Still, the real causal effect is difficult to prove. It may be difficult to predict the impact of imposing an existing legal framework from other jurisdictions, although doing so would further connect Hong Kong and Mainland Chinese law and procedures to more international jurisdictions. Finally, the interconnectedness between the Mainland and Hong Kong is further symbolised by this agreement. However, this does not necessarily mean that their legal systems and procedures should be aligned due to this – the existing courts have been achieving the same objective in practice with more flexibility than imposing a binding procedural framework. Therefore, the priority is to promote practical change due to this arrangement as suggested in this article, before we consider incorporating useful rules that would further integrate the two jurisdictions and build a competitive edge in executing cross-border insolvency arrangements that could fit the Hong Kong-Mainland relationship, and perhaps create a framework applicable for the Greater Bay Area for a start.

While recognising the need to both cater for the features of the Hong Kong-Mainland China relationship and connect with international practice, it is suggested that the important next step is to first facilitate transparency and information exchange. It is clear, from recent cases, that liquidators look for clearance to gain access to information on companies outside their jurisdiction. Nevertheless, we would recommend that the courts should be guided to provide open access to the information upon request if proceedings have begun in one of the respective jurisdictions. This appears to be the real motivation for liquidators to go to another court and seek redress. Information such as the number of companies in the group, their registered address, unpublished annual reports, registered assets, and the number of creditors and debtors are already useful for creditors to evaluate the next step. For example, a checklist could be provided to the judges of the two jurisdictions to offer the certainty of going to the court as insolvency practitioners would then know what they can get from the court. It would then be up to the liquidators to decide whether they want more. The corporate governance framework between the two jurisdictions should be further aligned to resolve this. Information sharing appears to be more important than the recognition framework itself. We propose that the next step should be to draft a complete list of information needed for the court as a guide and take a bold move to further integrate the procedures between the two jurisdictions.