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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?

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The Hong Kong Special Administrative Region of the People's Republic of China (Hong Kong) has recently developed a new mutual recognition framework that permits Hong Kong and Mainland China courts to collaborate on cross-border corporate insolvency (new cross-border insolvency cooperation arrangement). On 14 May 2021, in Shenzhen, the Secretary for Justice of Hong Kong and the Vice-President of the Supreme People's Court of 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 on Mutual Recognition of and Assistance to Bankruptcy (Insolvency) Proceedings between the Courts of the Mainland and of the Hong Kong (Record of Meeting). The SPC Opinion on Taking Forward a Pilot Measure in Relation to the Recognition and Assistance to Insolvency Proceedings in the Hong Kong was promulgated on the same day. This new mutual recognition framework signifies a consensus on the mutual recognition of and assistance to insolvency proceedings between Hong Kong and Mainland China.

In our new paper, we seek to critically evaluate whether the new cross-border insolvency cooperation arrangement has strengthened the status of Hong Kong as an international restructuring hub. The Record of Meeting is a new effort, but it has already received a number of scholarly analyses, which claim that Hong Kong lacks a legal framework for cross-border insolvency with other countries. We observed that the absence of a detailed framework and empirical arrangements drives existing literature to suggest possible steps to advance the mutual recognition framework, which is accomplished by comparing the new cross-border insolvency cooperation arrangement with the practises of other countries. We feel compelled to contribute to this investigation by providing a business perspective that reflects how creditors and debtors interact when debtors default, taking into account business norms, different areas where soft law has been developed outside of court, and the business purpose of involving the court in the insolvency or debt restructuring process. Before deciding the next step to enhance this long-awaited certainty in cross-border insolvency cooperation between Hong Kong and Mainland China, we believe it is important to analyse the positive practical improvements that the agreement might offer.

There are many scholarly works on this issue from the regulatory perspective. Yet, we have a limited understanding of this issue from business perspectives. In the article, we argue that the new cross-border insolvency cooperation arrangement is not a law. This is a one-of-a-kind

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circumstance; hence, the cooperation arrangement seems to be the appropriate form, since it is founded on a moral commitment to recognise Hong Kong's legal authority under the common law system. It may be argued that the notion of recognition already exists, but codifying the practice in this style is a significant advance.

Our article evaluates the new cross-border insolvency cooperation arrangement from three business perspectives. First, whether it brings a legal effect. Currently, the framework may only be seen as non-binding soft law backed by case law or international practice, which at least the Hong Kong courts have previously adopted. It may be considered a Memorandum of Understanding or treaty-like arrangement between two jurisdictions within the same country. Incorporating a set of formal rules by reference to the international standard of law may thus generate needless complication that exceeds the advantages of aligning the arrangement with the method adopted in the rest of the world and giving assurance from international liquidators.

Second, whether it aids in identifying a company’s assets. The location of a company's assets is an important consideration. It would be great if the courts provided clear standards for determining whether assets situated or registered in Mainland China companies might be subject to the Hong Kong creditors' pool; and vice versa. Given that many Chinese companies registered in Hong Kong have their primary operations in Mainland China, it may not be useful to identify the company's centre of major interests, since multiple locations and corporate identities seem to be the standard.

Third, its impact on court procedures and potential to facilitate information sharing between two regions. It is uncertain if a court on the Chinese mainland is legally or ethically required to approve a request. In this respect, the new structure may not result in an immediate shift on the Mainland Chinese side, partly because the application for recognition and support would continue to be handled by the Mainland Chinese side (art.4 of the Record of Meeting). Therefore, the achieved milestone may not be as meaningful in reality as could be assumed.

At the end of our article, we recommend that the next step should be to produce a comprehensive list of information required by the court as a guide and to take aggressive action to better integrate the processes across the two jurisdictions.