**Promoting Cross-Border Insolvency Cooperation:
Is China’s “Belt and Road” Initiative an Opportunity?**

 “One Belt, One Road” Initiative (the Initiative) is one of the most important foreign policies that the Chinese government has been actively promoting since 2013. “One Belt” refers to the “Silk Road Economic Belt”, which was based on the historical trade routes through Eurasia region. “One Road” refers to the Maritime Silk Road, which focuses on linking China with Europe through the Pacific Ocean. The areas proposed by the Initiative would cover about 70% of world population and 55% of global GDP.[[1]](#footnote-1) With the expansion of the Initiative, cross-border legal issues have attracted more attention. This article is trying to explore the cross-border insolvency issues associated with the development of the Initiative and argued it is necessary to develop a multilateral guidance for effectively solving cross-border insolvency issues among participating countries.

**The Nature of the Initiative**

The proposed initiative is trying to encourage international cooperation in different areas, including trading, investment, infrastructure and energy. The uniqueness of the Initiative is that it does not try to achieve geopolitical integration among countries; the cooperation is based on policy communication and objectives coordination, so it will be an open and flexible process.[[2]](#footnote-2) More importantly, the Chinese government also made it clear that, in order to benefit wider areas, the ambitious plan is not limited to the area of Silk Road, and opens to all the countries and international and regional organisations for engagement.[[3]](#footnote-3)

Specifically, the Initiative focuses on five tasks, which are policy communication, the connectivity of infrastructure construction, facilitating investment and trading, improving financial cooperation integration and people-to-people communication.

One difficulty that many western commentators are facing is how to define the Initiative proposed by China.[[4]](#footnote-4) Especially from the legal point of view, it is difficult to give it an appropriate conceptual analysis.[[5]](#footnote-5) Some argued that the purpose of Chinese government is to build a regional economic integration.[[6]](#footnote-6) However, the action plan also emphasised that the free flow would be achieved through in-depth regional economic cooperation and policy coordination; so it would be an open and flexible economic system balancing different countries’ benefits.[[7]](#footnote-7) The fact that the Initiative is open to all countries or organisations to join also illustrates it is beyond regional or any boundaries. Additionally, there are no conventional arrangements or conventions for countries to sign under the initiative, and in-depth governmental cooperation would be achieved through making full use of existing agreements at bilateral, regional or multilateral levels. Based on those special factors, “One Belt, One Road” Initiative should be defined as a new model of global governance.[[8]](#footnote-8) This new model explores new methods of international cooperation at a more integrated level.[[9]](#footnote-9)

**The Initiative and Cross-Border Insolvency**

As noted by the Supreme People’s Court in Opinions on Providing Judicial Services and Safeguards for the Construction of the “Belt and Road”, “to establish the international cooperation system, rule by law is an important safeguard and judicial assistance is indispensable.”[[10]](#footnote-10) Specifically, since one of the priority is to facilitate investment and trade among involved countries, it is foreseeable that commercial and investment activities would experience a significant growth with conditions such as lower trading barriers and better supporting policies. As a result, the demand for cross-border dispute solutions is bound to increase. Therefore, the Supreme Court further noted that building an effective system for solving cross-border legal issues is essential for the Initiative, which should eliminate legal uncertainties and promote commercial stability.[[11]](#footnote-11)

Currently, most Asian countries are still applying the traditional territorial approach to solve cross-border insolvency issues. Some countries have addressed cross-border issues under domestic insolvency system, but those laws usually have some limitations in practice. For instance, under Chinese insolvency system, the recognition of foreign proceedings will be decided based on the existence of the principle of reciprocity or bilateral agreement between China and the foreign country.[[12]](#footnote-12) However, among those countries covered by the Initiative, only one-third of them has signed bilateral agreement on judicial assistance and judgment recognition with China and some of those agreements do not cover insolvency issues.[[13]](#footnote-13) The application of reciprocity largely depends on whether the foreign courts have recognised similar Chinese cases before. Those bilateral approaches only can provide solutions for issues between two countries, so it does not have any regional or international effects. Since the Initiative is trying to develop a free trading network among involved countries, it needs an effective and harmonious cross-border insolvency standard that could be accepted by participating jurisdictions. The Chinese Supreme Court recommended that, in order to create a better trading environment, China should be more active to establish and promote relevant international rules.[[14]](#footnote-14)

It would be a challenging job to develop an international cross-border insolvency regime since such system needs to balance all different legal systems and legal cultures. So far, the most successful international experiences for establishing cross-border insolvency system are the UNCITRAL Model Law on Cross-Border Insolvency and the EU Regulation.[[15]](#footnote-15) Both regimes were established based on the concept of modified universalism. The UNCITRAL Model Law has been recognised as an effective and acceptable system that can be adopted by different legal systems.[[16]](#footnote-16) However, the Law has not been very popular among Asian countries. Currently only three Asian countries (Japan, South Korea and Singapore) have adopted the UNCITRAL Model Law.[[17]](#footnote-17) Compared with the flexibility of the Model Law, the EU Regulation has more binding features among member states. Under the regulation, the rules for jurisdiction and choice of law are relatively clear, and the automatic recognition among all member states makes multinational insolvency more efficient.

It is no doubt that a multilateral system like Europe’s insolvency regime is preferred for economic system proposed by the Initiative. But it would be extremely difficult to achieve such regime among participating countries. Firstly, European Union is a highly-integrated political organisation, so the operation of its insolvency regulation is supported by unified legal and political agreements among all member states. As mentioned above, the Initiative is trying to promote a flexible free trading network and not a common market, and there are no binding agreements to be signed by participants. Secondly, another factor to consider is that most of the Asian countries covered by the Initiative are at very different stage of development in terms of insolvency law. Many of them do not have a well-established insolvency system or experiences dealing with cross-border insolvency cases. So the diversities would be too huge to operate a unified law.

Since both of the international regimes cannot be directly applied to the Initiative, it is suggested that a **Cross-Border Insolvency Guidance** should be developed to establish main principles for effectively solving cross-border insolvency issues. The nature of the guidance would be a soft legal tool to facilitate multinational insolvency among countries covered by the Initiative. The contents of the guidance should include series of legal principles and suggestions, which should be borrowed from the UNCITRAL Model Law and the EU Regulation. For example, the general solution should be established based on modified universalism, and it should focus on recognition of foreign proceedings and cooperation among relevant parties and courts. In order to achieve that, the concept of centre of main interests (COMI) should be introduced to define different types of insolvency proceedings. The ways of communication and assistance among courts also should be included. Also, a court decision made based on those principles should be respected by other participating countries’ courts. The soft nature of the guidance is consistent with the objective of the Initiative. If a country is willing to join the Initiative for the purpose of seeking common benefits, it would also be willing to follow the legal guidance.

1. World Economic Forum, “What can the New Silk Road do for global trade?” (22 September 2015) <https://www.weforum.org/agenda/2015/09/what-can-the-new-silk-road-do-for-global-trade/> <accessed 10 November 2017 > [↑](#footnote-ref-1)
2. Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road (Action Plan), jointly published by the National Development and Reform Commission, the Ministry of Foreign Affairs and the Ministry of Commerce (https://www.yidaiyilu.gov.cn/yw/qwfb/604.htm) [↑](#footnote-ref-2)
3. ibid [↑](#footnote-ref-3)
4. Philippe du Fresnay, “The new Silk Road: Economic Initiative or Geopolitical Alternative?” (2016) International Business Law Journal 575 [↑](#footnote-ref-4)
5. Zeng Lingliang, “Conceptual Analysis of China’s Belt and Road Initiative: A Road towards a Regional Community of Common Destiny” (2016) 15 Chinese Journal of International Law 517 [↑](#footnote-ref-5)
6. Kar-yiu Wong, “The “Belt and Road” Initiative and Economic Integration” In Banik A., Barai M., Suzuki Y. (eds) *Towards A Common Future* (Palgrave Macmillan, 2016) [↑](#footnote-ref-6)
7. See above note2 [↑](#footnote-ref-7)
8. See above note 5 [↑](#footnote-ref-8)
9. ibid [↑](#footnote-ref-9)
10. Alexandr Svetlicinii, “Publication Review : Legal Dimensions of China’s Belt and Road Initiative by Lutz-Chtistian Wolff and Chao Xi” (2017) International Trade Law & Regulation 109; The Supreme People’s Court, “Several Opinions on Providing Judicial Services and Safeguards for the Construction of the “Belt and Road”” (the Opinions) (2017) <https://www.yidaiyilu.gov.cn/zchj/zcfg/2401.htm> <accessed 02 November 2017> [↑](#footnote-ref-10)
11. ibid [↑](#footnote-ref-11)
12. Article 5, the Enterprise Bankruptcy Law of China 2006 (China) [↑](#footnote-ref-12)
13. The Supreme People’s Court, “Typical Cases for the Construction of the “Belt and Road”” (2017) <http://www.court.gov.cn/zixun-xiangqing-44722.html> <accessed 15 November 2017> [↑](#footnote-ref-13)
14. ibid, para 13 [↑](#footnote-ref-14)
15. United Nations Commission on International Trade Law, Model Law on Cross-Border Insolvency (1997); Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast) [↑](#footnote-ref-15)
16. S. Chandra MOHAN, “Cross-border Insolvency Problems: Is the UNCITRAL Model Law the Answer?” (2012) 21 (3) International Insolvency Review 199 [↑](#footnote-ref-16)
17. UNCITRAL, “Status” <http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html> <accessed 16 November 2017> [↑](#footnote-ref-17)