

“One Belt, One Road”: Promoting cross-border insolvency cooperation in China

Bingdao Wang explores the opportunities arising from the “One Belt, One Road” initiative in China

Bingdao Wang is the winner of the 2017 Richard Turton Award.

Bingdao is currently a third year PhD candidate at University of Leeds, UK. His research focuses on the development of cross-border insolvency law in developing countries and explores how experiences from Europe and other developed jurisdictions would help the imperative insolvency system reforms in emerging markets.

Bingdao was invited to the Annual Congress in Warsaw to receive his award.

An abbreviated version of his award winning paper is presented here. The full version and further information about the award can be found on line at www.insol-europe.org/richard-turton-award

The “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 the world population and 55% of the global GDP.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 to underline that 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 objective coordination, so it will be an open and flexible process.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 the Silk



Bingdao Wang receiving his award from Marc Udink at the Gala Dinner in Warsaw

Road, but it is open to all the countries and international and regional organisations for engagement.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 Especially from the legal point of view, it is difficult to give it an appropriate conceptual analysis.⁵ Some argued that the purpose of the Chinese government is to build a regional economic integration.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 the different countries’ benefits.⁷

The fact that the Initiative is open to all countries or organisations to join also illustrates it is beyond regional or other 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 the existing agreements at bilateral, regional or multilateral levels. Based on those special factors, the “One Belt, One Road” Initiative should be defined as a new model of global governance.⁸ This new model explores new methods of international cooperation at a more integrated level.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 Specifically, since one of the priority is to facilitate investment and trade among the 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

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 the domestic insolvency system, but those laws usually have some limitations in practice. For instance, under the 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 However, among those countries covered by the Initiative, only one-third of them has signed bilateral agreements on judicial assistance and judgment recognition with China and some of those agreements do not cover insolvency issues.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 they do not have any regional or international effects. Since the Initiative is trying to develop a free trading network between the involved countries, it needs an effective and harmonious cross-border insolvency standard that could be accepted by the participating jurisdictions. The Chinese Supreme Court recommended that in order to create a better trading environment China should be

more active in establishing and promoting relevant international rules.¹⁴

It would be a challenging job to develop an international cross-border insolvency regime since such a system would need to balance all different legal systems and legal cultures. So far, the most successful international experiences for establishing cross-border insolvency systems are the UNCITRAL Model Law on Cross-Border Insolvency and the EU Insolvency Regulation.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 However, the Model 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 Compared with the flexibility of the Model Law, the EU Insolvency Regulation has more binding features among Member States. Under the Regulation, the rules for jurisdiction and the 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 the economic system proposed by the Initiative. But it would be extremely difficult to achieve such a regime among the participating countries. Firstly, the European Union is a highly-integrated political organisation, so that 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 stages 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 let a unified law operate.

Since neither of the international regimes can be directly applied to the Initiative, it is suggested that a Cross-Border Insolvency Guidance Manual 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 able to facilitate the treatment of multinational insolvency cases among the countries covered by the Initiative.

The contents of the Guidance Manual should include a series of legal principles and suggestions, which should be borrowed from the UNCITRAL Model Law and the EU Insolvency Regulation. For example, a 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 in order to define different types of insolvency proceedings. The ways of communication and assistance among courts also should be included. Also, a court decision made on the basis of those principles should be respected by the other participating countries' courts. The soft nature of the Guidance Manual must be consistent with the objective of the Initiative. If a country is willing to join the Initiative for the purpose of seeking common benefits, it should also be willing to follow the legal guidance. ■

Footnotes:

- 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 >
- 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/qwtb/604.htm>)



MOST ASIAN COUNTRIES ARE STILL APPLYING THE TRADITIONAL TERRITORIAL APPROACH TO SOLVE CROSS-BORDER INSOLVENCY ISSUES



- 3 *ibid*
- 4 Philippe du Fresnay, "The new Silk Road: Economic Initiative or Geopolitical Alternative?" (2016) *International Business Law Journal* 575
- 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
- 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)
- 7 See above note 2
- 8 See above note 5
- 9 *ibid*
- 10 Alexandr Svetlicinii, "Publication Review : Legal Dimensions of China's Belt and Road Initiative by Lutz-Christian 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/zcftg/2401.htm> <accessed 02 November 2017>
- 11 *ibid*
- 12 Article 5, the Enterprise Bankruptcy Law of China 2006 (China)
- 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>
- 14 *ibid*, para 13
- 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)
- 16 S. Chandra MOHAN, "Cross-border Insolvency Problems: Is the UNCITRAL Model Law the Answer?" (2012) 21 (3) *International Insolvency Review* 199
- 17 UNCITRAL, "Status" http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html <accessed 16 November 2017>