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Maritime Cross-Border Insolvency in China

*Jingchen XU**

Due to the high degree of mobility of ships and the special operational structures of shipping companies, it is difficult to harmonise the cross-border insolvency regime with the maritime law regime governing ships. One of the typical examples is the recent bankruptcy of Hanjin Shipping Co Ltd. Chinese creditors were heavily affected by the bankruptcy of Hanjin. However, Hanjin never filed an application to have its Korean insolvency proceeding recognised in the People's Republic of China (PRC). Nor did it commence any ancillary insolvency application under the Enterprise Bankruptcy Law of the PRC. Taking Hanjin's bankruptcy as an example, this paper examines the current statutory regime of cross-border insolvency in the PRC in detail and analyses the approach adopted by the Chinese courts to resolve the conflicts that arise between the cross-border insolvency and maritime law regimes.

Keywords: Cross-border insolvency, Chinese bankruptcy law, maritime liens, maritime preservation, jurisdiction.

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1 Introduction

As a consequence of ‘the Great Recession’ (2008-2011), the demand for export and import of goods has sharply declined. Shipping companies have struggled to remain afloat amongst rapidly declining demand and freight prices. This in turn has resulted in many shipping companies being forced to utilise reorganisation or other insolvency proceedings to try to extricate themselves from their financial difficulties. One of the typical examples is the recent bankruptcy of Hanjin Shipping Co Ltd (Hanjin). Prior to its bankruptcy, Hanjin was the largest container shipping line in Korea and the seventh-largest container shipping line in the world. It operated approximately 60 container lines, with about 140 vessels.¹ Hanjin had 9 offices in the PRC.² In addition, its wholly-owned subsidiary, Hanjin Shipping (China) Co Ltd (Hanjin China), was headquartered in Shanghai with 11 branches located in several important coastal cities.³ Hanjin China conducted business between China and Korea through vessels owned or operated by Hanjin.

However, Hanjin was seriously affected by the 2008 financial crisis and saw a ‘deep deterioration’ in both its ‘performance and financial standing’.⁴ On 31 August 2016, Hanjin filed an application for rehabilitation protection in the Korean Bankruptcy Court. At the time of its application for rehabilitation, the claims against Hanjin totalled approximately USD 5.5 billion.⁵ From the creditors’ claims report issued by Hanjin’s administrator, the company had approximately 3,600 creditors, of which more than 300 were Chinese companies.⁶ Most of these Chinese creditors’ claims against Hanjin were for breach of maritime contracts, such as

¹ See Patrick Fitzgerald, ‘South Korea’s Hanjin Shipping Files for US Bankruptcy Protection’ <<https://www.wsj.com/articles/south-koreas-hanjin-shipping-files-for-u-s-bankruptcy-protection-1473002745>> accessed 25 April 2019.

² For the purposes of this paper, the PRC is understood to include the mainland territory of the PRC only, as the Hong Kong Special Administrative Region of the PRC (HKSAR) follows its own cross-border insolvency regime due to the ‘one country, two systems’ policy.

³ Statistic from National Enterprise Credit Information Publicity System: see <www.gsxt.gov.cn> accessed 25 April 2019.

⁴ Fitzgerald (n 1).

⁵ *ibid.*

⁶ See Hanjin Shipping Rehabilitation Claim — List of Creditors, <<http://www.jkim.com/news-letters/?uid=121&mod=document#top>> accessed 25 April 2019; see also Jingxia Shi and Yuanyuan Huang, ‘The Recognition and Relief in Cross-border Insolvency — A perspective from Hanjin Shipping Co’ (2017) *Journal of Renmin University of China* 34.

unpaid brokerage fees, wharf fees, stevedore fees and port charges.⁷ Although Hanjin had many assets and creditors in the PRC, Hanjin neither applied to have its Korean insolvency proceeding recognised in the PRC, nor commenced any ancillary insolvency application under the Enterprise Bankruptcy Law of the People's Republic of China (EBL).⁸ Thus, Hanjin did not enjoy any bankruptcy protection in the PRC, such as a consolidation of proceedings and a stay order against creditors' enforcement actions. Upon the applications of creditors, most of Hanjin's assets within the PRC, including vessels, bank accounts, stocks and its containers, were arrested, frozen and eventually distributed by creditors. Instead of a single and consolidated proceeding, Hanjin's vessels were arrested individually and sold on a case-by-case basis.⁹

Taking Hanjin's bankruptcy as an example, this paper examines the current statutory cross-border insolvency regime in the PRC and analyses how Chinese courts deal with the conflicts that arise between the cross-border insolvency and maritime law regimes. Part 1 has provided an overview of the facts of Hanjin's bankruptcy proceedings in the PRC. Part 2 will examine the current statutory regime of Chinese cross-border insolvency and the criteria adopted by Chinese courts in deciding whether to recognise foreign insolvency proceedings. Part 3 will analyse the two major issues arising from conflicts between maritime claims and the cross-border insolvency framework. First, will the arrest proceedings commenced by maritime claimants be allowed to proceed regardless of the pending or subsequent insolvency proceedings? Secondly, which courts will have jurisdiction over maritime claims in insolvency proceedings: maritime courts or bankruptcy courts? Finally, Part 4 will conclude that, in the process of improving its cross-border insolvency regime, the PRC should pay attention to the unique features of maritime claims and the conflicts between maritime law and insolvency law.

⁷ Kexin Zhang, 'The Recognition and Assistance of Foreign Insolvency Proceeding in China — Thoughts on the bankruptcy of Hanjin Shipping Co' (2017) *People's Judicature (Application)* 25.

⁸ Hanjin China withdrew its application of bankruptcy in the Shanghai Pudong Intermediate People's Court before the court formally accepted and heard the case. One commentator believed that the reason for Hanjin China's withdrawal was the Hanjin administrator's lack of confidence in the Chinese insolvency regime. See Shi and Huang, 'The Recognition and Relief in Cross-Border Insolvency' (n 6) 35.

⁹ According to the statistics from China Judgments Online, a total of 129 cases with respect to Hanjin and its subsidiary companies were filed in first instance courts in the PRC. This included 40 pre-trial preservation cases and 89 trial cases. The total amount of the claims in these cases was approximately USD 150 million. See <<http://wenshu.court.gov.cn>> accessed 19 May 2019; Zhang (n 7) 25.

2 Cross-border insolvency regime in the PRC

The PRC has not adopted the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-border Insolvency (the Model Law)¹⁰ or Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (EU Recast Insolvency Regulation).¹¹ Traditionally, China adopted a strict territorial approach in respect of insolvency matters.¹² However, in 2006, China enacted a revised version of the Enterprise Bankruptcy Law (EBL). Under art 5 of the EBL, China has gradually moved toward ‘international co-operation between Chinese courts and foreign counterparts’, where co-operation in international insolvency may be based on ‘treaty obligations or reciprocity’.¹³ This will now be considered in detail.

2.1 Art 5 of the EBL

The only provision in the EBL that deals with the issue of cross-border insolvency is art 5, which provides that:

The procedures for bankruptcy which have been initiated according to the present Law shall have binding force over the assets of the relevant debtor beyond the territory of the People’s Republic of China.

Where any legally effective judgment or ruling made by a foreign court involves any debtor’s assets within the territory of the People’s Republic of China and if the debtor applies with or

¹⁰ The Model Law was issued by the Secretary of UNCITRAL in May 1997 to assist enacting states equipping their insolvency laws and promoting a fair and efficient administration of cross-border insolvency. See The Model Law, <https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency> accessed 18 April 2019.

¹¹ The EU Recast Insolvency Regulation provides conflicts of law rules for insolvency proceedings concerning debtors based in the EU with operations in more than one Member State. See The EU Recast Insolvency Regulation, 2015 OJ L141/19.

¹² The old EBL, enacted in 1986, did not provide provisions on cross-border insolvency: see generally Law of the People’s Republic of China on Enterprise Bankruptcy (For Trial Implementation) (1986). For an English translation of the Enterprise Bankruptcy Law 1986 see <<http://www.asianlii.org/cn/legis/cen/laws/ebti483/>> accessed 10 June 2019.

¹³ Jingxia Shi, ‘Twelve Years to Sharpen One Sword: The 2006 Enterprise Bankruptcy Law and China’s Transition to a Market Economy’ (2017) 16 J Bankr L & Prac 5 Art 2.

requests the people's court to confirm or enforce it, the people's court shall, according to the relevant international treaties that China has concluded or acceded to or according to the principles of reciprocity, conduct an examination thereon and, when believing that it does not violate the basic principles of the laws of the People's Republic of China, does not damage the sovereignty, safety or social public interests of the state, does not damage the legitimate rights and interests of the debtors within the territory of the People's Republic of China, grant confirmation and permission for enforcement.¹⁴

This provision is a 'tentative attempt to honor China's commitment to the World Trade Organization (WTO) and to transition from command to market economy'.¹⁵ Although it serves as a positive step towards signalling cross-border co-operation in international bankruptcy cases, art 5 of the EBL only establishes a very broad and general framework of cross-border insolvency in the PRC and does not go far enough to address all of the specific problems involved in the recognition of foreign insolvency proceedings.¹⁶ By relying on the obligations of international treaties and the doctrine of reciprocity, art 5 of the EBL adopts a relatively narrow basis for recognising and enforcing foreign insolvency proceedings.¹⁷ Nevertheless, as discussed below,¹⁸ under the recent 'Belt and Road' initiative, China is gradually shifting from territorialism to universalism in this area.

2.2 Outbound access

Paragraph (1) of art 5 of the EBL clearly indicates the outbound access of Chinese insolvency proceedings. In other words, Chinese insolvency proceedings have an extra-territorial effect on debtors' assets that are located outside Chinese territory.¹⁹ Asserting the extra-territorial effect of Chinese insolvency proceedings is a significant step in China's progression towards a

¹⁴ Art 5, EBL (2006). An English translation of the EBL 2006 is available at <<http://www.asianlii.org/cn/legis/cen/laws/lotprocoeb557/>> accessed 10 June 2019.

¹⁵ Didi Hu, 'Cross-border Insolvency Regime in China: Finding the Most Pragmatic Interim Solution for Globalised Companies under Localised Practices' (2018) 92 *Am Bankr L J* 523, 524; see also Qingxiu Bu, 'China's Enterprise Bankruptcy Law (EBL 2006): Cross-Border Perspectives' (2009) 18 *Int Insolv Rev* 187, 189.

¹⁶ For a detailed discussion of the evolution of art 5 of the EBL 2006, see Hu (n 15) 527–30.

¹⁷ Emily Lee and Karen Ho, 'China's New Enterprise Bankruptcy Law — A Great Leap Forward, But Just How Far?' (2010) 19 *Int Insolv Rev* 145, 172.

¹⁸ See text to nn 53–59 below.

¹⁹ Art 5, EBL; Lee and Ho (n 17) 172.

universalist approach.²⁰ It provides representatives, namely, administrators designated by courts, with a legal basis for recovering debtors' assets located outside the territory of the PRC and is often 'an important prerequisite and legal requirement for countries to recognise the Chinese insolvency proceedings'.²¹ However, unlike art 5 of the Model Law, para (1) of art 5 of the EBL does not explicitly provide statutory power for Chinese representatives to act abroad on behalf of Chinese insolvency proceedings, nor does it set out specific mechanisms for co-operation and communication with foreign representatives or foreign courts, which, to some extent, diminish the practical effect of art 5.²²

2.3 Inbound access

In addition to outbound access, para (2) of art 5 of the EBL provides inbound access for foreign insolvency proceedings. It stipulates the criteria for the recognition and enforcement of foreign insolvency judgements or rulings with respect to debtors' assets within the territory of the PRC.²³ Accordingly, an insolvency proceeding pending in a foreign country will be recognised and enforced by Chinese courts: 1) according to the relevant international treaties that China has concluded or acceded to; or 2) according to the principles of reciprocity; provided that this is not contrary to the regulations and public policies of China.²⁴

2.3.1 Treaty obligations

Article 5 of the EBL does not state whether the 'international treaties' to which it refers need to be bankruptcy-specific international treaties. To date, China has not yet concluded any specific bilateral or multilateral treaties on cross-border insolvency with other countries. However, there are over 30 bilateral treaties on judicial assistance in civil and commercial matters.²⁵ Most commentators agree that these bilateral treaties can be regarded as being

²⁰ Shi, 'Twelve Years to Sharpen One Sword' (n 13); Rebecca Parry and Nan Gao, 'The Future Direction of China's Cross-border Insolvency Laws, Related Issues and Potential Problems' (2018) 27 Int Insolv Rev 5, 10.

²¹ Parry and Gao (n 20) 10; see also Shi, 'Twelve Years to Sharpen One Sword' (n 13).

²² Art 5, the Model Law; art 5 para (1), EBL.

²³ Art 5 para (2), EBL.

²⁴ *ibid.*

²⁵ The PRC has entered into bilateral treaties on judicial assistance in civil and criminal matters with 19 countries including Poland, Russia; and bilateral treaties on judicial assistance in civil and commercial

equivalent to the ‘international treaties’ referred to in para (2) of art 5 of the EBL.²⁶ In *In re B&T Ceramic Group srl*,²⁷ a case that occurred prior to the EBL 2006, the Foshan Intermediate Court of the PRC recognised an Italian bankruptcy order based on the bilateral treaty on judicial assistance between the PRC and Italy and the Civil Procedure Law of the People’s Republic of China. Therefore, it can be argued that bilateral treaties on judicial assistance will provide a basis for Chinese courts to recognise foreign insolvency proceedings under the current EBL. However, in *B&T Ceramic*, although the court granted the recognition application, it was reluctant to provide any assistance to the Italian representative to enforce the debtor’s assets located within the territory of the PRC on the grounds that the ownership of the assets had been transferred to a third party in Hong Kong. This is inconsistent with the PRC’s treaty obligations under the bilateral treaty on mutual judicial assistance with Italy.²⁸ In addition, it is worth noting that *B&T Ceramic* was decided at the time of the PRC’s accession to the WTO, and it is unclear whether, or to what extent, the decision was influenced by the political impetus to demonstrate the PRC’s openness to foreign trade.²⁹

To date, there is no precedent showing that Chinese courts have recognised and enforced any foreign insolvency proceedings under the treaty obligations of art 5 of the EBL 2006. Nevertheless, I would argue that the bilateral judicial assistance treaties are clearly ‘international treaties’, which fall within the literal wording of the EBL. Unless specifically stated, bilateral judicial assistance treaties concluded by the PRC include the mutual recognition and enforcement of bankruptcy judgments and rulings.³⁰ Thus, the Chinese courts should follow the terms of the relevant bilateral treaties in determining whether to recognise foreign insolvency proceedings under the current EBL regime. However, due to the

matters with 18 countries including Italy, France, Hungary. See <https://www.fmprc.gov.cn/web/ziliao_674904/tytj_674911/tyfg_674913/default_1.shtml> accessed 16 June 2019.

²⁶ See eg Shi, ‘Twelve Years to Sharpen One Sword’ (n 13); Parry and Gao (n 20) 14; Xinxin Wang and Jianbin Wang, ‘Analysis About China’s Acknowledging Extraterritorial Effect System of Foreign Bankrupt Procedure and Its Improvement’ (2008) *Law Science Magazine* 10, 11.

²⁷ [2000] Foshan Interm Civ No 633.

²⁸ Art 6, Treaty on Civil Judicial Assistance between the People’s Republic of China and the Republic of Italy, <<https://www.mfa.gov.cn/chn//pds/ziliao/tytj/t422606.htm>> accessed 16 June 2019.

²⁹ Parry and Gao (n 20) 15.

³⁰ However, it should be noted that the bilateral treaty with Spain explicitly excludes the recognition and enforcement of bankruptcy rulings, while the bilateral treaties with Korea and Singapore are limited to the recognition and enforcement of arbitral awards only. See <https://www.fmprc.gov.cn/web/ziliao_674904/tytj_674911/tyfg_674913/default_1.shtml> accessed 16 June 2019.

absence of bilateral treaties with several major trading partners of China, such as the United States and Japan, the treaty obligations of art 5 of the EBL are relatively limited.

2.3.2 *Reciprocity*

2.3.2.1 De facto reciprocity

Absent treaty obligations, reciprocity is the last resort for foreign insolvency proceedings to be recognised in the PRC.³¹ During the drafting phases of the Model Law, the requirement for reciprocity as a prerequisite for recognition was raised several times. Nevertheless, due to the opposition of several countries, led by the United States, recognition of foreign proceedings in the final version of the Model Law was not based on reciprocity.³² Thus, many countries adopting the Model Law, such as Australia, Canada, Singapore, the UK and the US, have abandoned 'reciprocity' as a prerequisite for recognising foreign insolvency proceedings.³³ However, other countries, such as the British Virgin Islands, Mexico, Romania and South Africa, still insist on 'reciprocity' as one of the prerequisites for courts to recognise foreign insolvency proceedings in their enactments of the Model Law, fearing that allowing recognition on a non-reciprocal basis might impede the protection of their domestic creditors.³⁴

In the early stages of its application of the EBL, the PRC adopted so-called 'de facto reciprocity', where, if there are no precedents indicating that either country has recognised and enforced the judgment of the other country, there is presumed to be no corresponding reciprocal relationship between the two countries.³⁵ In other words, Chinese courts will not recognise foreign judgments or rulings unless a precedent case of recognition of the same type has been made by the relevant foreign courts. Therefore, in fact, lack of de facto reciprocity has become

³¹ Art 5, EBL; see also Hu (n 15) 534.

³² Hu (n 15) 534; art 17, the Model Law, on which see Jenny Clift, 'The UNCITRAL Model Law on Cross-Border Insolvency — A Legislative Framework to Facilitate Co-ordination and Co-operation in Cross-Border Insolvency' (2004) 12 *Tul J Intl & Comp L* 307, 318; HR Rep No 109–31, pt 1 at 113 (2005).

³³ See eg Look Chan Ho, *Cross-Border Insolvency: A Commentary on the UNCITRAL Model Law* (4th edn, Globe Law and Business Publishing 2017) 7–8.

³⁴ See eg Ho (n 33) 7–8; Clift (n 32) 318.

³⁵ See eg Hongyu Shen, 'Research on Some Difficult Problems in Recognition and Enforcement of Foreign Civil and Commercial Judgments' (2018) *Journal of Law Application* 9.

one of the more frequent grounds on which Chinese courts deny the application of recognition.³⁶

The 'de facto reciprocity' approach has been criticised by commentators and scholars in the PRC.³⁷ The main reason for this criticism is that it will be difficult for foreign judgments and rulings to be recognised and enforced, especially when both countries insist on de facto reciprocity, as neither of them will be willing to step forward first to break the deadlock.³⁸ In addition, insisting on de facto reciprocity will become a reason for refusal to recognise, or even a retaliatory tool for foreign courts to deny the recognition of Chinese courts' decisions. This will inevitably lead to an increase in cross-border parallel litigation.³⁹ A typical example of these problems is the recognition and enforcement of judicial judgments between Japan and China. In *In Re Application of Gomi Akira (a Japanese Citizen) to Chinese Court for Recognition and Enforcement of Japanese Judicial Decision*, the Dalian Intermediate Court of the PRC refused to recognise and enforce a Japanese judicial decision of seizure and credit transfer on the grounds that no international treaties on the recognition and enforcement of court decisions or rulings have been concluded or acceded to between Japan and China, nor has any precedent of reciprocal relationship been established between Japan and China.⁴⁰ Similarly, in *In Re Application of Awabiya Co Ltd for JRE in China*, the Shanghai Intermediate Court of the PRC refused to recognise and enforce a Japanese judgment delivered by a Japanese court in Yokohama based on the same reasoning.⁴¹ Unsurprisingly, given *Gomi Akira*, the Osaka High Court of Japan, in turn, refused to recognise a decision delivered by the

³⁶ Hu (n 15) 534.

³⁷ See eg Jingxia Shi and YuanYuan Huang, 'Sino-US Milestone of Cross-border Bankruptcy Co-operation — Comment on Topoint Solar Case' (2017) *Journal of Application (Judicial case)* 51, 58; Jiwen Wang, 'Defects of the Reciprocal Principle in Recognition and Enforcement of Judgments' (2008) *Journal of Yunnan University (Law Edition)* 166; Shen (n 35) 9; Zhihui Huang, 'Dilemma and Solution in China's Application of Principle of Reciprocity in Recognition and Enforcement of Judgment' (2018) *Tribune of Political Science and Law* 63.

³⁸ See eg Shen (n 35) 9; Yunfu Yang, Guobin Hou and Deling Wang, 'Practice of Cross-Border Insolvency and Conflicts between Maritime and Insolvency Matters under Chinese Law' (Ninth International Conference on Maritime Law, Shanghai, October 2018) 267.

³⁹ See Shen (n 35) 9.

⁴⁰ See Reply of the Supreme People's Court on Whether the People's Courts of the PRC Should Recognise and Enforce Japanese Judgments Concerning Claims and Obligations (最高人民法院关于我国人民法院应否承认和执行日本国法院具有债权债务内容裁判的复函), [1995] Civ Others No 17, <<http://www.people.com.cn/zixun/flfgk/item/dwjf/falv/9/9-1-7-2.html>> accessed 19 May 2019.

⁴¹ [2001] Hu Yi Interm Comm First No 267; see Mingyan Ren, 'On the Application of the Principle of Reciprocity in Recognition and Enforcement of Foreign Judgments' (2011) 1 *Citizen and Law* 54.

Shandong High Court of the PRC and held that there was no reciprocity in this area between Japan and China.⁴² The 'de facto reciprocity' that Chinese courts insist upon in practice has thus become a tool for Japanese courts to retaliate against the refusal of Chinese courts to recognise Japanese judgments.

In contrast, in *Hubei Gezhouba Sanlian Industry Co v Robinson Helicopter Co*, the United States District Court for the Central District of California recognised and enforced a Chinese monetary judgment delivered by the Hubei Higher People's Court in the PRC under the Uniform Foreign Money-Judgments Recognition Act (UFMJRA) in 2009.⁴³ Since there is no bilateral treaty on judicial assistance between the US and the PRC, *Robinson Helicopter* provides a precedent of de facto reciprocity for Sino-US international judicial co-operation in the area of civil and commercial judgments. Similarly, in *In re Zhejiang Topoint Photoelectric Co Ltd*, the US Bankruptcy Court for the District of New Jersey recognised a Chinese reorganisation proceeding filed in the Hai'ning Intermediate Court of the PRC as a foreign main proceeding under Chapter 15 of the US Bankruptcy Code in 2014, and granted an interim relief order to stay any creditors from commencing or continuing any action against the debtor's assets.⁴⁴ This is the first time that a US bankruptcy court formally recognised a Chinese bankruptcy proceeding, which provides a precedent and reciprocal basis for Sino-US international co-operation on the cross-border insolvency arena.⁴⁵ To date, there are no courts in the PRC that recognise any US bankruptcy proceedings under art 5 of the EBL. Nevertheless, in 2017, given *Robinson Helicopter*, the Wuhan Intermediate Court of the PRC in *In re Liu Li's Application for Recognition and Enforcement of the Civil Judgment of a Foreign Court* recognised a monetary judgment delivered by the Superior Court of California, County of Los Angeles, and therefore enforced the defendant's assets located in Wuhan of the PRC to fulfil the US judgment.⁴⁶ This is the first time that a Chinese court recognised a US commercial judgment. Although this is not a case specifically on cross-border insolvency arena, it at least provides a precedent for Chinese courts to recognise the existence of de

⁴² Osaka High Court, Judgment of 9 April 2003 (2005) 48 Japanese Annual of International Law 171.

⁴³ No 2:06-CV-01798-FMCSX (CD California July 2009), affirmed 425 F App'x 580 (9th Cir 2011).

⁴⁴ No 14-24549 (GMB) (Bankr New Jersey 12 August 2014). Chapter 15 of the US Bankruptcy Code is the US enactment of the Model Law.

⁴⁵ Shi and Huang, 'Sino-US Milestone of Cross-border Bankruptcy Co-operation' (n 37) 58.

⁴⁶ *In re Liu Li's Application for Recognition and Enforcement of the Civil Judgment of a Foreign Court* [2015] E Wuhan Interm Civ Foreign First No 00026.

facto reciprocity between the US and the PRC, which is a positive signal for Chinese courts to recognise and enforce US bankruptcy proceedings in the future.

In addition, due to the 'one country, two systems' policy, Hong Kong follows its own cross-border insolvency regime. Thus, Hong Kong's highly autonomous judicial power has led to the difficulties in cross-border insolvency and co-operation between Hong Kong and the PRC. In *CCIC Finance Ltd v Guangdong International Trust & Investment Corp (GITIC)*, the Court of First Instance of Hong Kong recognised a liquidation order issued by the Guangdong High Court of the PRC and stayed the execution against the debtor's assets in Hong Kong on the grounds that the Chinese liquidation proceeding was a process of 'universal distribution of a bankruptcy's effects' and the worldwide creditors would receive *pari passu* distribution.⁴⁷ Thus, *GITIC* has provided a reciprocal precedent for the recognition of a Hong Kong insolvency proceeding under art 5 of the EBL. However, in *In re Norstar Automobile Industrial Holding Ltd*, the Supreme People's Court of the PRC (SPC) refused to recognise an order issued by the Court of First Instance of Hong Kong appointing a provisional liquidator, ignoring the reciprocal precedent between Hong Kong and the PRC.⁴⁸ The SPC in *Norstar Automobile* interpreted 'judgments and rulings' narrowly, explaining that 'judgments or rulings' in art 5 of the EBL that are subject to be recognised have to be '*a final decision of payment with executive force made by a people's court in the mainland and a court of the HKSAR in a civil or commercial case under a written jurisdiction agreement*'.⁴⁹ Accordingly, the SPC held that the order made by the Hong Kong Court of First Instance to appoint a provisional liquidator was not a decision of 'payment' nor 'under a written jurisdiction agreement', and was therefore not a 'legally effective' judgment or ruling that is subject to be recognised under art

⁴⁷ *CCIC Finance Ltd v Guangdong International Trust & Investment Corp* [2001] HKCFI 920; see Jingxia Shi, 'Chinese Cross-Border Insolvencies: Current Issues and Future Developments' (2001) 10 Int Insolv Rev 33.

⁴⁸ Reply of the Supreme People's Court on the Application for the Recognition of the order of the Hong Kong SAR re *Norstar Automobile Industrial Holding Ltd* (最高人民法院于北泰汽车工业控股有限公司申请认可香港特别行政区法院命令案的请示的复函), [2011] Civ Fourth Others No 19, <http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=ed3d4a1878e04383bdfb&keyword=&EncodingName=&Search_Mode=&Search_IsTitle=0> accessed 19 May 2019.

⁴⁹ *ibid*; emphasis added. Arrangement of the Supreme People's Court between the Mainland and the HKSAR on Reciprocal Recognition and Enforcement of the Decisions of Civil and Commercial Cases under Consensual Jurisdiction (最高人民法院于内地与香港特别行政区法院相互认可和执行当事人协议管辖的民商事案件判决的安排), No 9 [2008] of the Supreme People's Court, art 1. For an English translation of the Arrangement see <<http://www.lawinfochina.com/display.aspx?lib=law&id=6893 &CGid=>> accessed 10 June 2019.

5 of the EBL.⁵⁰ Moreover, the SPC noted that recognition of the Hong Kong insolvency order would have an impact on pending enforcement or execution measures against the three wholly-owned subsidiaries of the debtor in the PRC. Thus, although a reciprocal precedent already existed between Hong Kong and the PRC, the SPC in *Norstar Automobile* strictly interpreted the definition of ‘legally effective judgment or ruling’ and refused to provide any assistance, which is entirely inconsistent with the spirit and letter of art 5 of the EBL. The denial of recognition in *Norstar Automobile* will not only impair the realisation of the rights and the interests of both debtors and creditor, but also be detrimental to the sound development of the close and valuable economic ties between Hong Kong and the PRC.⁵¹

As discussed above, Chinese courts did not recognise the existence of a reciprocity relationship between Japan and Hong Kong. In addition, although in *In re Liu Li* the court acknowledged the existence of reciprocity relationship between the US and the PRC, some commentators argue that the Sino-US mutual judicial co-operation is still relatively limited, because *In re Liu Li* arises from an unique situation where both parties are Chinese citizens and the amount of the judgment is relatively small.⁵² Thus, in general, the mutual recognition and co-operation of cross-border insolvency in the PRC is still relatively narrow and conservative.

2.3.2.2 Presumed reciprocity

Recently, in the context of the ‘Belt and Road’ initiative, the SPC issued Several Opinions of the Supreme People’s Court on Providing Judicial Services and Safeguards for the Construction of the ‘Belt and Road’ by People’s Courts (SPC Opinions) in July 2015. The SPC Opinions provide that:

⁵⁰ Reply of the Supreme People’s Court (n 48).

⁵¹ In practice, in order to bypass the recognition procedures and allow provisional liquidators appointed by Hong Kong insolvency proceedings to get access to the assets located in the PRC and to participate in insolvency-related proceedings conducted, provisional liquidators are usually elected as directors or managers of mainland subsidiaries through the change of board of directors or managers, and thereby control the assets located in the PRC. See eg *In re Bankruptcy of Nardu Co Ltd* [2006] Sui Interm Civ First No 44.

⁵² The amount of the judgment was USD 125,000. Dan Harris, ‘China Enforces United States Judgment: This Changes Pretty Much Nothing’, (Basics of China Business Law, Legal News, 5 September 2017) <<https://www.chinalawblog.com/2017/09/china-enforces-united-states-judgment-this-changes-pretty-much-nothing.html>> accessed 17 June 2019.

Under the circumstance where some countries have not concluded judicial assistance agreements with China, on the basis of the international judicial cooperation and communication intentions and the counterparty's commitment to offering mutual judicial benefits to China, the people's courts of China may consider the prior offering of judicial assistance to parties of the counterparty, positively promote the formation of reciprocal relationship, and actively initiate and gradually expand the scope of international judicial assistance.⁵³

The SPC Opinions explicitly emphasise the need to loosen criteria for reciprocal relationships and to promote co-operation in international judicial assistance, including co-operation among countries in the area of cross-border insolvency. Thus, the SPC Opinions may be seen as a deliberate shift in policy from 'de facto reciprocity' to 'presumed reciprocity', ie, that a reciprocal relationship is presumed to exist in the absence of evidence to the contrary for the purpose of recognising and enforcing foreign judgments.⁵⁴

In addition, the Nanning Statement of the 2nd China-Association of Southeast Asian Nations (ASEAN) Justice Forum (Nanning Statement) in June 2017 suggested that, in order to facilitate the mutual recognition and enforcement of civil or commercial judgments among different jurisdictions and avoid unnecessary parallel proceedings:

If two countries have not been bound by any international treaty on mutual recognition and enforcement of foreign civil or commercial judgments, both countries may, subject to their domestic laws, *presume* the existence of their reciprocal relationship, when it comes to the judicial procedure of recognizing or enforcing such judgments made by courts of the other country, provided that the courts of the other

⁵³ Several Opinions of the Supreme People's Court on Providing Judicial Services and Safeguards for the Construction of the 'Belt and Road' by People's Courts (最高人民法院关于人民法院为“一带一路”建设提供司法服务和保障的若干意见), No 9 [2015] of the Supreme People's Court, art 3. For an English translation of the Opinions see <<http://en.pkulaw.cn/display.aspx?cgid=251003&lib=law>> accessed 10 June 2019.

⁵⁴ Shen (n 35) 14; See also Meng Yu and GuoDong Du, 'Time to Loosen the Criteria for Recognizing and Enforcing Foreign Judgments in China' (2018) China Justice Observer <<https://www.chinajusticeobserver.com/insights/time-to-loosen-the-criteria-for-recognizing-and-enforcing-foreign-judgments-in-china.html>> accessed 29 April 2019.

country had not refused to recognize or enforce such judgments on the ground of lack of reciprocity.⁵⁵

Thus, the Nanning Statement, a consensus on reciprocity reached between the SPC and courts in ASEAN countries, is the first instrument to propose an approach of ‘presumed reciprocity’.⁵⁶ However, the Nanning Statement is not in the form of a treaty and courts are clearly not bound by it. It only reiterates the policy shift of ‘presumed reciprocity’ and the positive attitude of Chinese courts in ‘advocating and gradually expanding the international judicial co-operation, as well as actively promoting the formation of reciprocal relationships’.⁵⁷ Nevertheless, compared with the past practice of Chinese courts, it is a step forward in the application of the doctrine of reciprocity.⁵⁸ This deliberate shift in policy may improve the prospects of the recognition of foreign insolvency proceedings in China.

Moreover, it needs to be noted that the ‘presumed reciprocity’ under the SPC Opinions and the Nanning Statement does not apply to all countries, but only to ‘countries along the Belt and Road’ and ASEAN member countries. More importantly, ‘Belt and Road’ is only an initiative, rather than a concrete international body or organisation. There is no specific list of countries which are considered to be ‘countries along the Belt and Road’ and it is difficult to identify which countries will respond positively to the initiative.⁵⁹ Thus, the scope of ‘presumed reciprocity’ is still unclear and limited.

⁵⁵ Art 7, Nanning Statement of the 2nd China-ASEAN Justice Forum (emphasis added). For an English translation of the Nanning Statement see <<http://cicc.court.gov.cn/html/1/219/208/209/800.html>> accessed 10 June 2019.

⁵⁶ Shen (n 35) 14; see also Yu and Du (n 54). ASEAN was founded on 8 August 1967. As of 2018, there are 10 member states: Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam. See ASEAN Member States, <<https://asean.org/asean/asean-member-states/>> accessed 29 April 2019.

⁵⁷ Yongjian Zhang, ‘New trends in the Practice of Reciprocity in the Context of ‘the Belt and Road’ Initiative’ *People’s Court Daily* (Beijing, 20 June 2017) <http://rmfyb.chinacourt.org/paper/images/2017-06/20/02/2017062002_pdf.pdf> accessed 29 April 2019.

⁵⁸ *ibid.*

⁵⁹ Yang, Hou and Wang (n 38) 268.

3 Conflicts between maritime law and insolvency law

Even if foreign insolvency proceedings are recognised in China, questions still remain about how to treat maritime claims in cross-border insolvency proceedings. Cases involving maritime claims and bankruptcy law are troublesome because of the fundamentally different natures of the policy objectives of these two legal regimes. Bankruptcy law developed on a national level and focused on local land-based assets, assuming that the assets and creditors involved would be within the same local area; whereas maritime law was geared to deal with ships, which are highly mobile assets.⁶⁰ Especially, maritime law has developed its own particular security regime, combined with its own method of realisation of that security.⁶¹ Maritime creditors are allowed to arrest vessels in rem wherever they are found, and to realise their claims from the proceeds of vessels' judicial sales, regardless of shipowners' insolvency proceedings.⁶² The two major conflicts arising between maritime claims and cross-border insolvency regime are: 1) Should the arrest proceeding commenced by maritime claimants be allowed to proceed regardless of the pending or subsequent insolvency proceedings? and 2) Which courts should have jurisdiction over maritime claims in insolvency proceedings — maritime courts or bankruptcy courts?

In the case of Hanjin's bankruptcy, upon the application of insolvency protection in Korea, the administrator of Hanjin immediately applied to recognise its Korean insolvency proceedings in countries that adopted the Model Law, preventing its creditors from arresting Hanjin's ships. However, under the Model Law regime, it is left to each enacting country to decide whether maritime arrest proceedings can prevail over pending or subsequent insolvency proceedings.⁶³ Unsurprisingly, different countries have developed different approaches to this issue.⁶⁴ Thus, it is necessary to examine and analyse in some detail how the EBL and the

⁶⁰ Melissa Alwang, 'Steering the Most Appropriate Course Between Admiralty and Insolvency: Why an International Insolvency Treaty Should Recognise the Primacy of Admiralty Law over Maritime Assets' (1996) 64 *Fordham L Rev* 2613, 2618, 2828.

⁶¹ William Tetley, *International Maritime and Admiralty Law* (Éditions Y Blais 2002) 473.

⁶² See Martin Davies, 'Cross-Border Insolvency and Admiralty: A Middle Path of Reciprocal Comity' (2018) 66 *Am J Comp L* 101, 103; Steven Rares, 'Ship Arrest, Maritime Liens and Cross-border Insolvency' (FCA) [2017] *Fed J Schol* 19.

⁶³ Art 20(2), the Model Law.

⁶⁴ Eg the Singapore High Court recognised the Korean rehabilitation proceeding and granted an automatic stay order, suspending any pending or subsequent proceedings against Hanjin. However, the court allowed

Maritime Code of the PRC (CMC) deal with the interaction between maritime claims and bankruptcy proceedings at the domestic law level.

3.1 The enforcement of maritime claims

The EBL has been developed with little regard to the unique feature of maritime claims, especially maritime lien claims. The general rule in Chinese bankruptcy law is that, once an application for bankruptcy protection is accepted, ‘the measures for preserving the property of the debtor shall be lifted and the procedure for execution shall be suspended’.⁶⁵ The scope of the stay order in the PRC is relatively narrow, however. It only limits preservation measures and execution procedures against the debtor and does not extend to other legal proceedings. Further, secured creditors may be exempted from the stay in certain circumstances. In a liquidation proceeding, the majority opinion in China is that secured creditors are exempted from the stay and can proceed with their enforcement procedures regardless of pending or subsequent liquidation proceedings.⁶⁶ On the contrary, in a reorganisation proceeding, the right to enforce a secured interest over the property of a debtor is not exempted from the stay at first. Achieving a successful reorganisation often requires the insolvency debtor to be allowed to use its assets that are necessary for ongoing operations free from financial pressures.⁶⁷ The stay provides the debtor with a ‘breathing space’ to rehabilitate itself and to restore its business to profitability. Nevertheless, secured creditors may thereafter apply to the courts for a resumption of the exercise of their security rights ‘in the case of possible damage or significant depreciation of value, which may injure the [secured creditor]’s right’.⁶⁸

M/V Hanjin Rome, which was arrested before the recognition, to be exempted from the automatic stay order, *In Re Taisoo Suk* [2016] SGHC 195; Belinda Ang, ‘Arrest and Cross-Border Insolvency: The Singapore Experience’ in Paul Myburgh (ed), *The Arrest Conventions: International Enforcement of Maritime Claims* (Hart Publishing 2019) 206–08; cf The United States Bankruptcy Court for the District of New Jersey recognising the Korean rehabilitation proceeding and issuing a wide automatic stay order, but not preserving any exemptions for maritime claims. *In re Hanjing Shipping Co Ltd* No BR 16–27041, 2016 AMC 2113 (District of New Jersey September 2016).

⁶⁵ Art 19, EBL.

⁶⁶ Xinxin Wang, ‘On the Exercise and Protection of Secured Claims in Bankruptcy Proceedings’ (2017) *Journal of CUPL* 23, 36–37; see also art 109, EBL.

⁶⁷ Wang, ‘On the Exercise and Protection of Secured Claims in Bankruptcy Proceedings’ (n 66) 29–30.

⁶⁸ Art 75, EBL (this provision has significant flaws, which is ambiguous on numerous issues, for example, in order to be exempted from the stay order, how much damage or depreciation of value must the property suffer). See Xinxin Wang, ‘Exemption Right in the Newly Enacted Bankruptcy Law’ (2007) *Tribune of Political Science and Law* 31; Xiaoming Xi, *Understanding and Application of Judicial Interpretation of Enterprise Bankruptcy Law by the Supreme People’s Court* (People’s Court Press 2017) 152.

In practice, when creditors learn that their debtor is about to open or has opened an insolvency proceeding, they will usually try to enforce their maritime claims by arresting ships in maritime courts. Ships are wasting assets and perishable cargo, or potentially dangerous cargo, needs to be dealt with promptly. Therefore, when maritime claims interact with bankruptcy law, it is crucial to determine whether maritime claims can be categorised as secured claims so that they may be exempted from the stay order and prevail over pending or subsequent insolvency proceedings in bankruptcy courts.

Maritime claims in China can be divided basically into three categories, namely, maritime lien claims, ship mortgage claims and other general maritime claims. Ship mortgages, by definition, are secured claims.⁶⁹ However, the status of maritime liens and ‘other general maritime claims’ are far from clear.

3.1.1 *Maritime liens*

A maritime lien is a legal right peculiar to maritime law that attaches to the ship and the ship’s apparel.⁷⁰ As a Civil Law system, the PRC codified its provisions on maritime liens in Chapter 2 of the CMC.⁷¹ Chapter 2 of the CMC was drafted on the basis of a draft version of the International Convention on Maritime Lien and Mortgages 1993.⁷² Art 21 of the CMC defines a maritime lien as ‘a right of the claimant to take priority in compensation against shipowners, bareboat charterers or ship operators with respect to the ship which gave rise to the said claim’.⁷³ In China, there are five maritime claims that can give rise to maritime liens: 1) payment for wages; 2) personal injury occurring in the operation of ships; 3) payment for ship’s tonnage dues, pilotage dues, harbour dues and other port charges; 4) salvage payment; and 5) torts claim during the course of the operation of ship.⁷⁴ As is the case in Common Law

⁶⁹ The CMC defines ship mortgages as ‘the right of preferred compensation enjoyed by the mortgagee of that ship from the proceeds of the auction sale made in accordance with law where and when the mortgagor fails to pay his debt to the mortgagee *secured* by the mortgage of that ship’. (emphasis added) Art 11, CMC; see also Yuzhuo Si, *Maritime Law Monograph* (4th edn, China Renmin University Press 2018) 15.

⁷⁰ Si (n 69) 22–24; arts 3 and 21, CMC.

⁷¹ See Chapter 2, CMC.

⁷² See Si (n 69) 22.

⁷³ Art 21, CMC.

⁷⁴ Art 22, CMC.

countries, a maritime lien can only be enforced by arresting the vessel in a maritime court in China.⁷⁵

However, in China it is debatable whether maritime lien claims are secured claims for the purposes of insolvency law. The definition of maritime liens under art 21 of the CMC does not mention the ‘security function’ of maritime liens, but simply describes maritime liens as ‘rights of priority’ over other claims in compensation against shipowners.⁷⁶ Most Chinese commentators are of the view that maritime liens are substantive property rights that provide claimants with security interests under the CMC.⁷⁷ This position seems correct. First, as in Common Law countries, maritime liens under the CMC have several characteristics of substantive property rights. For example, a maritime lien can only be enforced by a maritime court by arresting the relevant ship;⁷⁸ and it travels with the ship regardless of changes in its ownership.⁷⁹ In addition, the substantive nature of maritime liens is further supported by the structure of the CMC.⁸⁰ The section regarding maritime liens is located in the same chapter of the CMC that deals with ownership and mortgages of ships.⁸¹ Therefore, it is arguable that the drafters of the CMC intended to regard maritime liens as substantive property rights.⁸² Although the CMC adopted the *lex fori* as the applicable law to decide whether to recognise a foreign maritime lien,⁸³ leading Chinese maritime scholars are of the view that ‘the CMC using the *lex fori* as the applicable law to recognise a foreign maritime lien is not due to the nature of the maritime lien, but to the fact that a maritime lien is enforced by a specific procedure and such procedure is subject to the *lex fori* rule’.⁸⁴

⁷⁵ Art 28, CMC.

⁷⁶ Si (n 69) 24.

⁷⁷ See Si (n 69) 23–24; Tingzhong Fu, ‘Value Conflicts of the Maritime Lien and Limitation of Liability for Maritime Claims and Way to Harmonise’ (2013) *Chinese Journal of Law* 193, 195; Haibao Xing, ‘A Study on the Maritime Lien’ (1996) *Jurists’ Review* 73.

⁷⁸ Art 28, CMC.

⁷⁹ Art 26, CMC.

⁸⁰ Chapter 2, CMC.

⁸¹ Fu (n 77) 196.

⁸² Hai Li, *A Study on Real Rights in Ships* (Beijing, Law Press 2002) 149. See also Dingjing Huang, ‘Maritime Lien and Insolvency under Chinese Law’ in Johanna Hjalmarsson and Jingbo Zhang (eds), *Maritime Law in China: Emerging Issues and Future Developments* (Routledge 2016) 135.

⁸³ ‘The law of the place where the court hearing the case is located shall apply to matters pertaining to maritime liens’: art 272, CMC.

⁸⁴ Yuzhuo Si and Zhiwen Li, *Study on the Theories of Chinese Maritime Law* (Peking University Press 2009) 94 (the original text is in Chinese, this quotation is this author’s translation); Huang (n 82) 136.

Thus, if we accept that maritime liens under the CMC are substantive property rights, in my view, they are, by definition, secured claims. Shipowners promise to secure creditors' debt through the vessel itself. Maritime liens under the CMC are security interests in the vessel that arise simultaneously when certain services are rendered to the ship or certain damage is done by the ship.⁸⁵ In other words, as substantive property rights, maritime lien claims become secured claims from the moment the claims arise. Accordingly, in a liquidation proceeding maritime lien claims should be allowed to proceed regardless of the pending or subsequent liquidation; whereas, in a reorganisation proceeding they should be suspended by the stay order initially, but creditors should be able to apply to lift the stay if they can prove that the secured property may suffer possible damage or the value of the secured property is declining.⁸⁶

3.1.2 *Other general maritime claims*

In addition to maritime liens in the CMC, the Special Maritime Procedure Law of the PRC (SMPL) also provides a list of 22 claims for claimants to apply for arrest of vessels to ensure their claims to be fulfilled, such as claims regarding charterparties, cargo damage, general average, towage, pilotage, ship insurance premiums and ship construction costs.⁸⁷ Claims listed in arts 21(1)–(5), (21) of the SMPL are maritime liens and ship mortgages claims, which have been discussed above; while claims listed in art 21(19) are claims related to ownership and possession of the ship, which are not relevant to this paper. For the purposes of this paper, 'other general maritime claims' refers to the claims listed in arts 21(6)–(22) of the SMPL.

Claims under arts 21(6)–(22) are 'maritime preservations', which are temporary compulsory preservation measures against shipowners designed to ensure the realisation of claimants' rights.⁸⁸ Maritime preservation is a crucial right for claimants in the sense that, under urgent circumstances, if the claimants do not immediately apply for the preservation of property, ie, arrest of vessels, their legitimate rights and interests could be irreparably harmed. Thus, the

⁸⁵ See Si (n 69) 23–24.

⁸⁶ Arts 75 and 109, EBL.

⁸⁷ Art 21, SMPL. An English translation of the SMPL is available at <<http://www.asianlii.org/cn/legis/cen/laws/smpl267/>> accessed 10 June 2019.

⁸⁸ Art 12, SMPL.

claimants may apply to courts to preserve the debtor's property before initiating trials to ensure that their claims can be fulfilled.

The SMPL was drafted in line with the International Convention on the Arrest of Ships 1999 (Arrest Convention 1999),⁸⁹ which is a product of compromise between Civil Law and Common Law systems.⁹⁰ Similarly, 'although the SMPL is a statute promulgated in a Civil Law regime, it is also regarded as having borrowed some of its concepts from the Common Law system of actions in rem and as being innovative, in the sense that it introduces some non-traditional mechanisms into Chinese law'.⁹¹ The most typical example is the procedure for ship arrest where the defendant has not yet been identified. The general principle in traditional Chinese civil procedure theory is that an action can only be brought against the defendant in personam and no judicial processes or preservation measures will be initiated until the defendant has been identified.⁹² However, when a maritime claimant applies to arrest the involved ship, if the name of the opposing party cannot be ascertained promptly, the filing of application will not be affected.⁹³ When filing the application form for the arrest of the ship, the claimant may merely indicate 'the owner of M/V XYZ' without specifying the exact name of the shipowner.⁹⁴ This mechanism can help the plaintiff to urgently secure its claim in the case that the true owner of the vessel is not easy to discern, which may be hidden and disguised through a 'one-ship company'. Nevertheless, although maritime preservations under the SMPL have many 'in rem' characteristics, the nature of maritime preservations is in personam since the PRC is a typical Civil Law country. Under Chinese law, an action can only be brought against the shipowner or relevant interested person in personam, and no action can be brought directly against a ship in rem.⁹⁵

⁸⁹ See Guoguang Li, *Explanatory Report on the Draft of the Special Maritime Procedure Law*, <http://www.npc.gov.cn/wxzl/gongbao/2000-12/06/content_5007229.htm> accessed 27 May 2019; Yingying Zou, 'National Translations of the Arrest Conventions: China' in Paul Myburgh (ed), *The Arrest Conventions: International Enforcement of Maritime Claims* (Hart Publishing 2019) 260.

⁹⁰ Nicholas Gaskell and Richard Shaw, 'The Arrest Convention 1999' [1999] LMCLQ 470, 473.

⁹¹ Zou (n 89) 262.

⁹² *ibid.*

⁹³ Art 25, SMPL.

⁹⁴ Art 25, SMPL.

⁹⁵ Si (n 69) 31.

Unfortunately, there are no regulations or cases in China illustrating whether maritime preservation will provide claimants with security interests upon the issuance of arrest orders. Scholars have rarely discussed this specific issue and their opinions are divided.⁹⁶ In my view, a ‘maritime preservation’ is by nature a temporary legal protection and does not generally create any security interest within the meaning of insolvency law.

First, the Arrest Convention 1999 has played an important role in the drafting stage of the SMPL. Thus, in order to decide whether maritime preservation will create any security interest under the SMPL, Chinese courts should draw on the experience under the Arrest Convention 1999. Since the Arrest Convention 1999 creates no security interest through the procedure of ship arrest, maritime preservation under the SMPL does not provide any security interest to claimants. The Arrest Convention 1999 provides for arrest as an interim remedy in support of a maritime claim and as a means of establishing jurisdiction.⁹⁷ It does not aim to create any substantive liens, while the legal framework of the creation and priority of maritime liens is subject to three other Conventions on Maritime Liens and Mortgages.⁹⁸ In other words, the Arrest Convention 1999 only deals with the right to arrest ships, but nothing in the Convention was intended to create a property right or a security interest of the person interested in the arrested property.⁹⁹ Thus, although the SMPL uses the term ‘arrest’ in the provisions regarding maritime preservation, the actual meaning of ‘arrest’ is ‘the detention of a ship by judicial process to secure a maritime claim’.¹⁰⁰ The purpose of maritime preservation under the SMPL is to assist the substantive proceeding to prevent the defendant from disposing or dealing with its assets in an improper way, which creates no property rights or security in the garnished assets, and does not therefore render the claimant a secured creditor.

⁹⁶ See eg Shaoyang Cheng, ‘Maritime Securities that do not have the Characteristics of a Mortgage on a Ship may Constitute an Atypical Security’ (2018) People’s Judicatures (Case) 83, 85; Guoqiang Wang, ‘Legal Research on the Admiralty Action in Rem and Its Implication for Ship Arrest in China’ (Master of Laws thesis, Dalian Maritime University 2016) 44.

⁹⁷ Gaskell and Shaw (n 90) 482.

⁹⁸ International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages 1926 (the 1926 Convention); the International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages 1967 (the 1967 Convention); and the International Convention on Maritime Liens and Mortgages 1993 (the 1993 Convention). See Francesco Berlingieri, *Berlingieri on Arrest of Ships: A Commentary on the 1999 Arrest Convention* (6th edn, Routledge 2017) vol 2, 20, 97.

⁹⁹ See Lia Athanassiou, *Maritime Cross-Border Insolvency* (Routledge 2017) 249; Robert Lynn, ‘A Comment on the New International Convention on Arrest of Ships 1999’ (2001) 55 U Miami L Rev 453, 459.

¹⁰⁰ Art 21, SMPL; see art 1.2, International Convention on the Arrest of Ships 1999.

In addition, the maritime preservation provisions are stipulated in the SMPL, which indicate that this mechanism is merely a procedural remedy rather than a substantive proprietary right as maritime liens under the CMC.¹⁰¹ The PRC, as a typical Civil Law country, does not treat ship arrest in the same way as Anglo-Common Law countries do.¹⁰² The arrest of ships based on claims under arts 21(6)–22 of the SMPL in the PRC, ie, maritime preservation, is a ‘purely’ procedural preservation mechanism, in the sense that the claims protected by arts 21(6)–22 are not necessarily secured by a substantive property right; a position which is more similar to *saisie conservatoire* in French law.¹⁰³ Maritime preservation only provides the creditors or claimants with a remedy to satisfy their claim, but neither creates any special legal vested right which did not previously exist, nor gives any priority to their claims. Maritime preservation is not secured by the vessel and will not travel with the vessel. Even upon the arrest of the vessel, maritime preservation will not become a secured claim for the purpose of subsequent insolvency proceedings.¹⁰⁴

Thus, when applying the EBL to either liquidation proceedings or reorganisation proceedings, if we accept that maritime preservation claims are unsecured claims, I would argue that they should be stayed from being brought, continued or enforced against the vessel, along with all other general unsecured claims.¹⁰⁵ Notwithstanding that, in practice, a few maritime courts will sell the vessel and distribute the proceeds among maritime claimants regardless of the pending insolvency proceeding,¹⁰⁶ the vessel, as the approach adopted by most courts, ought

¹⁰¹ See Chapter 2, SMPL; Liang Zhao and Lianjun Li, *Maritime Law and Practice in China* (Routledge 2017) 246; Minghua Xiang, ‘On the Action in Rem and the Law of Ship Arrest in China’ (2006) *Hebei Law Science* 121, 123.

¹⁰² In the majority view of Anglo-Common Law countries, upon the issuance of the writs in rem, statutory rights of actions in rem will have secured proprietary consequences prospectively. See eg *In re Aro Co* [1980] Ch 196; *Yakushiji v Daiichi Chuo Kisen Kaisha* [2015] FCA 1170.

¹⁰³ See Xiaofeng Li and Ping Guo, ‘Comment on the Legislative Breakthrough and Insufficiency of the Preservation Mechanism in the Civil Procedure Law’ (2015) *Journal of Law Application* 71, 71.

¹⁰⁴ See Liang Zhao and Lianjun Li, *Maritime Law and Practice in China* (Routledge 2017) 268.

¹⁰⁵ Art 19, EBL.

¹⁰⁶ See eg *In re Nanjing Lianrun Transport Trade Co Ltd* [2016] Zhe 72 Execution No 46; [2016] Hu 72 Execution No 107 <<http://wenshu.court.gov.cn/content/content?DocID=1d764993-bccb-4f75-89b9-a7fc017c17b9&KeyWord=>> accessed 10 June 2019 (where the Ningbo Maritime Court and the Shanghai Maritime Court refused to release the vessels after Lianrun Transport Trade Co filed liquidation protection in the bankruptcy court, but continued to sell the *M/V Lianrun 16* and the *M/V Lianrun 18*.)

to be entrusted to the liquidators or administrators of debtors for the purpose of distribution or reorganisation and for the benefit of all claimants.¹⁰⁷

3.2 Maritime courts v bankruptcy courts

In China, maritime courts are special courts that have exclusive jurisdiction over maritime claims and disputes.¹⁰⁸ However, any maritime or non-maritime bankruptcy proceeding may be filed in a general people's court (bankruptcy court), which deals with all civil matters.¹⁰⁹ There is, therefore, always the potential for a clash of jurisdictions. After the commencement of a bankruptcy proceeding, all claims relating to that bankruptcy have to be filed in a bankruptcy court. This is known as a consolidation of jurisdiction.¹¹⁰ Thus, when a maritime claimant wants to file a claim against the insolvent debtor, the question arises — which court will have jurisdiction over the maritime claim? A maritime court or a bankruptcy court?

There is no specific court-selection clause in neither the EBL nor the CMC with respect to actions for enforcing of maritime claims. In my view, if actions for enforcing of maritime claims, as discussed in part 3.1, are allowed to prevail over the pending or subsequent insolvency proceedings, the proceedings of ship arrests and judicial sales should be resumed or initiated in maritime courts.¹¹¹ Thereafter, the proceeds of judicial sales, after satisfying the maritime court's cost of arrest, custody and sale,¹¹² should be transferred back to bankruptcy courts for the purpose of distribution or reorganisation.¹¹³

¹⁰⁷ See eg *In re M/V Xin Dong Fu* [2013] Yong Ningbo Maritime Ct Execution No 63–67; [2013] Yong Ningbo Maritime Ct Entrust Execution No 6; [2013] Wen Le Comm Insolv No 13. (where the LeQing People's Court (bankruptcy court) entrusted the Ningbo Maritime Court to sell the *M/V Xin Dong Fu*. The Maritime Court sold the vessel and, after satisfying the custody fees, transferred the proceeds of the judicial sale back to the liquidation proceeding for the purpose of distribution among all creditors.)

¹⁰⁸ See Provision of the Supreme People's Court on the Case Acceptance Scope of Maritime Courts, Interpretation, No 4 [2016] of the Supreme People's Court. An English translation is available at <http://encmt.court.gov.cn/chinamaritimetrial/2016-10/26/c_59507.htm> accessed 10 June 2019.

¹⁰⁹ Art 3, EBL.

¹¹⁰ Art 21, EBL.

¹¹¹ See text to nn 121–124 below.

¹¹² See detailed discussion in part 3.2.3.

¹¹³ See text to nn 121–124 below; see also eg *In re M/V Xin Dong Fu* (n 107).

On the contrary, for other legal proceedings involving maritime claims (except for actions for enforcing maritime claims), arts 20 and 21 of the EBL provide the court-selection clauses for circumstances where legal proceedings involving maritime claims occur before and after insolvency proceedings, respectively.

3.2.1 *Legal proceedings involving maritime claims before insolvency proceedings*

Article 20 of the EBL provides that:

After the people's court accepts an application for bankruptcy, any civil action or arbitration involving the debtor that has been started but has not yet been concluded shall be suspended; however, the action or arbitration can proceed after an administrator takes over the debtor's property.¹¹⁴

Under this provision, if proceedings have already been filed in the maritime court before the commencement of an insolvency proceeding, the case will be suspended initially. After the bankruptcy court appoints an administrator or a trustee, the case will be resumed and will continue to be heard in the original maritime court.¹¹⁵ Although this provision appears to be relatively straightforward, it should be noted that, even though the merits of the maritime aspects of the case will be heard in the maritime court, maritime claimants should still declare their creditors' rights to the administrator or trustee. After the maritime court has heard the merits of the case, the disputed fund is supposed to be transferred back to the bankruptcy court for the purpose of distribution or reorganisation, rather than being distributed among maritime claimants separately.¹¹⁶

3.2.2 *Legal proceedings involving maritime claims after insolvency proceedings*

Article 21 of the EBL provides that '[a]fter the people's court accepts an application for bankruptcy, a civil action against the debtor can only be filed with the said people's court'.¹¹⁷

¹¹⁴ Art 20, EBL.

¹¹⁵ Art 20, EBL.

¹¹⁶ See eg *In re M/V Xin Dong Fu* (n 107); but see *In re Nanjing Lianrun Transport Trade Co Ltd* (n 106).

¹¹⁷ Art 21, EBL.

In addition, Provisions (II) of the Supreme People's Court on Several Issues concerning the Application of the Enterprise Bankruptcy Law of the People's Republic of China provide that 'if the people's court accepting the bankruptcy petition is unable to exercise jurisdiction over a case involving the debtor such as a case involving a maritime dispute, ... the people's court at a higher level may specify the jurisdiction'.¹¹⁸

Thus, under these provisions, bankruptcy courts will generally have jurisdiction over all disputes against debtors once an application for bankruptcy is accepted. However, if jurisdiction conflicts arise between bankruptcy cases and maritime cases after the commencement of bankruptcy proceedings, courts at a higher level will specify which court has jurisdiction to hear the matter. Nevertheless, the question still remains: which court will the higher-level court specify to exercise jurisdiction over maritime claims? Some commentators argue that, while bankruptcy courts should generally have jurisdiction over insolvent debtors, maritime courts should have jurisdiction when insolvent shipping companies are one-ship companies or most debtors' claims are maritime claims.¹¹⁹ Other commentators argue that maritime courts should have jurisdiction over maritime claims as long as the bankruptcy cases involve maritime claims.¹²⁰ In practice, courts dealt with this issue inconsistently as well. For example, in the 2014 liquidation of STX Dalian Shipyard and its five affiliated companies, the bankruptcy court exercised jurisdiction over the liquidation proceeding and relevant claims initiated against the debtor; whereas the judicial sale of the vessel was under the jurisdiction of the Dalian Maritime Court.¹²¹ On the contrary, in the 2015 reorganisation process of Jiangsu Sainty Marine Co Ltd, the bankruptcy court exercised

¹¹⁸ Art 47(3), Provisions (II) of the Supreme People's Court on Several Issues concerning the Application of the Enterprise Bankruptcy Law of the People's Republic of China (2006); Art 37, Civil Procedure Rule of People's Republic of China.

¹¹⁹ See eg Shengshun Wu, 'Conflict and Connection: Maritime Litigation and Bankruptcy Procedure Run Separately' (2017) Chinese Journal of Maritime Law 85, 86; Xinxin Wang, 'On the Legal Application of the Bankruptcy of Shipping Enterprises' (2018) Journal of Law Application 2, 7.

¹²⁰ See eg Chun Li, 'Analysis of the Jurisdiction of Disputes Related to Bankrupt Enterprises' Journal of Law Application 15, 15; Bingyang Liang and Zhongwen Yao, 'Dilemma of the Execution of Vessels in Bankruptcy Procedures' (2018) Journal of Law Application 14, 18.

¹²¹ [2014] Dalian Interim Ct Civ Third No 3-1; Notice on the First Creditors' Meeting of STX (Dalian) Shipbuilding Co Ltd and its affiliated companies, <http://court.dl.gov.cn/info/33836_84479.vm> accessed 29 April 2019; see eg [2014] Da Maritime Execution No 13.

jurisdiction over all the claims relating to the reorganisation proceeding of the debtor and organised the judicial sale of the assets of the debtor, including the vessels.¹²²

In my view, bankruptcy courts should have jurisdiction over general claims against debtors, but it would be more practical for bankruptcy courts to entrust the judicial sale of vessels to maritime courts and to transfer the proceeds of the judicial sale, after satisfying the maritime court's cost of arrest, custody and sale,¹²³ back to bankruptcy courts for the benefit of all creditors.¹²⁴ Maritime courts are more professional and more experienced than bankruptcy courts in the judicial sale of vessels, which will make insolvency proceedings more efficient and faster,¹²⁵ reducing the expenses of bankruptcy and maximising the value of debtors' assets. In addition, maritime courts will provide purchasers with clean title against the whole world, free from all existing liens, charges and other maritime claims, and reduce the risk of foreign courts' refusal to recognise the legal effect of judicial sales; whereas it is at least controversial that whether judicial sales of vessels by bankruptcy courts will discharge all the existing liens, especially maritime liens.¹²⁶ In addition, the clean title obtained by judicial sale by maritime courts will very likely increase the sale price of vessels, which will in turn increase the asset pool for the benefit of all creditors.¹²⁷

3.2.3 Expenses of arrest, custody, sale etc

In practice, an additional issue that Chinese courts have encountered frequently in maritime insolvencies is which court will be responsible for the expenses of arrest, custody, sale and expenses incurred for the common interests of all creditors, especially when ships are under the custody of third parties designated by courts. In other words, should the expenses of arrest, custody and sale be paid before vessels are released and the proceeds of judicial sales

¹²² *In Re Reorganisation of Jiangsu Sainty Marine Co Ltd* [2015] Ning Comm Bankr No 26, <http://www.njfy.gov.cn/www/njfy/cpws_mb_a39171226112833.htm.> accessed 29 April 2019.

¹²³ See detailed discussion in part 3.2.3.

¹²⁴ Wu (n 119) 90.

¹²⁵ SMPL and its statutory supplements provide special rules to expedite and streamline the rules and judicial sale of ships in maritime courts. Therefore, judicial sales of ships by maritime courts will be more efficient than bankruptcy courts. See Zou (n 89) 264.

¹²⁶ Minghua Xiang, 'Analysis of the Legal Nature of Judicial Sales of Ships', (2009) *Journal of Chongqing Institute of Technology (Social Science)* 67, 71; see also Lief Bleyen, *Judicial Sales of Ships* (Springer 2016) 153.

¹²⁷ Xiang, 'Analysis of the Legal Nature of Judicial Sales of Ships' (n 123) 71; Bleyen (n 126) 153.

are transferred back to trustees or administrators? In practice, there appears to be confusion over this issue in both maritime courts and bankruptcy courts. Due to the lack of regulations and precedents, ships may be under arrest for a long period, which will incur substantial custody fees and erode the residual value of ships. A typical example is *In re Qinzhou Guiqin Shipping Group Co.*¹²⁸ In this case, the debtor's vessel, M/V *ShengAnda 68* was arrested by the Ningbo Maritime Court of the PRC and the vessel was kept by a third party custodian company appointed by the Maritime Court. The vessel was later scheduled for judicial sale to enforce judgments against the debtor. Before the judicial sale, the debtor filed a reorganisation petition in the Qinzhou Intermediate Court of the PRC (Bankruptcy Court) and the administrator of the debtor asked the Maritime Court to stay the enforcement of the judgments and release the vessel. Accordingly, the Maritime Court suspended its enforcement against the vessel, but asked the administrator to pay the custody fees first before it transferred the vessel to the administrator. The administrator did not agree. Negotiations between the two parties continued for two years but an agreement was never reached. Finally, after reconsideration by the Court of Appeal (the common superior court of the Maritime Court and the Bankruptcy Court), the Court of Appeal instructed the Maritime Court to sell the vessel and to pay off the expenses of arrest, custody and sale from the proceeds of the judicial sale before transferring the remaining fund to the insolvency proceeding for the benefit of all creditors. The vessel was sold at approximately USD 890,000 but the custody expenses arising because of the stalemate between the bankruptcy court and the maritime court amounted to more than USD 300,000.¹²⁹

Therefore, it is important to clarify who is responsible for the expenses of arrest, custody, sale and expenses incurred for the common interests of all creditors to avoid the unnecessary waste of debtors' assets. In my view, these expenses should be paid from the proceeds of judicial sale before transferring those proceeds back to the bankruptcy courts. They are

¹²⁸ [2014] Yong Ningbo Maritime Ct First No 63, <<http://wenshu.court.gov.cn/content/content?DocID=bd762974-eeb2-4021-82c8-2c31033ba2ef&Keyword=>> accessed 27 May 2019; [2015] Zhe Higher Ct Maritime Final No 169, <<http://wenshu.court.gov.cn/content/content?DocID=b7ff2786-a5fc-45e0-8b8d-20d6f01ef267&Keyword=>> accessed 27 May 2019; [2015] Zhe Higher Court Execution No 45.

¹²⁹ Ibid.

expenses that have been incurred for the common interest of all maritime and non-maritime creditors, which should be realised from debtors' assets at any time under the EBL.¹³⁰

4 Conclusion

With the increasingly global integration of the world economy, the establishment of a modern cross-border insolvency regime has become a priority for China. A healthy and open attitude of cross-border insolvency regime in China will represent an important step towards a more reliable, transparent and efficient financial system for the benefit of both domestic and international creditors and debtors.¹³¹ However, art 5 of the EBL is only a general provision, leaving ample room for future improvement in the arena of cross-border insolvency. Although from the perspective of economic interests, Hanjin's administrator seems to have sufficient reasons to apply for recognition of its Korean insolvency proceeding in China, his refusal to file either a recognition petition or a bankruptcy application in the PRC indicates his pessimistic attitude towards Chinese cross-border insolvency regime; a view that is likely to be shared by other foreign creditors and administrators.¹³² Furthermore, the problem of maritime cross-border insolvency has risen to prominence in recent years with the global financial crisis and the current declining shipping market. In order to promote international trade and the shipping market, both debtors and maritime (and indeed non-maritime) creditors require certainty and predictability. Thus, when improving its cross-border insolvency regime, China should also pay attention to the unique features of maritime claims and the conflicts arising between these two regimes.

The Chinese practice in cases involving maritime cross-border insolvency is to conduct separate and parallel bankruptcy and maritime proceedings. Although the EBL contains general provisions on whether and when bankruptcy courts should take precedence, the lack of careful and detailed integration between the two regimes has given rise to considerable confusion, inefficiencies, delays and wastage. Thus, in order to give both debtors and

¹³⁰ Art 43, EBL; art 24, CMC; art 119, SMPL; see Wu (n 119) 89; Liang and Yao (n 120) 20.

¹³¹ Bu (n 15) 207.

¹³² Shi and Huang, 'The Recognition and Relief in Cross-Border Insolvency' (n 6) 41.

creditors certainty and predictability, an explicit exception of maritime lien claims should be granted in the PRC's future enactment of the Model Law (if the PRC decides to adopt the Model Law) or in a revision of the EBL or appropriate judicial interpretation. Maritime lien claims, as secured claims, should be exempted from general stay orders in liquidation proceedings; whereas they should be subject to stay orders in reorganisation proceedings. On the contrary, 'other general maritime claims', as unsecured claims, should be stayed from taking any enforcement actions against the insolvent debtor. In terms of jurisdiction, although bankruptcy courts should generally have jurisdiction over claims against the debtor, it would be more practical and efficient for maritime courts to conclude an ancillary judicial sale process of any vessels and thereafter transfer the proceeds of the judicial sale back to bankruptcy courts for the benefit of all creditors.¹³³

¹³³ Wu (n 119) 90.