Japan & China (including Hong Kong):
Introduction to the Tools Available for Corporate Rescue & Cross-Border Insolvency

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1. Introduction

This session will focus on the tools available for corporate rescue in the People’s Republic of China (PRC), Japan and Hong Kong and for cross-border recognition in the PRC and Hong Kong. These three jurisdictions offer an excellent contrast of what is necessary to create a well-functioning system and of the combination of infrastructures and underlying factors that must be in place for corporate rescue mechanisms to achieve their goals. In terms of the quality of the formal corporate rescue laws: the ranking is (1) Japan; (2) the PRC; and then (3) Hong Kong. Of the three jurisdictions, Japan has engaged in the most law reform, with a continuing series of reforms that commenced in the aftermath of the Asian Financial Crisis (AFC) in 1997 and continue to this day. Next comes the PRC, which enacted a modern corporate rescue procedure in 2006 that came into operation in 2007. Last on the list is Hong Kong, which in the early 1990s was one of the first two jurisdictions in Asia to commence the law reform process to enact a new corporate rescue law. Back in 1996 the Law Reform Commission of Hong Kong (LRC) called for the enactment of “provisional supervision” and although the enactment of various versions of this corporate rescue mechanism has been “on the horizon” for the last twenty years or so, the promulgation of this law is no closer now than it was in 1996, and Hong Kong still does not have a formal corporate rescue law in place.

Yet, as will be seen below, of the three jurisdictions, in terms of the best place in which to undertake a corporate rescue, the ranking is as follows: (1) Hong Kong; (2) Japan; and then (3) the PRC. The inconsistency of this ranking with the quality of the applicable laws can be explained by differences in the following factors: the strength of the corporate rescue culture; the expertise and creativity of the insolvency profession (both lawyers and accountants); and the quality of the judiciary. Moreover, for insolvency laws generally – and corporate rescue laws in particular – to function effectively, there should be transparency, predictability, and efficiency. Hong Kong leads in these areas as well. Thus, even though Hong Kong has the worst law of the three jurisdictions, it is the best of the three in which to restructure a company or a corporate group.

2. Responses to the AFC

Clearly, the need for corporate rescue mechanisms in Asia existed before the onset of the AFC. That being said, back in 1997 the norm in Asia for companies in distress was a liquidation model. Singapore was the only jurisdiction in the region at that time with a modern, formal corporate rescue system. The AFC was like a financial tsunami that hit the

1 Singapore is the other.
region, and some countries were hit harder than others. The three types of responses that led to the development of corporate rescue mechanisms were (1) insolvency law reform, (2) the promulgation of out-of-court workout guidelines, and (3) for countries with systemic insolvency in the financial sector, the enactment of administrative reforms, usually in the form of the establishment of Asset Management Companies (AMCs) to address high levels of Non-Performing Loans (NPLs) accumulating at banks.

With the onset of the AFC, there were immediate calls for insolvency law reform and the first wave of reform commenced in 1997 and 1998 in many of the jurisdictions hardest hit by crisis. New legislation or significant reforms were enacted in Indonesia, Malaysia, the Philippines, Japan, South Korea, Chinese Taipei, and Thailand. In many of these countries, further reforms followed. The second wave occurred several years later, and included new bankruptcy laws enacted in Vietnam (2004), China (2006), and Cambodia (2007). Ironically, as mentioned above, although Hong Kong started its law reform process before the onset of the AFC, the legislative stalemate continues and the jurisdiction remains without a formal corporate rescue procedure.

Although the enactment of formal insolvency laws insolvency receives the most attention in the press, the time taken to enact and implement such legislation is inevitably protracted, and additional time elapses as cases work their way through the courts. Thus, law reform proved less of a solution to the AFC than the beginning of the laying of groundwork for future crises. The second type of reform – the promulgation of out-of-court workout guidelines – had a more immediate effect on saving individual companies. The guidelines enacted in many Asian jurisdictions (eg, the HKAB/HKMA Guidelines in Hong Kong, the Bangkok Approach in Thailand, and the Jakarta Initiative in Indonesia) had their origins in the London Approach originally promoted in the 1970s by the Bank of England as an alternative to formal court-based corporate insolvency proceedings involving multiple financial creditors. The basic tenet of this approach is that it is in the interest of financial creditors to act in concert rather than in competition with each other – and thereby to preserve and benefit collectively from the going concern value of the company in distress rather than suffer from lower values if the company is liquidated.

These guidelines are primarily used by financial institutions and were particularly well suited for adoption in Asia where the majority of corporate debt was bank issued. Since the banking community in most Asian jurisdictions was smaller and more collegial than in many Western countries, once the guidelines were put into place, it was often possible to achieve consensus. In those jurisdictions where banks were less willing to collaborate (eg, Malaysia), the guidelines needed to include mechanisms to force recalcitrant bankers to the negotiating table.

A further benefit of the guidelines was that they were in harmony with Asian business culture. Asian companies prefer to resolve their difficulties discreetly, as quickly as possible, and without adverse publicity. Thus, the best solution for many companies in the aftermath of the AFC was to come to an out-of-court agreement with their major bankers for the rescheduling of corporate debt and overall re-financing.

It should be noted that out-of-court workouts occur in the shadow of the law. In countries that enacted effective formal corporate rescue procedures that included clear voting mechanisms setting out the percentage of assenting creditors and/or debt necessary to bind all creditors, holdout creditors came to have very little leverage; in cases where a dissenting
creditor voted against an out-of-court workout, other creditors or the debtor itself would be able to file a corporate reorganization petition and have a plan proposed that would be able to garner the necessary votes and bind the dissenting creditor.

Lastly, as is clearly evident from the recent Global Financial Crisis (GFC) that engulfed the financial sector in the United States and spread worldwide, dramatic administrative steps must be taken to save financial institutions in an effort to stop contagion from spreading to other financial institutions and generally throughout the economy. Thus, in the aftermath of the AFC, many Asian countries set up national AMCs to help strengthen the balance sheets of their banks that were in difficulty.

From the discussion below of the PRC, Japan, and Hong Kong, it will be seen that each of these jurisdictions has developed its own assortment of tools to foster corporate rescue.

3. The PRC

A. Background to the development of Chinese bankruptcy law

The development of the PRC’s bankruptcy and corporate rescue law is part of the broader evolution of its transition that started in the 1980s from a centrally-planned socialist economy to a more market-oriented economy. Early on, the backbone of the PRC economy comprised large state-owned enterprises (SOEs) that were funded with government-directed “policy loans” from the large state-owned commercial banks (SOCBs), with little concern as to the SOEs’ capacity to repay the loans. With the transformation of both the SOCBs and the SOEs into entities increasingly responsible for their own balance sheets and economic performance, it was clear that many SOEs would be unable to make this transition and would remain unable to repay their debts.

Over the years, the Chinese government instituted a variety of administrative procedures and legal reforms to address the problems confronting these inefficient, insolvent SOEs, including the enactment of the Law of the People’s Republic of China on Enterprise Bankruptcy (Trial Implementation) on 2 December 1986, which came into operation on 1 October 1988 (1986 EBL). This law, comprising 43 articles, applied only to SOEs and lacked sufficient detail. Other enactments addressed the problems with non-SOEs. There were many gaps in coverage as well as inconsistencies between the bankruptcy procedures for SOEs and non-SOEs. To address these problems, the Supreme People’s Court (SPC) issued a series of judicial interpretations.

In the first five years after the enactment of the operation of the 1986 EBL – from 1989 through 1993 – only 1,153 cases under the 1986 EBL were accepted by the Chinese courts. Although reorganization was in theory possible under these laws (but only for SOEs), the

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People’s Courts handled the cases under a liquidation approach. Moreover, only a small fraction of insolvent enterprises used these laws. By 1994, the Chinese government realized that these laws were insufficient and the Financial and Economic Committee of the National People’s Congress (NPC) established the Bankruptcy Law Drafting Working Group to draft a new, comprehensive bankruptcy law that would create a legal framework for the reorganization and more efficient liquidation of both SOEs and non-SOEs. However, it is important to realize that this law reform process was but one part of the Chinese government’s arsenal of reforms and remedies to address the historical problems resulting from the ongoing economic transition, namely (1) the SOEs’ dangerously high levels of NPLs; (2) the resulting weak balance sheets of the main SOCBs; and (3) the complicated issues relating to the need to resettle and retrain the workers of insolvent (and often the largest) SOEs. Thus, at the same time that the government pursued bankruptcy law reform, it also experimented with a broad range of administrative mechanisms, the most important of which were the use of State Council bankruptcy policy decrees to facilitate debt restructuring on a large scale through merger and acquisition and bankruptcy under the Capital Structure Optimization Program (CSOP). The State Council decrees provided that the resettlement rights of workers could leapfrog over the existing rights of secured creditors, and thus were inconsistent with the 1986 EBL’s treatment of workers’ rights.

When the AFC spread throughout the region, the PRC saw the dire consequences resulting from the collapse of the financial sector in many of its neighbors, and the Chinese government realized that SOE reform and bankruptcy law reform could not prove successful without first putting the SOCBs on a more sound financial footing. Thus, in 1999, China established four AMCs to deal with the high levels of NPLs of each of the four main SOCBs.

The drafting process for the new bankruptcy law proved contentious and over the years the Bankruptcy Law Drafting Working Group prepared several drafts of a new law. Many of the changes from draft to draft were quite significant and reflected divergent views within the drafting group. Finally, after more than a decade of discussion and debates, on August 27, 2006, the Chinese government enacted the Enterprise Bankruptcy Law (2006 EBL), which came into operation on June 1, 2007. Although back in 1994 it was envisioned that the new law would assist with the restructuring of the SOEs most in need of assistance, by the time the law came into operation the insolvency of thousands of SOEs had already been addressed under the CSOP policy bankruptcy approach. Moreover, Article 133 of the 2006 EBL created a further exception for SOE bankruptcies even after the promulgation of the new law:

> The particular issues concerning the bankruptcy of State-owned enterprises within the scope and time limits specified by the State Council before this law takes effect shall be handled in accordance with the relevant regulations of the State Council.

Thus, the 2006 EBL, rather than serving as the engine for the reform of SOEs, continues to take a back seat to the State Council policy bankruptcy approach. As recently as September 2015, the PRC State-Owned Assets Supervision and Administration Commission of the State Council (SASAC) issued guidelines for SOEs that continue this policy approach outside the scope of the 2006 EBL.
Although the 2006 EBL with its 136 articles is much more comprehensive than the 1986 EBL and the other earlier bankruptcy laws that it replaced, it does not deal comprehensively with all insolvency topics. Moreover, for a bankruptcy law to function efficiently, detailed bankruptcy rules and regulations must be in place. However, the Chinese government failed to promulgate such rules and regulations at the same time as enacting the 2006 EBL, and as of December 2015, still has not done so. In the meantime, to address some of the implementation problems that have arisen over the last eight years, the SPC has issued a variety of provisions, opinions and interpretations to assist with the administration of the 2006 EBL, including the 2007 Administrator Designation Provisions and the 2011 SPC Judicial Interpretation (relating to procedural issues involving the acceptance of bankruptcy petitions by the People’s Courts).

At the outset, a few unusual aspects of the Chinese system must be kept in mind. Firstly, although the 2006 EBL provides a much more comprehensive and detailed legal infrastructure than did the pre-1994 legal patchwork – the 1,973 bankruptcy cases in 2010; 1,331 cases in 2011; 2,100 cases in 2012; 1,998 cases in 2013; and 2,059 cases in 2014 hark back to levels from the 1993-1995 period (710 cases in 1993; 1,625 cases in 1994; and 2,344 cases in 1995). After the enactment of the 2006 EBL, the number of bankruptcy cases declined each year through 2011. There was an increase in 2012 and then a small dip in 2013. Since then the number of cases has started to rise again and it is expected that the number of cases under the new law will exceed 3,000 for the first time since enactment. But that will still be far lower than the high of 8,939 cases in 2001 under the old law.

These low levels of cases do not mean that the Chinese economy is strengthening and that the number of enterprises that fail is rapidly decreasing. Rather, the opposite is actually occurring, and commentators are increasingly worried about the fallout that will result from the current weakening of the Chinese economy. It must be kept in mind that in China, failing enterprises usually pursue avenues outside the 2006 EBL. It is estimated that for each bankruptcy case accepted by the courts, at least another 100-250 enterprises are closed down either through the use of out-of-court administrative procedures or simply disappear (many through deregistration and license cancellation). There are also many zombie companies that just carry on and are not included in the data.

Secondly, one of the reasons for the low number of cases has been the failure of many People’s Courts to follow the 2006 EBL and comply with the various deadlines and requirements. In some cases, petitioners have never even heard back from the court about the status of a bankruptcy petition. The 2011 SPC Interpretation was adopted to deal with this problem.

Thirdly, the government continues to play an important role in Chinese insolvencies. The difficulty is that the involvement is not transparent. The PRC has not established a semi-independent supervisory administrative agency for administrating insolvency cases, although a proposal to that effect has recently been made. Rather, the State Council plays an important role in policy bankruptcies, as does SASAC. Local governments also have a large say in bankruptcy cases and exert great influence over the local courts, especially since the local governments fund the court system. Especially in matters involving SOEs
and cases involving large numbers of workers or significant labor issues, courts are reluctant to accept cases in the absence of government support.

Fourthly, the judiciary plays a major role in the administration of bankruptcies in China. One of the innovations of the 2006 EBL was the creation of a new functionary in the bankruptcy process called the “administrator,” who was intended to take control of the debtor’s assets and exercise a broad range of administrative responsibilities. The idea was to replace government control of the liquidation committee with professionalism and insolvency expertise through the appointment of outside administrators (law firms, accounting firms, bankruptcy liquidation firms, or other public intermediary bodies). Although it was anticipated that administrators would play a significant role in the insolvency process, the judiciary has frequently proved reluctant in allowing administrators to do so. Instead, many courts prefer to utilize the liquidation committee, which was the norm under the old law (and which is still permitted under Article 24 of the 2006 EBL). In essence, there is an ongoing debate in the PRC as to whether the insolvency process should be guided by independent professionals with restructuring experience or government and administrative officials with the connections (guanxi) to navigate the insolvency process. Many cases are increasingly utilising a compromise approach in which a liquidation committee is appointed (and the government plays a leading role) and an independent professional is retained as a financial advisor. The administrator provisions were intended to change the way in which cases were administered, but in the face of the judicial opposition, a hybrid system has instead emerged.

Fifthly, there is often a significant gap between what the 2006 EBL provides in respect of employees’ claims and what happens in practice. For larger cases involving many workers (often in the high thousands), it is unlikely that a judge will even accept a bankruptcy case unless the local government is supportive of the proposed treatment of workers. And in most cases, it is unlikely that the bankruptcy process will proceed smoothly unless workers are satisfied with their proposed treatment. There have been anecdotal reports of workers resorting to self-help and robbing corporate premises when told that the operations would be closed or of workers “detaining” management until a satisfactory settlement could be concluded.

C. Overview of the formal Chinese reorganization procedure

As noted above, corporate rescue was possible for SOEs under the 1986 EBL, but more in theory than in practice. The hope was that with the enactment of the 2006 EBL, corporate rescue could become a reality. The insolvency law reform process emphasised the need for corporate rescue and reorganisation provisions are included in Chapter 8 of the EBL.3 Pursuant to Article 70 of the EBL, both debtors and creditors are permitted to file an application for reorganisation.4 Although reorganisation is no longer limited to SOEs to be

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3 Chapter 9 sets forth a conciliation procedure to enable the debtor to enter into an agreement with its unsecured creditors regarding the settling of debts and which is only binding on those creditors involved in the conciliation. This is a streamlined process for dealing with unsecured claims; it does not affect secured claims (2006 EBL, art. 101).

4 Investors who hold more than 10% of the registered capital of the company may also file in defined circumstances.
used at the discretion of the government, it is important to keep in mind the government often still plays a very important role.

The application for the reorganisation is submitted to the court. The PRC has developed a hybrid procedure providing for the administration of the debtor’s property by either the administrator or by the debtor itself under the supervision of the administrator. Once the reorganisation ruling has been made by the court, the administrator or the debtor (as the case may be) will have a period of six months within which to come up with a rescue plan that will then have to be placed before the creditors and ultimately before the court (EBL, Art. 79).

While this period of six months may be sufficient for most companies, it is possible to envisage that for larger companies, whose affairs are more complex, it will be difficult if not impossible to organise a restructuring within such a relatively short period. There are provisions for the six-month period to be extended for another three months when justified (EBL, Art. 79) but that may also prove insufficient. The creditors are divided into four groups for the purposes of voting on the plan – secured debts; workers’ claims; tax debts; and ordinary unsecured claims (EBL, Art. 82). Once the administrator’s plan has been approved by the creditors by a simple majority in number and two thirds in value of each group (EBL, Art. 84), it is then submitted to the court for approval (EBL, Art. 86). The law provides procedures for where the plan does not gain the approval of all four groups, including a limited “cramdown” power (EBL, Art. 87). Surprisingly, cramdowns are being used much more frequently than had been anticipated.

It can be seen from this brief description that the Chinese reorganisation procedure borrows heavily from Chapter 11 of the United States Bankruptcy Code, and this is a point frequently made by the PRC government and academics. However, although the two laws are quite similarly phrased, in practice they operate quite differently. Firstly, reorganisation remains the exception under Chinese law, rather than the norm. Secondly, China has adopted the wording, but not the spirit, of the US approach. For example, China has not yet developed a corporate rescue culture that lies at the heart of US Chapter 11. Thirdly, Chapter 11 is about negotiation and reaching a compromise, but the emerging trend in China is to force a deal on uncooperative parties through the use of the cramdown. Fourthly, the Chinese procedure lacks the insolvency infrastructure (comprising, eg, strong creditors’ committees with independent, experienced counsel; an outside regulator in the form of the US Trustee; and knowledgeable and experienced bankruptcy judges.) Fifthly, although Article 75 of the 2006 EBL provides that the debtor or the administrator may borrow money and create security for loans secured to help carry on the business of the company, at present the PRC lacks the sophisticated financing mechanisms at the heart of the US system. Perhaps the better comparator for Chinese restructuring law are the US policy bankruptcies involving General Motors and Chrysler that arose during the recent GFC and in which the US government played a significant role.

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5 Or of the shareholders in the absence of a superior department in charge.
6 Art. 73 of the 2006 EBL provides that the debtor may apply to the court for approval to administer its assets, and thereby serve as a debtor-in-possession (DIP). If approval is granted, the debtor will administer its property and business affairs under the supervision of the administrator.
All of this being said, in the brief time that the new law has been in operation in China, there have been some successful reorganisations, certainly more than in the close to twenty years under the old regime; but the number of reorganisation cases is still very low. From the enactment of the 2006 EBL through 1 June 2015, there have been only 59 reorganisations of listed companies and around 100 non-listed enterprise reorganisations. Even in regard to A-Share Listed Companies (listed on the Shanghai Stock Exchange and largely available only to domestic investors), the cases have involved companies that have been closed for a significant period of time and have few assets. The aim of the proceedings generally has not been to deal with on-going business operations with a view to saving corporate goodwill and jobs, but rather to salvage the value of the stock exchange listing and to find a purchaser for the listing shell – in other words to entice prospective purchasers with a back-door stock exchange listing.

Nevertheless, there have been several recent, high-profile restructurings in China, including Suntech, Chaor Solar, Ambow Education, Sino-Environment Technology Group Ltd, and Sino Forest. At a symposium organized by IAPBL and the Hong Kong TMA Chapter in Hong Kong in October 2014, leading Insolvency Professionals (IPs) based in Hong Kong and Shanghai who were involved in these and other recent Chinese cases offered their insiders’ perspective on the successes and failures of restructurings in the PRC:

The speakers noted that in some recent cases, good results have been achieved under the circumstances – not ideal by Western standards – but much better than in previous cases in China. One theme stressed by several speakers is that foreign IPs must realize at the outset that local Chinese management often has strong ties with local government officials and local creditors and is credited in the local communities for creating jobs, bringing in high levels of investment, and paying local taxes. Many challenges remain in the Chinese insolvency process and there are very few cases, but when the right conditions exist, foreign IPs have been appointed as administrators or advisors and, in some cases, have been able to increase value. The speakers were generally in agreement that the better results have been achieved when it has been possible to achieve consensus amongst the parties. Nevertheless, there is still much less transparency than would be found in insolvencies in Hong Kong. From their experiences in China, the speakers shared the following lessons for IPs: you need to identify where you share common ground with other parties; you need to recognize the changing role of government in PRC insolvencies; at the outset, you must decide not whether to restructure a business in China, but rather whether the business is, in fact, salvageable; you need to identify where you are best able to apply leverage; opportunities come to those who are pro-active, not to those who sit back and wait; and you must be realistic in assessing the situation.

Lastly, although it may at first appear surprising, in corporate reorganisations in China, pre-packs are the norm rather than the exception. This is because it is unlikely that a People’s Court will accept such a case without local government support. By the time a case has been accepted, the government has likely been intricately involved in the

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7 Data from the Bankruptcy Law & Restructuring Research Center, China University of Politics and Law, Beijing, China.

8 Through October 2010, there were 30 such cases. See Alan CW Tang & Christina LM Lam, Update on Reorganisation in Practice under the New PRC Enterprise Bankruptcy Law, Handout 4, Workshop: Mainland PRC Recoveries, 12 January 2013, HKICPA Diploma In Insolvency 2012/13.

9 Unlocking Value in the PRC: The Changing Nature of Restructurings on the Mainland – A Summary of a Symposium held in Hong Kong on October 10, 2014.
negotiations with creditors, the enterprise and bankers, and perhaps has even identified a purchaser of the corporate assets or listing shell. Although the parties usually prefer an out-of-court solution, this is sometimes not possible and the bankruptcy case will be necessary to secure the affirmative vote of the creditors for the draft reorganization plan and then the approval of the People’s Court.

D. Informal workouts

As noted in Section 3.B., above, the majority of insolvencies in China are handled outside the formal bankruptcy/reorganisation process. Where there is value in an enterprise being reorganised, out-of-court rescues will likely be pursued. For larger enterprises, local government support of a proposed reorganisation and worker resettlement issues will also be necessary. Over the years, the government has experimented with a variety of out-of-court mechanisms for rescuing companies including the following: merger and acquisition of SOEs; debt for equity swaps; the Changchun out-of-court approach; and policy bankruptcies by decree.

The PRC government is quite flexible and pragmatic in the variety of approaches that it has experimented with to foster corporate rescue. However, one of the overall problems with out-of-court rescue in China is that it is too government-driven, rather than market-oriented. This has delayed the development of a rescue culture from the bottom up. A further problem is the restriction that banks face in writing off bad debts in full or in part. This has further hindered the development of a rescue culture.

E. Cross-border insolvency

None of the old national PRC insolvency laws included provisions specifically applying to cross-border insolvency. Historically, when confronted with both inbound and outbound issues, Chinese courts traditionally adopted the territoriality approach. However, over the last decade or so – and leading up to the enactment of the 2006 EBL, changes were beginning to occur. Hong Kong liquidators began reporting that they increasingly were able to secure co-operation, especially in Guangdong. (Interestingly, recognition of a Hong Kong liquidator might be more likely in a voluntary liquidation commenced by the company’s shareholders or directors than in a compulsory winding up.) Similarly, in the light of Article 73 of the 2002 SPC Provisions, some commentators began arguing that Chinese law was extra-territorial in scope.

These issues were all addressed by the enactment of the 2006 EBL. Article 5 of the 2006 EBL explicitly asserts extraterritorial jurisdiction and makes it easier for Chinese representatives to seek assets and co-operation abroad. However, the treatment of inbound transactions in the new law is not as explicitly universal in scope. Article 5 provides as follows:

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 creditor applies to or 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, and does not damage the
legitimate rights and interests of the creditors within the territory of the People’s Republic of China, grant confirmation and permission for enforcement.

This article grounds the basis of co-operation in either a treaty or reciprocity; the difficulty with this approach is that China has not yet entered into any cross-border insolvency treaties, and reciprocity requires that a foreign jurisdiction will first have recognized a PRC insolvency case. China and Hong Kong have not yet even entered into a bilateral cross-border insolvency agreement. This is especially unfortunate given the amount of cross-border commercial activity between China and Hong Kong.

Overall, new Article 5 of the 2006 EBL is a step in the right direction, but difficult for foreign representatives to rely on. The requirement for a treaty or reciprocity sets a very high bar. Although it is unlikely to dramatically increase the recognition of foreign bankruptcies by the Chinese courts in the short term, it rejects the territoriality approach of China’s earlier bankruptcy laws.

On June 11, 2014, the SPC issued a decision in *Thumb Environmental Technology Group v Sino-Environmental Technology Group*. This case provided for the recognition of a foreign representative (from Singapore) not on the basis of Article 5 of the 2006 EBL, but rather on the basis of Article 14 of the Law for Foreign-Related Civil Legal Relationships of the PRC. This creative approach produces a favorable result that fosters cross-border co-operation, but the fact that the court bypassed the application of Article 5 of the EBL exemplifies the deficiencies of the approach set out in the new law.

Chinese restructurings are further complicated by the increasing use of Cayman Islands or BVI holding companies in the corporate group chain. The emerging corporate business structure of choice – with holding companies in the BVI or the Cayman Islands, layers of subsidiaries in Hong Kong (and elsewhere in Asia) and ultimately other subsidiaries holding assets in the PRC leads to cross-border complications when insolvency occurs. Difficult issues must be addressed involving offshore and onshore restructurings and competing interests amongst offshore and onshore creditors. These corporate failures often involve bankruptcy or reorganisation filings in several countries by different corporate entities in the group and/or the need to enter into parallel schemes of arrangement.

4. **Japan**

   A. **Background to the development of Japanese Law**

Japan was very hard hit by the AFC. In effect, it was struck by a double whammy – (1) its economy, which had collapsed years earlier with the bursting of the Japanese property market bubble, was struck hard by the crisis; and (2) problems were compounded by the fact that many Japanese companies had invested throughout the region (eg, Japan had the largest exposure to Indonesia) and these investments were severely affected by the impact of the AFC on its neighbors. After the AFC occurred, many Japanese companies were in dire shape and the Japanese financial sector was also in difficulty.

Unlike the PRC, which was grappling with the application of a recently enacted law when the AFC occurred, Japan had a very different problem: the Japanese legal infrastructure comprised a fragmented continental system with a US overlay. Looking at the history of Japanese insolvency law involved an exercise in legal archaeology:
The Commercial Code 1890 was derived from French law.
The Bankruptcy Act 1922 was derived from German law. It provided for a liquidation model controlled by the courts.
The Composition Act 1922 was derived from Austrian law. It provided temporary relief until creditors voted on a composition plan. It bound unsecured, but not secured, creditors.
The 1938 Corporate Arrangement Proceeding in the Commercial Code was based on the English Scheme of Arrangement procedure.
The Corporate Reorganization Act 1952 was derived from Chapter X of the US Bankruptcy Act 1898, as revised in 1938. It was better suited for larger, public companies, was trustee-controlled, and applied to both secured and unsecured debt.

Thus, unlike the PRC, Japan had many formal laws on its books, which had been in operation for decades. The problem for Japan is that these laws came from very different cultures and did not work well together. Even with all of these alternatives on the books, Japan had a very low level of bankruptcy filings, with an average of only 2,254 cases per year.

B. Post-AFC legal reforms in Japan

Japan pursued aggressive, comprehensive insolvency legal reform in the aftermath of the AFC and reforms continue to be enacted. Among the many amendments and enactments in Japan are the following:

- The Commercial Code was amended in 1997 to rationalise the procedures for corporate mergers. Further changes were made in 2000 to allow for corporate splits.
- The Civil Rehabilitation Act was enacted in 1999, and came into effect as of April 1, 2000. (The Composition Act was repealed in 2000.) On application, the court can stay secured creditors – with the goal of trying to get creditors to negotiate and reach a settlement.
- The Law on Recognition and Assistance of Foreign Insolvency Proceedings (UNCITRAL Model Law) was enacted in 2000 and came into effect in April 2001. (Covered in another INSOL Fellows Lecture.)
- Revisions to the Corporate Reorganization Law became effective in 2003.
- The Bankruptcy Act was amended in 2004.
- A Special Liquidation Proceeding was adopted as part of a new Company Code in 2005.

The goal of this broad array of reforms was not to radically change the structure of Japanese insolvency procedures, but rather to address many of the weaknesses of the old procedures and to make the law more flexible, more cost-effective, faster, more useful, and better able to be used for corporate rescue. The changes streamlined the procedures and tried to facilitate settlement. The new Civil Rehabilitation Act addressed problems with undersecured creditors and the number of cases skyrocketed to over 25,000 per year (although that number also included individuals). The laws made it easier for a debtor to sell all or parts of its business and the new corporate reorganization law made it easier to
use pre-packs where necessary.

Japan was the only jurisdiction in Asia that saw a dramatic increase in the number of insolvency cases under its new/revised insolvency laws. A key to the success of the reforms was the high quality of the Japanese judges. Unlike the judges in the PRC, the Japanese judges were receptive to the changes in the procedures and proved flexible in interpreting the new legislation and trying to make it work.

C. Post-AFC out-of-court workout reforms

Although the legal reforms proved successful in Japan, they were insufficient to address the full scope of the problems. A serious issue in Japan was the insolvency culture. Unlike companies in the West, Japanese companies were generally reluctant to file for bankruptcy protection; similarly, Japanese banks were reluctant to push their debtors into bankruptcy. The result was that the government realized that it needed to get more actively involved and try to foster corporate rescue and assets sales. In the aftermath of the AFC, the Japanese government pursued a variety of mechanisms to achieve these goals, including the following:

- Guidelines for Multi-Financial Creditors Workout (based on INSOL principles and the London Approach) were put into place in 2001.
- The Industrial Revitalization Corporation of Japan (IRCJ) was established pursuant to the Industrial Revitalization Corporation Act on April 16, 2003. It operated from May 8, 2003 to March 2, 2007 with the goal of revitalizing the banking sector by eliminating some of the banks’ debt overhang through the rehabilitation of the banks’ corporate debtors. It assisted 41 corporate groups and helped companies in distress to deleverage and improve their balance sheets, which, in turn, took some of the pressure off their bank lenders.
- SME Turnaround Associations were established in all 43 prefectures and assisted with the reorganization of many SMEs.
- The Business Reorganization ADR (BRADR) was commenced in 2009 and operated in the private sector with experts.
- The Enterprise Turnaround Initiative Corporate (ETIC) was established in 2010. It was similar to the IRCJ. Although originally established to focus on SMEs it handled the massive filing of JAL, the “big whale.”
- The Financial Reconstruction Program of the Financial Services Agency (FSA) instituted the “Takaneka Plan” that required Japanese banks to lower their NPL levels by 50% from 2002-2005.

This broad variety of out-of-court approaches and administrative institutions were designed to allow the government to give a “push” to the insolvency and restructuring processes. These state-backed turnaround bodies were able to infuse large amounts of cash into companies in distress. By utilizing private sector expertise, the goal was to end the “long lived lazy culture” and facilitate the development of a corporate rescue culture. The approaches pursued by the Japanese government were much more transparent than those pursued by the PRC and attempted to utilize the strengths of both the public and private sectors.
D. On-going developments

The Japanese government is in the midst of another major reform – in essence, enacting a statutory mechanism for out-of-court workouts that does not require unanimity. This enactment will offer a further alternative to be used for corporate rescue.

5. Hong Kong

A. Introduction

The Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of China on the Question of Hong Kong in 1984 provided for the return of Hong Kong to the PRC and the Basic Law of the Hong Kong Special Administrative Region became Hong Kong’s constitution on July 1, 1997. Under the negotiated “one country, two systems” model, Hong Kong was “to enjoy a high degree of autonomy” and the Hong Kong laws in force in Hong Kong at the time of the transfer were to remain in force unless they contravened the Basic Law. Thus, Hong Kong has a completely different insolvency regime from the one in place in the PRC. And that regime, for the most part, has its origins in old British company law procedures from the early 20th century colonial era.

Hong Kong has a unique claim to fame – it is one of the few commercial centers in the world – or perhaps the only – without a formal corporate rescue regime. Although the insolvency law reform effort commenced in Hong Kong in 1990 and proposals for a corporate rescue mechanism were made by the LRC in 1996, when the AFC erupted Hong Kong was using an antiquated corporate insolvency regime – with detailed liquidation (winding-up) procedures and an abbreviated scheme of arrangement procedure for use in corporate rescue. That combination continues to this day. Hong Kong’s banking sector was in much better shape than that of many of its neighbors and the Hong Kong government did not need to utilize administrative measures to protect the sector. However, the Hong Kong government did take steps to support its stock market.

B. Schemes of arrangement

Until recently, Hong Kong’s corporate rescue mechanism was included in Section 166 of the Companies Ordinance (Cap 32). With the recent changes to Hong Kong law, the procedure is now included in Sections 666 to 675 of the revised Companies Ordinance (Cap 622). These sections set forth a procedure whereby a company can come to a binding compromise or arrangement with its shareholders and/or creditors. They can be useful for binding dissenting creditors. However, it is important to keep in mind that this procedure is not limited to insolvent companies, which is why the provisions are included in the Companies Ordinance.
and not in the Companies (Winding-up and Miscellaneous Provisions) Ordinance (C(WUMP)O) (Cap 32).

The procedure typically enables a scheme of arrangement to be made binding on all the company’s creditors where: (a) it has been voted on and accepted by all the various classes of the company’s creditors (each class must have a separate meeting and approval is by a majority in number of the creditors present and voting (the so-called “headcount test”) and by a 75% majority in terms of value at the relevant meeting(s)); and (b) the scheme is subsequently approved by the court.

Since there is little in the way of statutory detail, schemes of arrangement usually lead to expensive, time-consuming litigation over the determination of the appropriate classes for the purposes of voting. Further difficulties are caused by the lack of a moratorium on creditor actions. In other words, the fact that a company is pursuing a scheme of arrangement does not prevent an individual creditor from suing the company, seizing the company’s property or presenting a winding-up petition. In fact, some (often smaller) creditors will deliberately take such actions once they know that major creditors are in favour of a scheme of arrangement – since a small creditor can in this way make such a nuisance of himself that there is always the chance that he will get a better deal or even be paid off in full. Of course, where a winding-up order has been made or a provisional liquidator has been appointed, a moratorium would come into effect – but, again, not without significant extra costs and time delays.

The process is substantially court-driven, particularly in its early stages, which further adds to the cost. A further problem is that secured creditors cannot be forced to participate in the process, which gives them great leverage. There is no doubt that the scheme of arrangement procedure is a useful tool for restructuring, but it does not function well when it is the only available tool.

C. Provisional Supervision

In 1996, the LRC proposed a framework for a new rescue regime called “provisional supervision,” by which a qualified specialist called a “provisional supervisor” would after commencement of the process take control of the company and be responsible for drafting a proposal for creditor agreement. The first draft bill proposing the Provisional Supervision procedure was gazetted in 2000 and proposed as a Bill in 2001. It offered many advantages over the then current law, but a primary flaw was the proposal that employees’ salaries and certain defined benefits be satisfied in full before a provisional supervision could commence. Satisfaction of these claims could be made either through payment in full or placing sufficient funds in a trust account for that purpose. The government later amended the procedure by proposing a cap on the amounts paid, but these amendments proved insufficient to gain support for passage of the bill. In 2009, the Hong Kong government re-commenced its efforts to enact Provisional Supervision and proposed alternative, more reasonable procedures for addressing the treatment of workers’ claims, but these proposals also have yet to be enacted. With the current term of the Legislative Council expiring in July 2016, it is increasingly looking like the clock will yet again run out. The corporate rescue law reform process in Hong Kong has proven to be a sorry state of affairs.

D. Provisional liquidation

14
Fortunately for Hong Kong, creative practitioners stepped into the law reform gap and attempted to adapt the liquidation procedures for use as a corporate rescue mechanism. In a line of cases beginning in 2002 with Re Keyview Technology (BVI) [2002] HKCFI 91, the Hong Kong judiciary was receptive to allowing provisional liquidation to be used to facilitate corporate rescue. The idea was to take advantage of the moratorium that comes into effect upon the appointment of a provisional liquidator and to extend the provisional liquidator’s normal powers of appointment to enable him to try to work out a rescue before the court had to determine whether to wind up the company. Several other cases headed down this path, but the use of provisional liquidation to assist with corporate rescue was narrowly re-interpreted in the case of Re Legend International Resorts Ltd. [2006] HKCA 75, which required that a company’s assets first be in jeopardy for a provisional liquidator to be appointed. Although this decision did not end the use of provisional liquidation for the purposes of facilitating a rescue, it put the brakes on the further evolution of this line of development and demonstrated the importance and need for the Hong Kong government to work apace in the drafting of a new corporate rescue bill.

E. Informal workouts

Parallel to the efforts being taken to enact a formal corporate rescue law, in the aftermath of the AFC, Hong Kong enacted a version of the London Approach called the Guidelines on the Hong Kong Approach to Corporate Difficulties. The Guidelines were jointly issued by the Hong Kong Association of Banks (HKAB) and the Hong Kong Monetary Authority (HKMA) (HKAB/HKMA Guidelines). The basic features of the HKAB/HKMA Guidelines are as follows:

- Firstly, when it becomes apparent that a company is in financial difficulty, no bank should individually take steps to put the company into receivership or liquidation or withdraw banking facilities. Instead, there should be a “standstill”, so that breathing space is given to the company, during which time an informed decision can be made as to whether the company is salvageable.

- Second, during this process, a single bank should not act selfishly or try to gain some separate advantage for itself; the objective should be the best deal for all lenders. (It will be noted that a bank that acts selfishly to maximise its own recovery at the expense of other lenders might find the position reversed in later cases).

- Third, a lead bank should be nominated to head up negotiations with the company, but any agreement ultimately reached cannot be forced upon an individual bank without its agreement.

- Fourth, during this collective process the banks should share relevant information, while ensuring that confidential information about the company’s affairs does not leak out to third parties.

Other aspects of the HKAB/HKMA Guidelines are the ability to hire outside advisors and provide post-standstill financing. The Guidelines were generally well received by the close-knit Hong Kong banking community. Corporate lending in Hong Kong is unusual by Asian standards. Hong Kong companies rarely have just one or two lenders. During the
AFC, it was not unusual to hear of Hong Kong companies with 10, 20, or even 30 or more different bankers. With that many financial creditors involved, it would be difficult, if not impossible, for any agreement to be reached in the absence of co-operative guidelines. There were some complaints made by local banks that some of the foreign Asian banks (eg, from Japan and Korea) were not as co-operative as they could have been, in part because they were not given as much autonomy to negotiate and had to constantly check with their home office. In the few instances where banks were upset by the lack of co-operation of a fellow bank, the HKMA was known to have called in the bankers for a “cup of tea” to discuss the matter.

The following statement in November 1999 by Mr David Carse, the then Deputy Chief Executive of the HKMA, was made in respect of the HKAB/HKMA Guidelines. However, the substance of his comments apply equally well to the guidelines adopted elsewhere in the region:

"Usually the best way of achieving . . . [the] best return [for lenders] is not to rush to put a company into liquidation at the first sign of financial difficulty, but instead to co-operate with the company and with the other lenders to try to salvage the company and keep it going. Keeping commercially viable companies going is in itself desirable as it preserves employment and productive capacity. But the more immediate advantage from the lenders’ point of view is that giving such companies the time to restructure their operations and financial position can ultimately improve their ability to service and repay their debt. Bearing in mind the generally low recovery rate that unsecured creditors obtain from liquidations, workouts will usually be the better option as far as maximizing the lenders’ return is concerned. But it is important to note that workouts should not be seen as a soft option for the debtor or an act of charity on the part of the creditors. Banks will generally only be prepared to embark on a workout if the prospect of eventual recovery is greater than it would be in a liquidation. And the threat of liquidation must always be there to provide an incentive for the debtor to face up to its problems and to agree to co-operate with the banks. Co-operation, and a recognition of shared interests, is integral to the workout process."  

F. Cross-border insolvency

As with corporate rescue, Hong Kong does not have a statutory mechanism in place for cross-border insolvency. There are no statutory provisions in C(WUMP)O or the Companies Ordinance that govern the recognition of foreign insolvencies. Instead, Hong Kong applies a common law approach based on “modified universalism,” pursuant to which it recognises foreign insolvency proceedings, but still allows domestic, independent insolvency proceedings to proceed in Hong Kong. Under this approach, Hong Kong applies its own substantive insolvency law, but nevertheless exercises its discretion to co-operate with a foreign jurisdiction where possible, and perhaps to order the turnover of property to the overseas court or provide other relief to the foreign office holder.

The guiding principles regarding recognition may be found in the case law. There are not many Hong Kong cases discussing this topic (although an increasing number over the last few years), but the Hong Kong courts also follow applicable English cases. The basic principles include the following:

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11 HKMA, QUARTERLY BULLETIN (Feb. 2000), p. 70.
• Hong Kong law draws a distinction between the recognition of foreign bankruptcies and the recognition of foreign liquidations.

• As a rule, Hong Kong courts will recognize a foreign winding-up order made in the place of the company’s incorporation. However, this is not the sole ground of recognition, and additional criteria include the following:
  
  (i) that the company carries on business within the jurisdiction of the foreign court;
  (ii) that the company submits to the insolvency jurisdiction of the foreign court; or
  (iii) that a liquidation is unlikely to take place in the jurisdiction in which a company is incorporated.

• Even where one of these criteria is satisfied, the court may refuse to grant recognition where:
  
  (i) the recognition of the foreign insolvency would be contrary to Hong Kong public policy;
  (ii) the foreign insolvency decree was made as a result of fraud or is in breach of the rules of natural justice; or
  (iii) the foreign insolvency proceedings are an attempt to enforce a foreign penal or revenue law.

• Foreign reorganisations may be recognized as cases involving foreign liquidations.

In the typical cross-border insolvency case, the foreign representative comes to Hong Kong to seek to secure assets, gather information and/or gain the assistance of the Hong Kong courts. In pursuing his goals, he may pursue either non-insolvency or insolvency options. The following aspects of Hong Kong law are relevant for the non-insolvency options:

• A foreign order vesting title in a foreign trustee operates to vest in the foreign trustee movable property in Hong Kong that is not subject to prior attachment, execution, or valid charge – provided that the foreign law extends to the property located in Hong Kong. Although title usually does not vest in a foreign liquidator, the Hong Kong courts will usually recognise the powers of a foreign liquidator appointed by the court in the place of the company’s incorporation to represent a foreign company in Hong Kong and deal with its assets in Hong Kong, subject to any pre-existing attachment, execution or charge – again, provided that the foreign law extends to the property located in Hong Kong.

• Hong Kong courts have the inherent jurisdiction to assist a foreign representative from any jurisdiction, including by recognising his appointment and powers over the insolvent company’s assets.

• The foreign representative may commence civil proceedings, seek injunctive relief, seek a declaration regarding the effect of foreign insolvency proceedings, try to recover debts, and submit a proof of debt in a Hong Kong insolvency.
• The foreign representative may provide a “letter of request” to the Hong Kong court requesting assistance.

If the foreign representative pursues the liquidation option, the following information is relevant.

• Foreign companies (non-Hong Kong companies) in Hong Kong are wound up as unregistered companies pursuant to the provisions in Part X of C(WUMP)O.

• A foreign representative should consider filing, or procuring the insolvent company to file, a winding-up petition where unsecured creditors would benefit from the application of the stay, or of a liquidator’s avoidance or investigatory powers as provided for under C(WUMP)O. The safest route at present is for foreign liquidators to procure the foreign company to file a petition in the form of “the Company (in liquidation).”

• The provisions in Part X of C(WUMP)O commonly relied on for the winding up of foreign companies are Section 326, which defines “unregistered company and Section 327, which provides that subject to the provisions of Part X, any unregistered company may be wound up under C(WUMP)O, subject to the exceptions and additions mentioned in Section 327.12

With the exception of a jurisdictional reference in Section 327A, Part X of the C(WUMP)O is silent as to the jurisdictional connection that must exist between a foreign company and Hong Kong for a foreign company to be wound up in Hong Kong. The result is that the jurisdictional criteria are not fixed, but can vary from case to case. This lack of a clear jurisdictional test is one of the major weaknesses of Hong Kong law in this area, and leads to unnecessary and expensive litigation. Historically, the jurisdiction to wind up a foreign company in Hong Kong, as in England, was based on the presence of assets. On the basis of the English decision in Re A Company (No 00359 of 1987) [1988] 1 Ch 210, it became generally accepted that assets need not be present in the jurisdiction, and that “provided a sufficient connection with the jurisdiction is shown, and there is a reasonable possibility of benefit for the creditors from the winding up, the court has jurisdiction to wind up the foreign company.”

In 1991, the sufficient connection test was expressed in the following form as one of three core requirements by the court in Re Real Estate Development Co [1991] BCLC 210:

1. There had to be a sufficient connection with England, but this did not necessarily have to consist in the presence of assets within the jurisdiction;

2. there must be reasonable possibility that the winding-up order would benefit those applying for it; and

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12 Section 327A, which is entitled, “Overseas companies may be wound up although dissolved,” may also be used.
(3) the court must be able to exercise jurisdiction over one or more persons interested in the distribution of the company’s assets.

In the application of this test in Hong Kong, the presence of assets has become but a factor – granted, a key factor – to be considered under a sufficient connection test.

A recent issue arising in Hong Kong is whether a Hong Kong court should be able to exercise its jurisdiction to wind up an unregistered company in a case in which the third core requirement from Re Real Estate Development is not satisfied. In the recent case, Re China Medical Technologies, Inc, unrep, HCCW 435/2012, 9 April 2014, Harris J stated:

As I explained in paragraph 27 [sic] of my judgment in Re Pioneer Iron and Steel Group Company Limited in my view there may be cases in which the connection with Hong Kong is sufficiently strong and the benefits of a winding-up order sufficiently substantial that a court considers it a proper case in which to exercise its discretion despite the third core requirement not being satisfied. The core requirements constitute guidance as to the circumstances in which the discretion should be exercised and their application can be moderated if the circumstances clearly call for it.

The making of the winding-up order is a matter of discretion. Once a court finds that the jurisdictional criteria have been met, the court must then decide whether ordering relief is warranted.

When the winding-up order is made in Hong Kong, the Hong Kong winding-up is called a “concurrent liquidation” as it proceeds concurrently with the foreign insolvency. In some concurrent liquidations, the Hong Kong liquidator is on equal footing with his foreign counterpart and each jurisdiction administers its assets and makes payments to creditors in the respective liquidation. In a distinctive type of concurrent liquidation called an “ancillary insolvency,” the Hong Kong court decides to act in an ancillary capacity and assist the foreign liquidator in the collection and preservation of the assets within Hong Kong. Under such an approach, the Hong Kong court applies Hong Kong substantive insolvency law, but nevertheless exercises its discretion to co-operate with the foreign jurisdiction.

One of the unusual aspects of Hong Kong company practice is that many companies that are based in Hong Kong are incorporated elsewhere, such as in the Cayman Islands or BVI. When such a company collapses, insolvency proceedings are usually commenced both in the place of incorporation and the primary place of business (ie, Hong Kong). In many such cases, the same individuals are appointed as liquidators in both insolvencies. The use of protocols has emerged as a pragmatic solution for harmonising and co-ordinating concurrent liquidations. They are especially useful when dealing with insolvencies involving corporate groups and where the laws of the relevant jurisdictions are similar.

C(WUMP)O is silent on the extraterritorial jurisdiction of Hong Kong liquidations. Nevertheless, it is clear from Hong Kong case law that that a Hong Kong liquidator may go abroad to protect the assets of companies being wound up in Hong Kong. It is also clear that after taking legal advice and getting judicial approval, a liquidator may commence insolvency proceedings abroad and seek a turnover of overseas assets for distribution in the Hong Kong insolvency proceedings. Thus, Hong Kong liquidators may commence insolvencies abroad of companies in liquidation in Hong Kong, including for example by seeking recognition in the United States under Chapter 15 of the US Bankruptcy Code.
The current common law approach being utilized in Hong Kong is insufficient and Hong Kong needs to enact a modern, domestic legal framework for resolving cross-border disputes and issues. In 1996, the LRC considered recommending that Hong Kong adopt the UNCITRAL Model Law on Cross-Border Insolvency. Hong Kong could have been the first Asia-Pacific jurisdiction and perhaps the first in the world to adopt the UNCITRAL Model Law, but the LRC feared to do so. Now, almost 20 years later, Hong Kong still has not taken any steps to enact the law. Moreover, business corporate structures have evolved to cause further problems under this antiquated legal regime. It is clear that current structures involving holding companies in the BVI or the Cayman Islands, layers of subsidiaries in Hong Kong (and elsewhere in Asia) and ultimately other subsidiaries holding assets in China create insolvency labyrinths when corporate groups collapse. The lack of a bi-lateral agreement with the PRC regarding cross-border insolvency issues further exacerbates the situation.

6. Conclusion

With the PRC, Japan, and Hong Kong, we have three jurisdictions with three very different approaches to corporate rescue.

Japan has the best law of the three jurisdictions, but with the general reluctance of the corporate and banking sectors to utilize the law, the overall success of the Japanese process has been achieved through a combination of good laws, the backing of an experienced judiciary, and a strong push by the government through the establishment of government-backed workout bodies that work in tandem with private sector experts. The Japanese model is based on reaching consensus and the Japanese process is developing a new procedure based on the codification of a non-unanimous out-of-court workout process.

Legal reforms have not proved as effective in China, the judiciary has not been as adept in administering the law, and the Chinese government remains heavily involved in the corporate rescue process. The Chinese strength remains the government’s administrative flexibility and its crafting of administrative solutions. Individual corporate successes have been achieved but more on a top-down basis and there is little transparency or predictability to the process.

The irony is that Hong Kong, which lacks a formal corporate rescue law, is the best of the three jurisdictions in which to rescue companies. There is no doubt that Hong Kong’s free market, common law heritage gives it certain advantages in the area of corporate rescue, but the main reasons for its successes in this area are the creativity of its lawyers and accountants, the receptiveness of the judiciary to allowing liquidation-based procedures to be used to facilitate corporate rescue, the availability of financing for corporate rescues, and the development of a corporate rescue ethos among the insolvency professionals and banking communities.