Proceedings of the 4th International Conference on Global Politics and Socio-Humanities
DOI: 10.54254/2753-7048/2026.32797

Institutional Issues and Enhancement of Recognition of Foreign Insolvency Proceedings in China: With Reference to the Australian Model Law Framework

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Abstract. The cross-border insolvency issue is becoming critical in the globalized economy, and the recognition system of China under Article 5 of the Enterprise Bankruptcy Law faces a serious institutional problem. In this paper, the author will analyse a recognition regime that is currently practised in China and presents significant obstacles to international cooperation based on rigid reciprocity and treaty requirements. Based on the implementation of the UNCITRAL Model Law that is applied in Australia, the current study establishes four major institutional weaknesses, including restrictive entry requirements that rely on the principle of reciprocity, as opposed to universalism, inadequate procedural and relief predictability, a lack of court cooperation mechanisms, and vague boundaries of the public policy exception. This paper, based on comparative analysis, demonstrates that the framework of the Model Law used in Australia offers predictable recognition pathways based on the concept of centre of main interests (COMI), automatic and discretionary relief measures and structured court cooperation protocols. The paper ends by giving operational recommendations for China, such as legislative amendments to reduce reciprocity barriers, judicial capacity building to determine COMI, setting up court cooperation guidelines, and clarifying the boundaries of the public policy exception to align with international best practices.

Keywords: cross-border insolvency, UNCITRAL Model Law, recognition of foreign insolvency proceedings

1. Introduction

Amidst the economic globalization that has never been witnessed before, corporate insolvency is becoming international. The present-day business operates at a complex multinational, owning assets, transacting business activities and even having creditor relationships in more than one jurisdiction. In cases of financial distress in such enterprises, the lack of efficient cross-border insolvency recognition procedures leads to considerable inefficiencies, such as the dissipation of assets, forum shopping, and the conflict of judgments, and reduced creditor recoveries [1].

The cross-border insolvency cooperation is based upon recognition mechanisms as its architecture. They permit the courts of one country to recognise and give effect to foreign

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DOI: 10.54254/2753-7048/2026.32797

insolvency proceedings, which brings about coordinated management of the global estate of a debtor. In their absence, every jurisdiction would separately deal with the local assets of the debtor and create disjointed processes, which do not reflect the unity or collective nature of insolvency law and reduce the overall value for stakeholders [2]. The UNCITRAL Model Law on Cross-Border Insolvency, which was adopted in 1997 and adopted in 62 States and 65 jurisdictions, represents the international community's response to this challenge, which stipulates a framework of recognition, relief, cooperation, and coordination [3,4].

The economic stakes are substantial. International insolvency cases that possess cross-border aspects have been on the rise dramatically in the recent past. Proper recognition mechanisms reduce the transaction costs, increase certainty in the law, and have an economic effect on distributing resources efficiently in the international markets. They also protect the interests of local creditors and do not interfere with the principle of universalism, the idea that a single insolvency process should govern the worldwide assets of the debtor [5].

The main question in this paper is as follows. What are the institutional gaps in the existing cross-border insolvency recognition framework under the Enterprise Bankruptcy Law Article 5 in China, and how can the implementation of the Model Law in Australia be used to inform improvements? The discussion will particularly be about recognition mechanisms and the legal avenues used in one jurisdiction in order to acknowledge and give effect to foreign insolvency proceedings. Although the topic of cross-border insolvency involves more than just the choice of law, distribution of assets, and involvement of creditors, the topic of recognition is the threshold question to any further cooperation and, as such, the focus of this paper.

The framework of comparison focuses on the application of the UNCITRAL Model Law by Australia in the form of the Cross-Border Insolvency Act 2008. Australia is a good case study for several reasons. To begin with, being a common law nation having considerable trade and investment connections with China, Australia must encounter similar practical challenges in cross-border cooperation on insolvency. Second, the implementation of the Model Law in Australia is a mature system with established case law and a well-established procedure. Third, Australia has been active in dealing with Asian jurisdictions in matters of cross-border insolvency, and therefore, its experience is especially applicable in the Chinese regional context [6]. As a comparative law paper, this paper is not aimed at giving a detailed doctrinal comparison of the two systems of insolvency. Rather, the application of the UNCITRAL Model Law in Australia is applied in a functional sense to point out structural characteristics and institutional limitations in the current recognition regime of China. Through the use of recognition mechanisms as an important institutional gateway to cross-border insolvency cooperation, the comparison demonstrates the manner in which various legal systems approach the same coordination issues in international insolvency regulation.

Section 2 discusses the Model Law framework in Australia and evaluates its criteria of recognition, relief measures, cooperation instruments and safeguards of the public policy. Section 3 outlines the existing regime of recognition in China under the Enterprise Bankruptcy Law Article 5, as it contains its reciprocity requirements, procedural uncertainties, and limited case law. Section 4 presents a comparative analysis on a systematic basis; there are four key institutional gaps, namely, entry thresholds, procedural certainty, cooperation mechanisms, and public policy boundaries. Section 5 provides practical suggestions on how to enhance the structure of China, based on the experience of Australia and consideration of the context of China. Section 6 finishes by placing these recommendations in a wider context with the larger trends in international insolvency law.

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2. Australia: model law route

2.1. Framework and recognition standards

Australia has adopted the Cross-Border Insolvency Act 2008, which integrates the UNCITRAL Model Law on Cross-Border Insolvency with minimal alterations. The Model Law provides a structured framework for recognising foreign insolvency proceedings on the principle of the centre of main interests (COMI) of the debtor. Within this framework, a foreign representative can seek recognition of a foreign main proceeding or a foreign non-main proceeding by an Australian court [7].

The concept of COMI gives a predictable and objective criterion for recognition. In the case of corporate debtors, the place of the registered office is assumed to be the seat of the COMI, but this assumption can be rebutted by evidence that the actual seat of the administration and management of the debtor is elsewhere. This approach contrasts with reciprocity-based systems, because this system is oriented to the factual relationships between the jurisdictions and the debtor and not on bilateral treaty relations [4].

The Model Law does not entail any kind of reciprocity, treaty relationship or any evidence that the Australian proceedings would be recognised in the foreign jurisdiction. Instead, the court will focus on whether the foreign proceeding qualifies as a collective judicial or administrative proceeding under the definition contained in the Model Law and whether the applicant is a foreign representative who is authorised to act in the foreign proceeding. Such a universalist solution allows being recognised in multiple legal systems and encourages effective coordination of multinational insolvencies [6].

2.2. Relief mechanisms and cooperation between the judiciary

The Model Law draws a clear distinction between automatic relief and discretionary relief. Automatic relief takes effect immediately upon the recognition of a foreign main proceeding, whereas discretionary relief may be granted by the court upon application. In the case of a foreign main proceeding, automatic relief includes a stay of individual actions against the debtor's assets, rights, obligations and liabilities, a stay of execution against the debtor's assets, and a suspension of the right to transfer, encumber, or otherwise dispose of those assets [7].

In addition to automatic relief, courts may widely exercise discretion to provide other relief on a case-by-case basis, such as placing in the hands of the foreign representative the administration of local assets; examining witnesses and taking evidence; granting discovery; and other relief that can be provided under domestic insolvency law. It is through the application of principles of cooperation, creditor interests, and asset protection that courts apply this discretion [6].

The Model Law contains specific provisions that facilitate the collaboration of the courts and cooperation between insolvency representatives in different jurisdictions. Article 25 permits courts to collaborate to the maximum extent possible with foreign courts and foreign representatives. Article 26 allows courts to communicate directly with courts in foreign countries or foreign representatives, provided that proper procedural protection is provided [8].

The direct court-to-court communication allows judges to communicate with one another and coordinate the hearings, as well as work out joint solutions to the complex issues. Australia has come up with feasible procedures such as case management conferences involving more than one jurisdiction, common hearings through a video connection and simultaneous endorsement of worldwide insolvency agreements [6].

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2.3. Public policy safeguards

The Model Law has a provision of a public policy exception whereby the court may deny recognition or relief when that would be manifestly contrary to the public policy of the state in which the enactment occurs [4]. This is a limited exception which only applies in extraordinary cases when fundamental principles of the state of the forum would be compromised. The manifestly contrary standard is extremely difficult to meet, which makes it impossible to apply the public policy objections on a regular basis and ensures consistency in cross-border recognition [5].

The courts of Australia have utilised the public policy exception sparingly, in line with the pro-recognition philosophy of the Model Law. The exception does not allow the courts to examine the substantive correctness of foreign proceedings or deny recognition due to the difference between the foreign law and the Australian law. Instead, it safeguards against recognition that will infringe on basic procedural fairness, constitutional or core interests of the state. Such a reserved action is necessary so that the policy of the state can be an effective protection and not some camouflaged parochialism [6].

3. China: Enterprise Bankruptcy Law Article 5

3.1. Statutory framework and requirement of reciprocity

The cross-border insolvency recognition regime in China is primarily regulated by Article 5 of the Enterprise Bankruptcy Law, through three possible paths of recognition and judicial support that are implemented under domestic law authorisation, through international treaties entered into or acceded to by China, and on the basis of reciprocity [9]. The Article then provides that recognition should not be contrary to the basic principles of the Chinese law, the sovereignty of the state, its security, social public interest or the legitimate rights and interests of creditors in China.

The requirement of reciprocity in practice has proven highly restrictive. China has not enacted comprehensive domestic legislation that define the procedures that are taken to recognise foreign insolvency proceedings, and it is not a party to any multilateral insolvency treaties. As a result, recognition is based on demonstrating reciprocity that the foreign jurisdiction would also recognise Chinese insolvency proceedings in such cases [2].

The reciprocity condition brings about a lot of confusion. In contrast to the COMI approach of the Model Law, which offers an objective test, reciprocity is based on the consideration of how hypothetical proceedings in China would be treated by foreign courts. This forecast is further complicated by disparities in the legal systems, lack of settled precedents and proving that this is reciprocated before the Chinese courts. The outcome is an immense entry barrier, which has restricted cross-border insolvency cooperation [10].

3.2. Procedural voids and judicial discretion

Article 5 provides very limited procedural guidance on applications for recognition. It does not clearly specify which court has jurisdiction, what evidence should be submitted, on what grounds recognition should be granted, what relief may follow recognition, or how cooperation between Chinese and foreign courts should be conducted. These gaps leave substantial discretion to individual courts and, as a result, reduce predictability for foreign representatives [11].

Procedural ambiguity also extends to the relief mechanisms. Article 5 is not specific on what protective measures take effect upon recognition, as the Model Law does, i.e. whether the relief is

DOI: 10.54254/2753-7048/2026.32797

automatic or discretionary. The appropriate relief to award in a case has to be decided on a case-by-case basis, relying on the general tenets of Chinese civil and insolvency legislation, which can create inconsistencies in their application [2].

Another major challenge is the judicial capacity. The international insolvency cases involving cross-border bankruptcy demand particular expertise in international insolvency law, foreign law and issues of complex coordination. Such cases are of limited experience in Chinese courts, and there is no established body of case law that can inform the judicial decision-making [10].

3.3. Sparse case law and pilot programs

The cooperation mechanism between Mainland China and Hong Kong is the most important development, which has been established under the jurisdiction of judicial interpretations and pilot programs. In May 2021, the Supreme People's Court published the framework of mutual recognition and assistance by issuing the "Record of Meeting on Providing Assistance for Bankruptcy Proceedings in the Hong Kong Special Administrative Region" [1].

This is a positive development of the Mainland-Hong Kong mechanism, but it has major limitations. First, it is only applicable to particular pilot areas. Second, it must also be that the debtor's COMI is located in Hong Kong or otherwise in the Mainland pilot region. Third, it offers a limited amount of guidance on such critical points as the extent of relief, levels of priority in making claims, and conflict resolution [12].

The pilot program model indicates the gradualism of China in legal reform. This, however, implies that most Chinese courts are not accustomed to cross-border recognition, and foreign representatives are uncertain beyond pilot areas. This uncertainty is also worsened by the fact that there are no published judicial decisions [13].

3.4. Sovereignty and public policy concerns

Article 5 contains an implicit public policy exception, where the court can reject recognition in case it is against the Chinese public policy or sovereignty. The law, however, has no definition of the grounds of public policy or guidance to be followed. This ambiguity leaves a high level of discretion for the courts and uncertainty among the foreign representatives [10].

The public policy of Chinese courts regarding cross-border insolvency is still underdeveloped because of the limited case law. It has been proposed that the issues of public policy might encompass safeguarding the interests of Chinese creditors, maintenance of employment and social stability, prevention of asset stripping and stability of the financial system. But, unless clear judicial guidance is provided or the limits are specified by legislation, they are not clear [2].

The relationship between reciprocity and public policy is also unclear. Other scholars state that reciprocity in itself has a public policy role, as it ensures that China only offers recognition to jurisdictions that would offer the same. Some others argue that there is a distinction between reciprocity and public policy. This conceptual ambiguity reflects broader tensions between the need of China to engage internationally and issues regarding sovereignty and control [11].

4. Comparison

Although the two jurisdictions share the importance of cross-border cooperation, their institutional frameworks have varying legal traditions and policy priorities. The application of the UNCITRAL Model Law in Australia focuses on the predictability, coordination and judicial cooperation, and in

DOI: 10.54254/2753-7048/2026.32797

China, emphasis is more on the considerations of sovereignty and reciprocal legal relationships amongst countries.

4.1. Thresholds to entry: reciprocity vs universalism

The Model Law framework of Australia is a universalist one, which means that it acknowledges foreign proceedings on the basis of the factual relationships without any reciprocity or treaty relationship between the debtor and the creditor. This makes it easier to be recognised under different legal frameworks and brings about effective coordination [7].

The reciprocity requirement in China poses a high barrier. The foreign representatives should demonstrate that their jurisdiction would recognise Chinese proceedings in a similar case, a fact that is often hard or impossible to do owing to the differences in legal systems and the lack of precedents. This reflects a more territorialist philosophy and does not value multilateral cooperation in favour of bilateral reciprocity [2].

The practical consequences are enormous. A foreign representative is able to gain recognition in Australia under the Model Law in a fairly predictable and fast manner. According to Article 5 of China, it is not always recognised even when the debtor has meaningful links to China, in case there is no way to prove reciprocity. Such ambiguity discourages foreign representatives from seeking recognition in China and can result in a lack of efficiency in managing assets [10].

4.2. Mechanisms of procedural certainty and relief

The implementation of the Model Law in Australia offers detailed procedures and relief provisions. The law stipulates application processes, evidentiary requirements, and standards of decision. It differentiates between automatic relief and discretionary relief. Such clarity lowers transaction costs and makes it possible to plan strategies [6].

Article 5 of China contains a few procedural directives. The law fails to indicate application procedures, evidentiary practices and relief options. These elements are to be developed case-by-case by the courts, which creates the risk of inconsistency. The lack of differentiation between automatic and discretionary relief implies that foreign representatives cannot know what protection they will have, even in the case of recognition [11].

This gap in the processes extends to coordination mechanisms. The Model Law contains very clear guidelines on communication and cooperation between insolvency representatives and the courts. Article 5 of China refers to judicial assistance, but does not give any information about the implementation. The mechanism of Mainland-Hong Kong cooperation has begun to address these problems, but it is only in that narrow bilateral relationship [12].

4.3. Cooperation infrastructure

Australia has established a significant infrastructure for carrying out the cooperation provisions of the Model Law. Courts have developed guidelines for direct communication with foreign courts, the process of case management in order to bring a hearing together and mechanisms for practical information sharing. This is a ten-year experience of introducing the Model Law and the desire to make cooperation provisions effective [8].

The cooperation infrastructure in China is underdeveloped. Article 5 allows judicial assistance, but there are no established procedures. The Mainland-Hong Kong mechanism is a step in the right direction, but it is confined to pilot areas and one bilateral relationship. Chinese courts are not used

DOI: 10.54254/2753-7048/2026.32797

to direct court-to-court communication when it comes to insolvency cases, and there is no established system to coordinate parallel proceedings [13].

This infrastructural gap is both a legislative and a practical problem. The Chinese civil procedure is legally traditionally focused on the formal diplomatic mechanisms of cooperation of international courts, which are too slow to provide such real-time coordination as is needed in the insolvency cases. Practically, Chinese courts are not used to the informal and direct communication accompanying Model Law cooperation. The creation of this infrastructure will demand legal reform, judicial training, and cultural adaptation [1].

4.4. Public policy exception limits

Both systems incorporate public policy exceptions, and their applications vary widely. The high bar of the manifestly contrary standard in the Model Law restricts the situation when public policy reasons are used to refuse recognition to extraordinary cases that involve fundamental principles [4]. This standard has been interpreted in Australia by the courts in a restrictive way so that public policy is not a common obstacle [6].

The public policy ground under Article 5 in China is wider and less defined. There is no instruction given in the statute on what constitutes a violation of public policy, and a lot of discretion is left to the courts. Such ambiguity leaves the foreign representatives in a state of uncertainty and can result in unequal application [10]. This uncertainty is also compounded by the absence of case law [2].

As it was found in the comparative analysis, the exception to the public policy of China can be invoked more easily than under the Model Law framework when it is done without the qualifier of manifestly contrary, without judicial guidance. Such a distinction is indicative of larger philosophical differences. The Model Law is more focused on predictability and international cooperation, whereas the Chinese system is more willing to give considerable flexibility to its domestic policy at the perceived cost of certainty [2,10].

5. Recommendations

5.1. Reformation of recognition standards

China should move towards recognition criteria based on the centre of main interests, either through legislative amendment or through implementing regulations inspired by the Model Law. Such an approach would allow courts to identify the appropriate forum on the basis of the debtor's factual connections, rather than requiring proof of reciprocity as a threshold matter. The concept of COMI has already proved workable across a range of legal systems and offers a more predictable basis for recognition [1].

Even if some element of reciprocity is retained in the Chinese framework, clearer presumptions and evidentiary standards should still be introduced. For example, proceedings commenced in jurisdictions that have adopted the Model Law could be presumed eligible for recognition, while the burden of proving the absence of reciprocity would fall on the objecting party. This would reduce uncertainty and make the recognition process more coherent in practice [10].

At the same time, China should continue to develop treaty-based relationships in the field of cross-border insolvency. Bilateral or multilateral arrangements on recognition would provide a firmer institutional basis for cooperation. The experience of the Mainland–Hong Kong mechanism demonstrates that treaty-based or quasi-treaty-based models can operate effectively in practice.

DOI: 10.54254/2753-7048/2026.32797

Extending similar arrangements to other major trading partners would create more foreseeable and stable pathways for recognition [12].

It is also necessary to clarify the limits of the public policy exception. One option would be to adopt the Model Law standard of manifestly contrary, while another would be to develop judicial guidance that more clearly defines the circumstances in which public policy may justify refusal. The present formulation is too open-ended and risks inconsistent application. Clearer standards would improve predictability while still preserving legitimate domestic policy interests [2,10].

5.2. Procedural development and judicial capacity

China should develop clearer procedures for recognition applications. At present, the process would benefit from detailed procedural guidance covering matters such as jurisdiction, the documentation and evidence to be submitted, decision-making timelines, the criteria for granting or refusing recognition, and the availability of appeal mechanisms. Such guidance could be introduced through judicial interpretations issued by the Supreme People's Court or through implementing regulations [13].

It is also necessary to clarify the relief that may follow recognition. At a minimum, recognition should trigger the suspension of individual enforcement measures and the preservation of the debtor's assets. Beyond this, additional relief should be available on a discretionary basis, guided by principles of cooperation and the protection of creditors' interests [2].

Further progress also depends on the development of court-to-court cooperation mechanisms. China should establish clearer protocols for communication and coordination with foreign courts, including the initiation of communication, the protection of due process and party rights, the sharing of information and evidence, and the practical organisation of hearings and decision-making. The experience developed under the Mainland–Hong Kong mechanism could provide a useful starting point for this process [1].

Consideration should also be given to the establishment of specialised insolvency courts or dedicated divisions with jurisdiction over cross-border recognition applications. Specialisation would enable judges to build expertise in international insolvency principles, the determination of COMI, and the operation of coordination mechanisms [11].

Judicial capacity should be strengthened through systematic training programmes for judges handling cross-border insolvency matters. Such training should cover the UNCITRAL Model Law framework, principles for determining COMI, the design and application of relief mechanisms, court-to-court communication protocols, and comparative perspectives on foreign insolvency systems [4].

At the same time, judicial exchanges with judges from Model Law jurisdictions should be encouraged. These exchanges would allow Chinese judges to gain practical insight into how cooperation mechanisms operate in practice, to learn from foreign experience, and to build professional relationships that may facilitate future cooperation [6].

Finally, greater emphasis should be placed on the publication of judicial decisions in cross-border insolvency cases. Published decisions would provide guidance to future courts, help foreign representatives understand the approach taken by Chinese courts, and promote greater consistency in practice. The current absence of published decisions contributes significantly to uncertainty in this area [11].

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5.3. International cooperation strengthening

China should give serious consideration to adopting the UNCITRAL Model Law, either in full or with limited modifications designed to accommodate specific domestic interests. The Model Law has already been adopted by more than fifty jurisdictions and has contributed to the development of a broadly compatible international framework for the recognition of cross-border insolvency proceedings. Its adoption by China would not only signal a stronger commitment to international cooperation but also make it easier for Chinese insolvency proceedings to obtain recognition abroad [4].

China should also participate more actively in international forums addressing cross-border insolvency, including UNCITRAL working groups, the International Insolvency Institute, and relevant regional organisations. Greater engagement in these forums would allow China to contribute to the shaping of international standards while also learning from the experience of other jurisdictions [14].

In addition, pilot programmes should be extended beyond the Mainland–Hong Kong context to include other major trading partners. If such pilots prove effective, they could then be expanded more broadly at the national level. This approach would be consistent with China's gradualist style of legal reform and would allow experimentation before comprehensive institutional change is introduced [12].

6. Conclusion

This comparative study shows that there are serious institutional gaps in the Chinese cross-border insolvency recognition system. Although Article 5 of the Enterprise Bankruptcy Law offers a legal basis for recognition, the absence of specificity in the procedure, the reliance on reciprocity and underdeveloped cooperation mechanisms, as well as the absence of transparent boundaries in public policy, supply significant challenges to successful cross-border cooperation. The practical implications of these gaps include the uncertainty on the part of foreign representatives concerning the recognition of their proceedings in China, the absence of clear rules to direct Chinese courts in recognition applications, and a lost opportunity to organise the multinational insolvencies effectively. The implementation of the Model Law in Australia shows a different strategy that is rather oriented towards predictability, cooperation, and efficiency.

The suggestions presented in this paper, such as legislative change to minimise the barriers of reciprocity, the building of judicial capacity, procedural development, developing the policies of the government, and international interaction, provide a roadmap on how to change the framework of China. Those recommendations are not a call to a wholesale adoption of foreign models, but the recommendations on how to adjust international best practices to the Chinese legal and policy environment. The effectiveness of the Mainland-Hong Kong cooperation mechanism demonstrates that China is capable of creating working cross-border insolvency regimes, provided that there is a political desire and institutional support.

On a larger scale, the comparison demonstrates a long-standing dispute in the cross-border insolvency law between territorial sovereignty and modified universalism. Although the current system in China emphasises reciprocal legal relations and regulatory independence, the Model Law methodology that has been used elsewhere in jurisdictions aims to manage the coordinated regulation of multinational insolvencies by creating standardised recognition mechanisms. As the economy of China is increasingly interconnected with the global economy, reinforcing the institutional design of cross-border insolvency recognition could be a valuable part of enhancing

DOI: 10.54254/2753-7048/2026.32797

legal certainty, promoting international business, and making China more involved in the emerging infrastructure of global insolvency regulation.

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