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Review of the Jurisdiction of Hong Kong SAR Winding-up Orders in the Mainland: Localization Application of the COMI Rule for Real Estate Enterprises

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Abstract. The 2021 Opinions of the Supreme People's Court on Launching the Pilot Program of Recognition of and Assistance to Bankruptcy Proceedings in the Hong Kong Special Administrative Region (Pilot Program) introduced the Center of Main Interests (COMI) as the jurisdictional standard for recognizing Hong Kong SAR bankruptcy proceedings. However, real estate companies, typified by Evergrande, generally adopt a structure characterized by offshore registration, Hong Kong SAR listing, and mainland assets, which poses challenges for determining COMI. Taking the Evergrande case as a starting point, this article systematically analyzes the three-fold dilemma in determining COMI for real estate enterprises: the hollowing out of the presumption of place of incorporation, disputes over the application of the six-month existence requirement, and jurisdictional conflicts in parallel proceedings. Based on this analysis, the article proposes localized adaptation pathways from both legislative refinement and judicial discretion perspectives: the presumption of place of incorporation should incorporate a third-party recognizability standard and clarify the burden of proof; the six-month existence period should balance form and substance while taking industry characteristics into account; and parallel proceedings should adopt a coordination mechanism between primary and secondary proceedings to establish routine judicial communication. This paper advocates embedding considerations of the unique characteristics of real estate enterprises into procedural rules to achieve an effective balance between cross-border insolvency cooperation and the protection of domestic interests.

Keywords: Hong Kong SAR winding-up order, jurisdiction review, COMI, real estate companies, localized application.

1. Introduction

In 2021, the Supreme People's Court and the Government of the Hong Kong SAR issued the Pilot Program, in which Article 4 introduced the Center of Main Interests (COMI) as a criterion for reviewing jurisdiction for the first time.

Regarding the issue of jurisdiction in cross-border insolvency cases between the Mainland and Hong Kong SAR, scholars such as Liu Kun have pointed out that modified universalism has become the mainstream position in cooperation between the two regions, and the Pilot Program established

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COMI as the core criterion for reviewing jurisdiction [1]. Building on this foundation, scholars such as Guo Shua, Zhao Jingchen, and Zhang Kai have put forward differing views on issues such as the criteria for determining COMI, the relevant period, and the coordination of parallel proceedings; relevant discussions remain contentious [2,3]. However, the aforementioned studies have largely focused on the analysis of technical elements, overlooking the unique impact of real estate enterprises' specific business models on the practice of jurisdiction review.

On January 29, 2024, the High Court of Hong Kong SAR issued a winding-up order against China Evergrande Group [4]. This brought a systemic gap to the forefront of practice: the structure of real estate enterprises, typified by Evergrande—registered in the Cayman Islands, listed in Hong Kong SAR, and holding assets in mainland China—makes determining COMI exceptionally complex. This paper employs normative legal analysis, case studies, and comparative law to first outline the rules governing jurisdictional review, then analyze the specific challenges involved, and finally explore pathways for adapting the COMI rule to local contexts, thereby guiding legislative amendments and practical application.

2. Rules of jurisdictional review for the recognition of hong kong SAR winding-up orders in mainland China

2.1. Theoretical basis: modified universalism and the introduction of the COMI rule

The modified universalist approach, which conditionally recognizes foreign insolvency proceedings and uses COMI as the standard for determining jurisdiction, represents the mainstream international position and has been adopted by both the Mainland and Hong Kong SAR [1]. The COMI rule requires that the insolvency court have the closest connection to the debtor's economic life and that this connection be reasonably foreseeable by creditors [2]. The UNCITRAL Model Law on Cross-Border Insolvency and the EU Insolvency Proceedings Regulation presume the place of registration to be the COMI but allow this presumption to be rebutted by contrary evidence, thereby balancing certainty with flexibility and guarding against mailbox jurisdiction [1]. This rule promotes a shift in jurisdiction from formalism based on the place of registration to economic substance, providing a theoretical framework for addressing the challenges of determining the COMI of real estate enterprises.

2.2. Institutional framework: provisions on jurisdictional review in the pilot program guidelines

The 2021 Pilot Program was the first normative document to explicitly set forth the jurisdictional review criteria for the mainland's recognition of Hong Kong SAR bankruptcy proceedings. Article 4 stipulates that, for determination, COMI generally refers to the place of registration, while also taking into comprehensive consideration the principal place of business, the principal place of operations, and the location of the principal assets; Regarding continuity, the COMI must have been continuously maintained in Hong Kong SAR for at least six months before the application for recognition, to prevent forum shopping; regarding the burden of proof, the court may review the matter ex officio and shall not automatically grant recognition merely because an interested party has failed to provide evidence [1]. This system uses the place of registration as the primary reference while allowing for discretion based on the actual place of business, thereby providing a set of guidelines for cross-border bankruptcy cooperation between the two regions.

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2.3. Case law: initial application of the COMI rule

Following the promulgation of the Pilot Program, mainland courts began exploring the specific application of the COMI rule in several cases, thereby accumulating practical experience to refine the rule. The most representative of these is the Senxin Case As the first case in mainland China to recognize Hong Kong SAR bankruptcy proceedings, the court ultimately determined that Hong Kong SAR was the debtor's center of main interests based on a comprehensive assessment of the debtor's place of registration, the location of its principal business, and the location of its principal assets—all three factors pointing to Hong Kong SAR. This case established the fundamental approach to determining COMI, namely that the registered office criterion should not be applied mechanically, but rather that the debtor's actual connections with various jurisdictions should be examined comprehensively.

2.4. Limitations of existing rules

The rules outlined in the Pilot Program are primarily designed for general enterprises. For real estate companies registered offshore, listed in Hong Kong SAR, and holding assets on the mainland, the current rules do not yet clarify how the weightings of various identifying factors should be allocated [1]. The current regulatory framework is out of step with the complex structures of real estate enterprises, creating a dilemma in determining COMI: should the focus remain on the public record advantage of the registered location, or should it shift to a substantive assessment of the center of operations [2]? This regulatory gap serves as the practical starting point for this study.

3. Insights from the evergrande case: the threefold dilemma of determining the center of main interests for real estate companies

China Evergrande Group is a classic example of a real estate company utilizing an offshore structure: the company was established in 2006 and registered in the Cayman Islands and listed in Hong Kong SAR in 2009; however, more than 90% of its assets are located in mainland China, and its business primarily consists of real estate development [4]. This structure exhibits the typical characteristics of a three-location separation: the place of registration, the Cayman Islands, is an offshore jurisdiction with no substantive business operations, serving only a legal formal purpose; the listing location, Hong Kong SAR, serves as the primary financing platform, handling overseas capital operations; and the location of assets, the mainland, is the operational hub, where the company's major assets and core business are concentrated. This registration-financing-operation separation structure constitutes a classic example of the tension between form and substance in cross-border bankruptcy jurisdiction reviews.

3.1. Dilemma one: the hollowing out of the presumption of place of registration

Evergrande is registered in the Cayman Islands, but the company has no substantive business operations there; its place of registration is merely a legal formality—more than 90% of the company's assets are located in mainland China, and the actual center of its operations is also in mainland China. This separation between the place of registration and the place of business renders the COMI rule, which presumes the place of registration, ineffective.

Under the rebuttable presumption principle of the COMI rule, the presumption of the place of registration is not absolute; it may be rebutted by contrary evidence when the place of registration is merely an offshore location with no substantive connection to the debtor's actual business activities

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[1]. The issue lies in determining where the COMI should be located after the presumption is rebutted. Although the Pilot Opinions list multiple identifying factors, they do not clarify the relative weighting or order of application of these factors when there is no substantive business at the place of registration [2]. The ambiguity inherent in these rules has created a dilemma regarding the determination of COMI in the Evergrande case: adhering strictly to the presumption of the registered office may deviate from the original intent of the COMI rules to identify the economic center of operations; conversely, shifting to a substantive assessment of the center of operations presents a dilemma of judicial discretion due to the unclear weighting of the various factors.

From a comparative law perspective, in the Sunac China case, U.S. courts, taking into account the fact that the company's headquarters, key management, major assets, and the majority of its creditors were all located in Hong Kong SAR, overturned the presumption of the Cayman Islands as the registered place and determined that its COMI was in Hong Kong SAR [5]. This case demonstrates that U.S. courts place greater emphasis on the actual location with the closest connection to the debtor, rather than mechanically adhering to the formal place of registration. However, China's current rules do not explicitly define the standard of proof or the factors to be considered for rebuttable presumption, resulting in a lack of uniform guidance for judicial rulings. It is precisely this regulatory gap that has plunged the determination of COMI in the Evergrande case into a dilemma between form and substance.

3.2. Dilemma two: disputes over the time gap in the six-month continuity requirement

According to Article 4 of the Pilot Opinions, COMI must have been continuously located in Hong Kong SAR for at least six months at the time of the application for recognition. This requirement is intended to prevent debtors from maliciously selecting a court by temporarily shifting their center of main interests. As Evergrande has been listed in Hong Kong SAR for a long time, it should, in theory, meet this requirement.

However, the issue is complicated by two factors. First, different jurisdictions differ on the timing for determining COMI: the EU uses the commencement of insolvency proceedings as the benchmark, emphasizing the prevention of forum shopping; the U.S. uses the time of the application for recognition, allowing for a shift in functions during the reorganization period [2]. The Pilot Opinions adopt the latter approach but do not clarify the criteria for assessing continuity—when management functions undergo a substantive shift within the six-month period, should the time be calculated mechanically, or should a substantive review of the center of interests be conducted [1]?

Second, the decentralization of management functions among real estate companies is the norm rather than the exception [2]. With over 90% of Evergrande's assets located in mainland China and its listing in Hong Kong SAR, management inherently spans both jurisdictions. Current rules do not clarify how to distinguish between normal functional flows and malicious forum shopping, nor do they establish criteria for determining whether a transfer of functions constitutes a change in COMI.

A deeper issue lies in the fact that the lack of clarity in the rules traps the application of the six-month continuity requirement in a dilemma between formal requirements and substantive assessment: if a formal review is adhered to, Evergrande's long-standing listing in Hong Kong SAR is sufficient to meet the requirement; if the focus shifts to substantive assessment, the transfer of functions during a crisis raises questions about whether the COMI has changed. Compounded by the fact that mainland judges still lack sufficient experience in handling cross-border insolvency cases, this combination of regulatory ambiguity and inexperience adds new uncertainties to the jurisdictional review of cross-border insolvency proceedings involving real estate enterprises [6].

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3.3. Dilemma three: conflicts of jurisdiction in parallel proceedings

The Evergrande case involves parallel proceedings across multiple jurisdictions: proceedings under the Arrangement Scheme were initiated in the Cayman Islands, where the company is registered [7]. The debtor simultaneously applied to a U.S. court for recognition of the debt restructuring proceedings already initiated in Hong Kong SAR; and the Hong Kong SAR High Court subsequently issued a winding-up order [8].

For mainland courts, the primary focus of their jurisdictional review is the Hong Kong SAR winding-up proceedings. In this process, mainland courts must address two key issues: first, how to determine the relationship between the Hong Kong SAR and Cayman proceedings—which constitutes the main proceeding—requiring a careful assessment based on the COMI standard; and second, whether to initiate ancillary proceedings regarding Evergrande's assets in the mainland to protect the interests of special creditors, such as domestic homebuyers.

The resolution of these issues should ideally rely on clear legal rules. However, the current Pilot Program only regulate the bankruptcy assistance relationship between the Mainland and Hong Kong SAR; regarding proceedings in the Cayman Islands and the United States, as well as their relationship with Hong Kong SAR proceedings, the Opinions have no direct applicability. Even when focusing on the core scenario of mainland courts reviewing Hong Kong SAR proceedings, Article 19 of the Pilot Opinions merely makes a general requirement that administrators in both jurisdictions strengthen communication and cooperation. This places Mainland courts in a dilemma when dealing with Hong Kong SAR liquidation proceedings: if they rely entirely on the Hong Kong SAR proceedings for unified handling, the priority status of special creditors—such as domestic homebuyers—under Mainland bankruptcy law may not be safeguarded; if they initiate separate Mainland proceedings, they face the strict jurisdictional limitations of the Enterprise Bankruptcy Law, which requires place of domicile as the basis for jurisdiction, resulting in insufficient grounds for jurisdiction.

4. Local adaptation of the COMI rule: pathways to improvement from the perspective of real estate enterprises

4.1. Substantive determination of the presumed place of registration

First, introduce the third-party recognizability standard. Legislation should draw on the experience of the EU and the Model Law on Cross-Border Insolvency to clarify that the COMI must be recognizable to a third party [2]. Judicially, for real estate enterprises, the focus should be on creditors' reasonable expectations regarding the center of main interests—given that Evergrande has been listed in Hong Kong SAR for a long time, bondholders should have a clear expectation that Hong Kong SAR serves as the center of main interests.

Second, clarify the burden of proof and relevant factors for the rebuttable presumption. Legislation may draw on the Singaporean Fullerton case: the registered office presumption serves as a mandatory starting point, and the party seeking to rebut it bears the legal burden of proof, requiring demonstration of objectively stronger, third party-recognizable connections in another jurisdiction [9]. In judicial practice, when there is no substantive business at the registered office, the presumption should be rebuttable, and a new COMI should be determined based on the closest connection principle. The Sunac China case may serve as a reference for comprehensively weighing factors such as the location of the headquarters, management personnel, principal assets, and creditors.

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Third, the order of priority for the relevant factors should be clarified. Legislation should explicitly stipulate that, where there is no substantive business at the registered office, substantive factors such as the principal place of business and the location of principal assets should be given priority. In judicial practice, courts may exercise flexible discretion in accordance with the above rules; for enterprises such as Evergrande, special factors such as the location of assets and the concentration of homebuyer creditors should be given particular attention to achieve substantive fairness.

4.2. Flexible application of the 6-month continuity period

To address the ambiguity in the criteria for determining the 6-month continuity period, the method for establishing continuity should be clarified through the interpretation of the rules.

First, it should be made clear that the determination of continuous existence must take into account both form and substance. The methodology of the Singaporean Fullerton case may serve as a reference: while using the date of the application for recognition as the reference point, different weights should be assigned based on the relevance of the facts to that point in time, with the core focus being on examining whether there is evidence of forum shopping [9]. That is, the six-month continuous existence requirement should not be merely a formality; rather, it should examine whether the debtor's management functions and principal business activities have substantially and continuously existed in Hong Kong SAR during that period.

Second, greater consideration should be given to the mobility of management functions in specific industries. The movement of management functions among different jurisdictions is the norm rather than the exception for real estate enterprises. A distinction must be made between normal functional mobility and malicious forum shopping: if a transfer is based on legitimate commercial reasons and is known to creditors, it should not be readily deemed a change in COMI; if, however, the decision-making center is temporarily relocated during a debt crisis to evade liabilities, its validity should be scrutinized with caution.

Third, judicial practice should be used to fill gaps in the rules. Mainland judges still lack sufficient experience in handling cross-border insolvency cases. Pilot courts should be encouraged to accumulate experience through individual cases and gradually clarify the criteria for determining continuous existence through typical cases, thereby alleviating the dual challenges of regulatory ambiguity and lack of experience [6].

4.3. Dilemma one: the hollowing out of the presumption of place of registration

To address jurisdictional conflicts in parallel proceedings, a coordination mechanism between the main and auxiliary proceedings should be introduced at the institutional level, and communication and cooperation with the Hong Kong SAR courts should be strengthened.

First, legislation should introduce a coordination mechanism for main and secondary proceedings. Drawing on internationally accepted practices established by the Model Law and the EU Insolvency Regulation, a main-secondary proceedings model should be established: main proceedings are initiated by the court of the center of main interests and have global effect; secondary proceedings are initiated by the court of the location of other assets and have local effect, aimed at protecting the interests of local creditors or supporting the main proceedings. Although the current Draft Amendment to the Enterprise Bankruptcy Law introduces the concepts of foreign insolvency proceedings and COMI, it has not established rules distinguishing between main and auxiliary proceedings, nor has it clarified whether Mainland courts may initiate auxiliary

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proceedings. Future legislation should refine relevant rules and establish a coordination mechanism for parallel proceedings.

Second, establish a regular judicial communication mechanism. The Mainland and Hong Kong SAR must clarify, through communication and cooperation, that once a debtor enters bankruptcy proceedings in one jurisdiction, the administrator has the right to exercise powers such as the consolidation of assets, collection of claims, and suspension of litigation in the other jurisdiction, thereby ensuring the consistency and efficiency of cross-border bankruptcy proceedings [10].

5. Conclusion

Taking the Evergrande case as a starting point, this article highlights the challenges posed by the three-jurisdiction separation structure of real estate companies to the review of the COMI jurisdiction. When a company registered in the Cayman Islands, listed in Hong Kong SAR, and holding more than 90% of its assets in the mainland, enters liquidation proceedings in Hong Kong SAR, the Mainland courts should not mechanically adhere to the presumption of the place of registration. Instead, they should apply the dual criteria of closest connection and third-party recognizability, incorporating the location of domestic assets, creditors' reasonable expectations, and the protection of special priority rights into substantive considerations; While recognizing the Hong Kong SAR winding-up order, supplementary procedures must also be implemented to safeguard the interests of priority creditors, such as homebuyers in the Mainland. The root of this threefold dilemma lies in a structural misalignment between the current COMI rules and the operational realities of real estate enterprises: the hollowing out of the registered domicile reflects a conflict of efficacy between formal legality and substantive justice; the ambiguity of the six-month existence period reveals institutional tension between procedural stability and commercial liquidity; and conflicts arising from parallel proceedings directly point to the fairness dilemma between cross-border judicial deference and the protection of the interests of vulnerable local parties. Therefore, the localized application of COMI cannot be limited to the weighting of technical factors but must incorporate considerations of interest balancing into institutional design.

However, this paper relies primarily on publicly available materials and foreign case law, lacks first-hand empirical data, and has not quantified the subjective criteria for determining forum shopping. Future research should pay closer attention to judgments from pilot courts, explore the formal incorporation of localized factors—such as the COMI of the homebuyer's creditors—into the COMI determination rules, and promote the signing of specialized judicial assistance arrangements between the Mainland and Hong Kong SAR regarding the conditions for initiating ancillary proceedings, thereby achieving a genuine balance between cross-border cooperation and the protection of domestic interests.

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