

A Comparative Study between some different features of China and Australia Insolvency System

Legislation

Australia is a federal system, dividing the legislative powers between the Federal(i.e. Commonwealth) and State(or Territory) government. The effective Commonwealth legislation in respect of insolvency is Bankruptcy Act 1966(personal) and Corporation Act 2001(corporate) while China promulgated its Enterprise Bankruptcy Law 2006. What need to be emphasized here is until now China still has no personal bankruptcy system, although the concept of personal bankruptcy can be found in its Company Act and other relevant civil Acts(the reason of this won't be discussed in this essay).

Administration

As a consequence of the two different systems between personal and corporate, there are also different organizations in Australia taking charge of this issue.

ITSA(Insolvency and Trustee Service Australia) and ASIC(Australian Securities and Investments Commission) accept personal bankruptcy and corporate insolvency respectively and the court plays its legislative roll. The situation in China is the court where the relevant debtor is domiciled disposes the case from filing to the end of the proceeding.

Initiation of the procedure

It seems important to know the insolvency categories in Australia before discussing. Personal bankruptcy can be divided into voluntary and involuntary. The former is a petition by the debtor to the Official Receiver(ITSA) and the latter is initiated by a sequestration order from the court following a creditor's petition to the court. There must be a debt of at least \$2,000.

In corporate, the classification is voluntary administration, receivership and liquidation. the first does not need a filing with the court. The majority of the company's directors or the liquidator or any person entitled to enforce a charge on all or nearly all of the debtor's property is suffice. The second is usually appointed by secured creditors and receiver's duty is to obtain the maximum possible return for the secured creditor. Receivership occurs where the debtor corporation defaults on covenants set out in security documents. The third(liquidation) has three types:

a) members voluntary----which can only be used by solvent corporations. The directors are required to make a declaration to the effect that the corporation is capable of paying its debts in full within a period of 12 month.

b) creditors voluntary----where a corporation is not solvent.

c) compulsory ----which is effected by an order of the court where a creditor petitions the court to have a corporation wound up on grounds of insolvency, relying on failure of the corporation to comply with a demand for repayment of a debt. Liquidator may be the creditor's nominee or from a list using a rotation system.

The initiation of bankruptcy in China is not as sophisticated as in Australia as we don't have the concept of receivership and the court command the whole proceeding. It is clearly stipulated in article 7 and 2 that a debtor may file an application with the people's court for rectification, compromise or bankrupt liquidation when the enterprise legal person fails settle its debt as due, and assets are not enough to pay off all the debts or if it is obviously incapable of clearing off its debts; or a creditor may file an application with the court for rectification or bankrupt liquidation; and also when an enterprise legal person has been dissolved without any liquidation or without completing the liquidation and if the relevant assets are not enough to clear of the debts, the person liable for liquidation shall apply for bankrupt liquidation.

Administrator

Although the above content of this essay has mentioned something about this point, the two country's insolvency administrator system remains large differences and this is the most important part which the writer hope to deal with.

In Australia, generally, administrators and their remuneration are determined by the one who initiate the procedure(it is not the case In some compulsive proceedings). The trustee(in personal bankruptcy) or receiver or liquidator(the latter two in corporate) can only be made by a natural person. In China, administrators can't be determined by creditors and are normally agencies like law firms, accounting firms, bankruptcy liquidation firms which have been established according to law. In most of the state owned enterprise bankruptcy cases, a so called liquidation group comprised of the relevant government departments and organs will act as the administrator. Meanwhile, remuneration of the administrator is determined by the court. Chinese bankruptcy provision in this field is practically proved bane rather than boon. Obviously, both two countries legislation stipulated that the administrator's remuneration has priority to debtor's rights(receiver's remuneration ranks before secured creditor's rights). In other words, the remuneration is actually paid by the creditors. How can a client who pays money has got no rights in determine the supplier and the price of the service? And personal liability can force the administrator behave in a more diligent and dutiful way rather than it is an organization. In fact, judges have often found themselves in a very awkward and unpleasant situation when a city vice mayor is the leader of the so called liquidation group(as we may know Chinese judges are not as independent as their western counterparts).

Administrators in Australia can be classified as official trustee and registered trustee in personal and receiver and liquidator in corporate. Over 90% of bankruptcies and less than 1% of arrangements with creditors are administered by the official trustee while 10% of all bankruptcies and almost all personal insolvency agreements are handled by registered trustees. ITSA fulfils the role of official trustee and will automatically be the trustee of a bankrupt estate or an arrangement with creditors by operation of the law

unless a registered trustee has consented to act as trustee. A person who has appropriate accountancy or other qualifications can apply to ITSA to become to be a registered trustee.

In corporate, there are two different systems--the receiver and the Liquidator. Receivership is the highlight of western insolvency system which even can harmonize a whole country's legal system(the affection can be found in the following discussion of bankrupt distribution. And it also affects liquidation sequence). A receiver is the representative of secured creditors. It is possible for a receiver and a liquidator to be appointed at the same time, but the liquidator has got no control over the secured property. ASIC is responsible for the insolvency practitioner(receivers and liquidators).

Rectification & Compromise(deed of company agreement)

In Australia, Debtor agreements(personal) is very popular. Around 25% of all the personal insolvency cases are settled through way. But the following conditions must be satisfied:

----debtor has not been insolvent in past ten years

----debts less than \$82,500

----assets less than \$82500

----income less than \$61,875

----legislative requirements are otherwise met

When it is a corporate insolvency case, Creditors may choose to resolve it by execute a deed of company arrangement after the meeting of creditors.

The aim of compromise is clear and procedures can be vary.

Creditor's meeting

Although in China, creditors don't have the right to select the administrator and also the remuneration is not determined by them, they still have other similar rights as those creditors in Australia. Problems occur here because lacking of receivership system. Both secured and unsecured creditors sit together and decide those questions like: if the company still go on operation or not; deciding rectification plan and compromise agreement; deciding the managing plan of the insolvent assets; disposing the residual properties; deciding to adopt a distribution plan of the insolvent assets. Chinese Enterprise Bankruptcy Act, article 64 stipulates that the decision of the creditor's meeting shall be based on the consent of $\frac{1}{2}$ or more of the creditor's with the right to vote who attend the meeting, representing $\frac{1}{2}$ or more of the total credit amount free from property guarantee. If it is a decision about compromise agreement, it will need $\frac{2}{3}$ or more of the total unsecured creditor amount represented by $\frac{1}{2}$ or more of the creditors(secured creditors have no voting right). Only when it is an issue about rectification, secured creditors and unsecured are divided into different voting groups. And rectification plan needs the consent of all the groups. when $\frac{1}{2}$ or more of the creditors in a same voting group at the creditor's meeting agree, representing $\frac{2}{3}$ or

more of the total amount of the creditor's right, it shall be deemed as an adoption. Here we can imagine, if there is an insolvent case in which unsecured creditors are the majority decide to postpone the sale of a house which is already mortgaged (insolvent assets) until the price reach to a certain amount. This decision meets those unsecured creditors' interest if the price of real estate in that certain area has a rising trend. But how about the secured creditor? The Enterprise Bankruptcy Act didn't prescribe that those unsecured creditors should pay this secured creditor interest during the postponed period. And if the price drop down, things will be worse. It is prescribed that any creditor who find a decision of the creditors meeting infringes his interest may ask the court to revoke this decision. But does this mean that a new dispute is occurring? This is just one example. Due to the original difference between secured and unsecured creditors, without receivership system, there are far more difficult disputes need to be settled. And depriving the secured creditor's voting rights(also don't have voting right when deciding distribution plan) or to separate them into voting groups are just too simplify. Similar problems won't occur in Australia as only receiver(attorney of secured creditors) can have the right to dispose the secured insolvency assets.

Ranking of creditors

We can summarize Australian insolvency ranking of creditors as follows:

- 1) Rents, state taxes and other outgoings in relation to the charged property as paid by the receiver(in the course of receivership);
- 2) Costs charges and expenses incurred by the receiver(including legal fees paid to lawyers);
- 3) Remuneration of the receiver;
- 4) Secured creditor's fixed charge debts
- 5) Priority payments out of floating charge debts(433 Corporations Act – employee wages and superannuation, employee industrial entitlements and leave, employee retrenchment payments);
- 6) Secured creditor's floating charge debts;
- 7) Amounts owed to the Commissioner of Taxation under a statutory notice;
- 8) Liquidator's expenses;
- 9) Costs of court application for winding up;
- 10) Liquidator's remuneration;
- 11) Unsecured creditors, equally in proportion to what they are owed.

Ranking in China is as follows:

- 1) The cost bankruptcy proceedings and community liabilities(includes costs of action on bankruptcy cases; expenses for the administration, conversion and distribution of the debtor's assets; expenses for the bankruptcy administrator's performance of its functions and duties, for its remuneration and expenses for the recruitment of employees)
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- 2) secured creditor's debts(taxes have priority if happen before the security come into force);
- 3) The wages and subsidies for medical treatment and disability, comfort and compensatory expenses as defaulted by the bankrupt, the fundamental old-age insurance premiums, fundamental medical insurance premiums that shall have been transferred to the employees' personal account as well as the compensation for employees as prescribed by the relevant laws and administrative regulations
- 4) The social insurance premiums and tax fees as defaulted by the bankrupt other than those as prescribed by the aforesaid;
- 5) Unsecured creditor's debts.

Differences are found here because of the following reasons:

- 1) There are two different administrators in Australia(receiver and liquidator).
- 2) China doesn't have the system of 'floating charge'.
- 3) Chinese courts care more than their Australian counterparts about their income.
- 4) The different procedures respectively.

Through this comparison, we can also find that secured creditors in China don't have the same priority as they do in Australia(they pay the administrator, although the liquidator may largely work for the unsecured creditors).

Summary

Each country's legal system is based on its different economical, cultural, political background and can be affected by many other periodical elements. Thus, to have their own features is also common.

There are lots of similarities remain in those two country's insolvency system, but Australia insolvency system is obviously much more complex and reasonable than ours. To initiate an insolvency proceeding is easier in Australia and cases can be settled in a comparatively short time. In most of the cases, judges don't play the leading role. Creditors have more rights than in China.

The last but best system worth to be reminded is receivership.

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