



UNITED



SHANGHAI UNITED LAW FIRM



UNITED



SHANGHAI UNITED LAW FIRM

Legislation

Australia

■ Introduction

- 1) Two systems and two pieces of legislation, which is one of the few remaining countries not to have a single one
- 2) personal insolvency & corporation insolvency
- 3) generally speaking, bankrupt should cover both insolent status for person and corporation, but in Australia, bankrupt has its specific meaning, only referring to personal insolvency, which often caused the confusion of America legal practitioners, although they are based on the common law system.

■ Legislation

Bankruptcy

- ✓ Bankruptcy Act 1966: includes 316 articles, 18 parts and many divisions and subdivisions
- ✓ Bankruptcy Regulations 1996
- ✓ Bankruptcy (Estate Charges)Act 1997

Corporate Insolvency

- ✓ Corporations Act 2001: is said biggest corporations law in the world

Legislation & Judicial Interpretations

China

■ Introduction

- 1) No legal system or even single legal provisions for personal insolvency;
- 2) It is said belonging to civil law, but the court interpretations have a specially influence on the practice and application of Laws and Regulations. And in the bankruptcy, the court is the sole authority to accept, make decision directing the procedure and appointment of liquidator, etc.
- 3) New systems are adopted from the advanced practice of western countries, but not all the ways copied.
- 4) The other underlying legal system or concept or doctrine are sharply different, such as the trust system, security system.

■ Legislation

Law of the People's Republic of China on Enterprise Bankruptcy (Bankruptcy Law)

- 1) Old **Bankruptcy Law** (1986) (repealed)
- 2) New *Bankruptcy Law* (2006)

■ Judicial interpretation

- 1) Provisions of the Supreme People's Court on Some Issues about the Application of Law for the Enterprise Bankruptcy Cases (still waiting)
- 2) Provisions of the Supreme People's Court on Designating the Liquidator during the Trial of Enterprise Bankruptcy ;
- 3) Provisions of the Supreme People's Court on Determination of the Liquidator's Remunerations;
- 4) Provisions of the Supreme People's Court on Some Issues about the Application of Law for the Enterprise Bankruptcy Cases that have not been concluded when the Enterprise Bankruptcy Law comes into effect

China

Bankruptcy Law

- Old Bankruptcy Law (1986) (repealed)
 - 1) limited scope to be bankrupt, only governed the state-owned enterprises
 - 2) relatively simple, only 43 articles
 - 3) problematic standard to apply for bankruptcy: “unable to discharge matured liability”
 - 4) was regarded as administrative and political process, for the policy at that time requiring to first protect the interests of the employees, which was always rebuked for neglecting the rights of the creditors.

NB:

- Legislators did not have any previous experience
- The court also lacked experience to make the judge of bankruptcy when encountered a real world of financial distress.
- implemented on a trial basis

China

Bankruptcy Law

■ New Bankruptcy Law (2006)

1) Scope widened: covering all enterprises with legal person status, listed and non-listed companies, domestic and foreign invested enterprises, privately run or state-owned enterprises, as well as financial institutions. But, does not extend to allow natural persons, partnerships or enterprises without legal person status.

2) Adopting the modern insolvency regime-options for financial difficult company

(1) liquidation, created new role of liquidator and vested them the right of taking over the asset of the debt company. The liquidation is also regarded as the last resort in the view of this Law, when a company is in the insolvent status. The sole power to designate a liquidator is given to the court. A law firm, an accounting firm, an insolvency liquidation firm or a liquidation group formed from the foresaid firms could be designated by the court as the liquidator in charge of the debtor's property and other matters during the bankruptcy process.

(2) rectification: in case of a court having already accepted an application for bankruptcy, the debtors or shareholders with subscribed capital contributions amounting to no less than 10% of the debtor's registered capital may apply to the court for rectification prior to the closure of bankruptcy proceedings

(3) reconciliation, this also under the charge of the court.

3) New order for distributing bankruptcy assets. Under the new rules, after the promulgation of the new law, if any wages, pensions, basic medical insurance or other labor-related compensations incurred are not fully paid by unsecured assets of the debtors, the distribution is behind that of the secured creditors whilst the old law that it had the priority over the secured creditor.

4) cross-border insolvency process, mentioned some principle but not concrete

5) Fraudulent insolvency

NB:

- adopted on August 27, 2006, effective on June 1, 2007;
- comparatively big with 12 chapters and 136 articles
- comparatively complete, with relatively comprehensive procedures

Brief Traditional impression

- Absconding debtor
- Aggrieved creditor
- Rogue director
- Naïve latecomer

Three strong treads of concern of Insolvency Regime

- To establish formal legal procedures for business rescue;
- The orderly realisation and distribution of assets; and
- To erect a regulatory framework that would prevent commercial malpractice and abuse of the insolvency procedure

Modern Insolvency Concept

- In general

The modern Insolvency Regime is advanced to a kind of the broad meaning of bankruptcy law, which means the principal focus of modern insolvency legislation and business debt restructuring practices no longer rests on the liquidation and elimination of insolvent entities but on the remodelling of the financial and organizational structure of debtors experiencing financial distress so as to permit the rehabilitation and continuation of their business.

Purpose of Legislation

Australia

- 1) to enable a person who is unable to pay their debts to be free from the burden of those debts to allow the debtor to make a fresh start; and
- 2) to enable most of the debtor's property to be taken as used to pay the creditors in proportion to the amounts owed to them.

China

Article 1 of the Bankruptcy Law, it provides, “to regulate the procedures of enterprise bankruptcy, fairly liquidate the credits and debts, safeguard the legitimate rights and interests of creditors and debtors and maintain the **market order of the socialist economy**.”

NB.

✓ If we peruse the wording of the above purpose, we will find different emphasis point and value which may be quite important when apply to real case.

Insolvency Court Process Contrast

■ Australia Usual Creditor's Bankruptcy Process

- ✓ Judgments totally \$2000+
- ✓ Bankruptcy Notice (BN)
- ✓ Creditor's Petition
- ✓ Sequestration Order

■ Australia Usual Creditor's Corporation Insolvency

- ✓ Debt totally \$2000+
- ✓ Statutory Demand
- ✓ Originating Process
- ✓ Winding up Order

■ Chinese Insolvency Process

- ✓ No specific amount requirement, but there's criteria that if debtor fails to pay off its debts and: 1) that if its assets are not enough to pay off all the debts; or 2) if it is obviously incapable of paying off its debts
- ✓ Direct application
- ✓ No matter voluntary bankruptcy, both need to through the court
- ✓ Even rectification and reconciliation are also parts of the bankruptcy proceeding, under the charge and presiding of the court

Insolvency Options

■Australia

- 1) Bankruptcy: (1) informal arrangements; (2) Debt Agreement; (3) Personal Insolvency Agreement; (4) Bankruptcy
- 2) Corporation Insolvency: (1) Voluntary Administration;
(2) Receivership;
(3) Liquidation

■China

- (1) liquidation;
- (2) rectification;
- (3) reconciliation

Fulfil the concerns - Administration Regime

■ Australia

- ✓ to have an independent and suitably qualified person to take control of the company and find out a solution for the financial difficulty of the debtor in the best interest of the creditors
- ✓ to investigate and report to creditors about the company's affairs, business, property and financial circumstances, including any unfair preferences which may be recoverable, any uncommercial transactions which may be set aside, and any possible claims against the company's officers
- ✓ to enquire into the failure of the company and possible offences by people involved with the company and report to ASIC
- ✓ Others

■ China

- Taking over the asset, seals as well as the account books and documents of the debtor ;
- Surveying the financial status of the debtor and formulating the financial statements
- Determining the internal management of the debtor
- Determining the daily expenditure and other necessary expenditures of the debtor
- Determining, before the holding of the first meeting of creditors, whether to continue or terminate the debtor's business
- Managing and disposing of the debtors' assets
- Appearing in actions, arbitrations or any other legal procedures on behalf of the debtor
- Suggesting the hold of creditors' meetings
- Fulfilling other functions and duties that the people's court believes it should perform

Insolvency Regime-Role of External Administrator

■ Australia

➤ Liquidator

- ✓ collect, protect and realise the company's assets
- ✓ investigate and report to creditors about the company's affairs, including any unfair preferences which may be recoverable, any uncommercial transactions which may be set aside, and any possible claims against the company's officers
- ✓ enquire into the failure of the company and possible offences by people involved with the company and report to ASIC
- ✓ after payment of the costs of the liquidation, and subject to the rights of any secured creditor, distribute the proceeds of realisation—first to priority creditors, including employees, and then to other unsecured creditors, and
- ✓ apply for deregistration of the company on completion of the liquidation.

➤ Voluntary administrator

- end the voluntary administration and return the company to the directors' control ;
- approve a deed of company arrangement through which the company will pay all or part of its debts and then be free of those debts ; or
- wind up the company and appoint a liquidator.

➤ Receivership

- to collect and sell enough of the charged assets to repay the debt owed to the secured creditor;
- if they have been appointed under a fixed charge (e.g. over land, plant or equipment), to pay out the money collected:
 - 1) first, to pay the secured creditor, and;
 - 2) second, if there are any funds left over, to pay this surplus to the company or its other external administrator if one has been appointed
- if they have been appointed under a floating charge (e.g. over cash, debtors or stock), to pay out the money collected
 - 1) first, to pay priority claims (including certain employee entitlements) ;
 - 2) second, to pay the secured creditor, and
 - 3) third, if there are any funds left over, to pay the company or its other external administrator if one has been appointed
- to report to ASIC any possible offences or other irregular matters

Fulfil the concerns –Restrictions on the Directors or other personnel of Debtor

■ Australia

- ✓ When the company is insolvent, or there's a real risk of insolvency, the directors' duties expand to include creditors
- Duty to exercise powers and duties with the care and diligence that a reasonable person would have, which includes taking steps to ensure you are properly informed about the financial position of the company and ensuring the company not trading while insolvent. Otherwise, will cause civil penalties, including pecuniary penalties of up to \$200,000
- ✓ compensation proceedings, by creditor or by ASIC, could caused the personal bankruptcy of the director and further disqualifies that director from continuing as a director or managing a company
- ✓ criminal charges, a fine of up to \$220,000 or imprisonment for up to 5 years, or both
- the duty to exercise your powers and duties in good faith in the best interests of the company and for a proper purpose
- the duty not to improperly use your position to gain an advantage for yourself or someone else, or to cause detriment to the company, and
- the duty not to improperly use information obtained through your position to gain an advantage for yourself or someone else, or to cause detriment to the company.
- Duty to keep books and records

■ China

- ✓ a director (also extending to supervisor or senior manager) undertaking obligations of being honest and diligent. If violates:1)shall be subject to relevant civil liabilities;2)within 3 years after the bankruptcy, assume the post of director (supervisor or senior manager) of any enterprise
- ✓ During the period from the day when the people's court's decision which accept the application for bankruptcy is served on the debtor to the day when the procedures for bankruptcy are terminated, the relevant personnel of the debtor shall bear the following obligations: (1) Well preserving the assets, seals and account books as well as documents under its occupation and management; (2) Working in light of the requirements of the people's court and the bankruptcy liquidator, and answering their inquiries faithfully; (3) Attending the creditor's meeting as a nonvoting delegate and answering the creditor's inquiries according to the fact; (4) **Not leaving its domicile if without the permission of the people's court;** and (5) **Not assuming any post of director, supervisor or senior manager in any other enterprise'**
- ✓ Any entity that violates the provisions of the present law and thus constitutes a crime shall be investigated for criminal liabilities according to law
- ✓ Where any staff member of a debtor violates the provisions of the present law by presuming to leaving his domicile, the people's

Insolvency Regime- Sequence in Funds for Distribution

■ Australia

- costs and expenses of the liquidation, including liquidators' fees
- outstanding employee wages and superannuation
- outstanding employee leave of absence (including annual leave, sick leave—where applicable—and long service leave)
- employee retrenchment pay, and
- unsecured credits.

NB.

- Each category is paid in full before the next category is paid. If there are insufficient funds to pay a category in full, the available funds are paid on a pro rata basis.
- Secured creditor, enjoy the priority over its

■ China

- Bankruptcy Expenses and Community Debts
- The wages and subsidies for medial treatment and disability, comfort and compensatory expenses as defaulted by the bankruptcy, 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 fees for employees as prescribed by the relevant laws and administrative regulations
- outstanding employee leave of absence (including annual leave, sick leave—where applicable—and long service leave)
- The social insurance premiums other than those as prescribed in the aforesaid provisions and **tax fees** as defaulted by the bankruptcy , and
- unsecured creditors.

NB.

- Each category is paid in full before the next category is paid. If there are insufficient funds to pay a category in full, the available funds are paid on a pro rata basis.
- Secured creditor, enjoy the priority right to be repaid by means of the particular assets

Insolvency Regime: Affairs in Insolvency

■ Australia

- Unfair preference, may be recoverable
- Uncommercial transaction, may be set aside
- While insolvent, claims against company's officers, or director banning
- ✓ Trading, enter into an agreement or transaction with the intention of avoiding employee entitlements of a company
- ✓ Failure to disclose property
- ✓ Failure to advise false proof of debt
- ✓ Falsification of books
- ✓ Conduct preventing delivering of records
- ✓ Misrepresentation to creditors
- ✓ Have a material interest in that matter
- ✓ Failure to exercise due care and diligence
- ✓ Unauthorized exercise of powers

■ China

- Within 1 year before the people's court accepts an application for bankruptcy, revoke:
 - ✓ Transferring the assets free of charge;
 - ✓ Trading at an obviously unreasonable price;
 - ✓ Offering asset guarantee to those debts without any asset guarantee;
 - ✓ Paying off the undue debts in advance; or
 - ✓ Giving up the creditor's rights.
- Within half year before the people's court accepts an application for bankruptcy, revoke:
 - ✓ Where debtor fails to pay off its debts, and that if its assets are not enough to pay off all the debts or if it is obviously incapable of paying off its debts, but it still made payment to certain individual creditor.
- Void conducts
 - ✓ Concealing or transferring the assets so as to avoid the debts; or
 - ✓ Fabricating any debt or acknowledging any inauthentic debt.

Insolvency Regime: Conclusion of liquidation

■ Australia

➤ Creditors' voluntary liquidation

- ✓ the liquidator hold a final joint meeting of creditors and members to give an account of how the liquidation has been conducted how company property has been disposed of. After the final meeting is held, the company is automatically deregistered by ASIC 3 months after a return of the holding of the meeting is lodged.

➤ In a court liquidation

- ✓ Seek an order for release from the court
- ✓ Seek an order for release and that ASIC deregister the company, or
- ✓ If there are insufficient assets to obtain a court order for the company's deregistration, request that ASIC deregister the company.

■ China

- In case of no asset for bankruptcy to distribute, the relevant bankruptcy custodian shall request the people's court to terminate the procedures for bankruptcy.
- In case of having asset for bankruptcy, after the conclusion of distribution, liquidator shall request the people's court to terminate the procedures for bankruptcy, with submitting to the court a report on the distribution of insolvent assets;
- The court makes the decision within 15 days upon the request and publicly announce the decision
- The custodian deregisters the company with Administration for Industry & Commerce.

Summary

- There're many similarities between the two systems. We could say many ideas and concepts of Australia have been covered in the new Chinese Bankruptcy Law. However, the ways, wordings and the furthermore and the systems are quite different, for I consider different plants grows in different soil.
- Chinese Bankruptcy Law is still lack of practicing details on certain aspects. And we still don't have bankruptcy law for individual.
- But I'm sure China will update its system and later we will have more similarities.

NB:

- ✓ The system is huge and complicated, varying from different real situations.
- ✓ This presentation may exist misunderstanding, inaccuracy and even mistakes.