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The Path to Restructuring the Insolvency Administrator System

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Abstract:

Currently, China's insolvency administrators are moving towards specialisation, but there are still shortcomings in the system that need improvement. In terms of the selection system, the court's sole appointment system can be based on reference to the opinions of creditors and debtors. Soft conditions could be added to the distribution of the administrator's remuneration to make it more reasonable. The supervision of administrators also needs to be further refined.

Keywords:

Insolvency Administrator, Mode of Selection, Supervision, Remuneration

1. Basic Concepts and Characteristics of the Insolvency Administrator System

An insolvency administrator is selected by the court to administer the property of an insolvent company in an insolvency case, with the main functions of safekeeping, liquidation, valuation, disposal and distribution of property to protect the interests of creditors and debtors, with the main aim of safeguarding the balance between the interests of the insolvent business and creditors. The purpose of the system is to administer the debtor's property and protect the interests of creditors.

An insolvency administrator has four characteristics.

One is independence. In insolvency proceedings, no interested party can be responsible for the role of the insolvency administrator, who must be an independent body. His special function requires that his interests must not be linked to any of the parties to the debt, otherwise he would need to recuse himself and lose his litigation status. The recognition of the independence of his status is a key feature of the regime that cannot be ignored. [1]

The second is professionalism. As can be seen from the functions it performs, the profession requires a high level of professionalism and must possess a good reservoir of professional knowledge and skills. Our new insolvency law draws on some good experiences - it sets a professional threshold for administrators, and only professionally qualified persons can become insolvency administrators. This filters out, at least in terms of professional issues, an indiscriminate group of people,

safeguards the quality and basic professional skills of insolvency administrators, provides professional and technical support to improve the efficiency of insolvency administration and helps to reduce insolvency costs with a greater possibility of protecting the interests of the parties. [2]

Thirdly, it is participatory throughout. In insolvency proceedings, the insolvency representative needs to manage and dispose of all the insolvency estate are to be available, the insolvency representative should be involved and perform important duties in the insolvency proceedings from the beginning to the end.

Fourthly, the statutory nature of the duties. The duties of the insolvency administrator are not only clearly defined in Article 25 of the Bankruptcy Law, but also in Article 23, which provides that the insolvency administrator is subject to supervision by the creditors' meeting and the creditors' committee in the enjoyment of his rights. The insolvency administrator exists to assist in the smooth running of the insolvency process and naturally has certain fixed obligations, which are set out in the law in relation to his or her duties.

2. The Need for Improvement of the Current Insolvency Representative System

2.1. Selection process

In China, the bankruptcy administrator is mainly selected by the court and supplemented by the creditors' meeting. This unique method of appointment in China is very effective in judicial practice and plays a very important role, but at the same time, there are also shortcomings in this method. Firstly, in practice, according to the relevant provisions of the Supreme Law, the court mainly adopts a random method to appoint the administrator, and it often happens that creditors express dissatisfaction with the bankruptcy administrator. Secondly, it is not possible for the court to achieve the appointment of an administrator at the same time as the case is received, and it often takes some time. During this gap, the debtor's estate is left in a state of unprofessional administration, unable to reach the maximum value of the insolvent business's estate.

2.1.1. Unreasonable method of selection and appointment

According to the bankruptcy law and the interpretation of the Supreme Court, the bankruptcy administrator is appointed by the court from a list, and if the creditors have objections they can apply to the court for a change, but the right to decide on the bankruptcy administrator is still in the hands of the court, and as the court has absolute leadership, the objections of the meeting of creditors do not have any influence on this leadership and do not have much substantive significance. [3] If creditors are dissatisfied with the actions of the bankruptcy administrator, they can only apply to the court. The public authority has absolute power over the selection of the bankruptcy administrator, and if there is abuse of power and corruption, it will be difficult to ensure the reasonableness, fairness and independence of the case, and the authority of the judiciary will be adversely affected.

In addition, most indicators for the court to select an insolvency representative are convenience. This has resulted in the courts often failing to take into account the wishes of the insolvent enterprise and the creditors. Moreover, the qualifications of insolvency administrators in China are mixed and the degree of specialisation is low.

If an insolvency administrator is unable to complete his or her work in a timely and good manner, it will not only harm the interests of the parties but even slow down the judicial process. The court, as the main supervisor of the insolvency administrator, is also unable to fully supervise the insolvency administrator due to its many distractions.

According to Article 22 of Chinese bankruptcy law, the scope for creditors to request a change is very narrow, but it still does not specify the specific requirements of "inability to perform his duties in accordance with the law and impartially" and "incompetence", leaving much room for freedom and even indulgence. This leaves a lot of room for freedom and even indulgence.

2.1.2. Unclear responsibilities

The low level of professionalisation of insolvency administrators in China corresponds to the low level of specificity in the regulation of the insolvency administrator profession in China. There is a lack of proper guidance and careful allocation of responsibilities for the insolvency administrator profession in China, and the courts, which have absolute leadership, can interfere to a large extent in their work, resulting in a lack of clarity in the scope of their duties and a tendency to work inefficiently. [4]

Firstly, the civil liability is not strong in practice. The insolvency law provides for the liability of administrators, but there are no clear standards of conduct for the duty of diligence and the duty of fidelity, and no detailed enumeration of the rules, which makes judicial determination difficult. The liquidation team, social intermediaries and individuals are three subjects that are allowed to be administrators, but the specific responsibilities are not elaborated. Furthermore, there are no details of the grounds on which administrators may be exempted from liability in terms of civil liability, the scope of liability that should be available, the conditions or manner in which liability should be attributed, and the source of the liable property.

Second, the scope of administrative liability is not broad. The law provides for the court to impose fines on administrators for incompetence, but due to varying local standards, the court's liberal rulings have not had an effective warning and deterrent effect in regulating insolvency administrators.

Thirdly, criminal liability is not clear. Article 131 of the Chinese bankruptcy law highly outlines the criminal liability of administrators, but does not clearly define the scope of serious violations, resulting in a virtual absence of criminal liability, which does not help to prevent and stop serious violations and crimes from occurring.

2.1.3. Remuneration issues

There are usually several questions regarding remuneration.

Firstly, the remuneration is not in line with the time and effort put in. Some insolvency cases are very complex, the work is very difficult and the workload is very high, but the remuneration received under the relevant regulations is very small. At this point, the court is unable to break the provisions of the judicial interpretation in order to determine the remuneration of the administrator because of unreasonable fees, and the insolvency administrator is likely to be unable to secure the completion of the insolvency administration. [5] In cases where creditors pay their remuneration, it is even more difficult for creditors to realise the benefits expected from creditors' rights. In other cases, some insolvencies are not complex and the subject matter of the

insolvency estate is so large that the insolvency representative can be well paid for a very small amount of time and effort. Clearly, this situation is very unfair to the insolvency representative and the remuneration system has obvious flaws. [6] Furthermore, if the insolvency administrator's work brings additional benefits to the creditors, can the administrator receive additional remuneration from it? This is not explained in detail in the judicial interpretation.

Second, the practice of the insolvency administrator is more risky. With the administrator's complete ignorance of the debtor's property situation, it is difficult for the insolvency administrator itself to make a risk assessment of the debtor and is in a very passive position in relation to the court's appointment. Once the court appoints an administrator, the administrator cannot refuse the court's appointment except for justifiable reasons, so the risk of his practice is self-evident.

Therefore, in terms of the current legal provisions, there is still a need to continue to clarify and refine the issue of remuneration for administrators.

3. Feasible Paths for the Improvement of the Insolvency Representative System

3.1. Adjustment of designation

The power of the court to select and appoint is too large and excessive, which cannot take into account the rights of creditors and has a relatively strong administrative overtone; the qualification of the administrator is lacking and the standard varies; the existing appointment method has a gap in management, etc. These deficiencies are not conducive to our bankruptcy law playing its own role.

The following improvements are currently available.

First, the establishment of a diversified model for the selection of insolvency representatives. In bankruptcy, the bankrupt enterprise is clearly in a disadvantageous position, while the bankruptcy administrator representing the court is in an advantageous position, often making the bankrupt enterprise as the debtor to be treated unfairly. Therefore by the court appointing the insolvency administrator, the debtor should also have a certain right to recommend, and the insolvency petition should give the debtor the right to recommend the applicable administrator intermediary or individual to the court. At the same time, the meeting of creditors should also have the right to recommend an administrator. A tripartite model of coordination and checks and balances should be established to further ensure the smooth conduct of the insolvency process in terms of improving the manner in which the insolvency administrator is selected.

Second, the adoption of a competitive mechanism and assessment to determine the administrator. According to relevant laws and regulations, only a small number of bankruptcy cases in China will take the path of competition for the selection of administrators. However, only competition can cultivate an excellent group of bankruptcy administrators, and only competition can make the selection of bankruptcy administrators more transparent and efficient; therefore, a competitive mechanism for administrators must be implemented. In cases where the difficulty of the bankruptcy case is high and the scope of the case is extensive, bidding can also be used to determine the administrator. In addition, it is necessary for China to establish a trade association for insolvency administrators. The emergence of a trade association is

conducive to the standardisation of the insolvency administrator profession. The association is able to judge the qualities of the administrator required for the case according to the case, thus better matching the suitability of the insolvency case with the administrator and providing some guidance and supervision to the insolvency proceedings. The existence of the association has transformed insolvency administrators from distinct individuals into a more connected group, and the closer communication and competition within the profession has helped to improve the overall professionalism and professional skills of insolvency administrators in China. Another point that should not be overlooked is the establishment of a qualification system for insolvency administrators. This will set a basic threshold for the insolvency administrator profession, provide basic motivation for the development of the insolvency administrator profession and at the same time establish a performance record for the insolvency administrator, which will facilitate the selection of the insolvency administrator and help to make the selection more open and transparent.

3.2. Establishing mechanisms to fulfil responsibilities

The establishment of mechanisms for the fulfilment of responsibilities requires the improvement of the various ways of assuming responsibility.

Firstly, the civil liability of the insolvency administrator is refined to enhance judicial practicability. First, when stipulating its civil obligations, the legislative technique can be in the form of examples as the main body and generalisations as the auxiliary form in order to realise the tangibility of the obligations, so that the administrator has a clear understanding of the norms of its own conduct and the supervisory body has a clear understanding of the norms of the administrator's conduct, which provides a standard for judging whether it has fulfilled its obligations. Secondly, the content of civil liability should be specified and the principle of presumption of fault should be applied in the principle of attribution. [7] At present, China has not yet achieved the formation of a professional and vocational administrator industry, and strict liability has increased its mental pressure, which is not conducive to the development of professional specialisation of bankruptcy administrators. In terms of liability, reference can be made to the partnership in the civil law, where internal liability is pursued according to the specific degree of failure after the external assumption of unlimited liability or limited liability.

Secondly, in terms of administrative liability, there is a need to improve and strengthen the liability. There is a lack of administrative liability for insolvency administrators in China, so it is necessary to draw on the experience of other countries to provide for more types and types of administrative liability. Diversification of administrative measures will effectively regulate the conduct of insolvency administrators in the area of insolvency administration and provide more possibilities to improve their efficiency.

Finally, there should be greater clarity with regard to criminal liability. In order to reduce the likelihood of criminal misappropriation of property to the detriment of the bankrupt, it should be prevented by legislation, as the bankruptcy administrator has greater powers to administer the bankrupt's estate. The criminal aspects of liability are outlined in a short sentence in the insolvency law, to which we need to expand so that the provision is put into practice in a suitable way and criminal liability is implemented. Only by implementing these three types of liability will we be able to

prevent them beforehand, pursue them afterwards and maximise the benefits of the administrator's set-up.

3.3. Improving the supervision of insolvency administrators

The author believes that improving the supervision of insolvency representatives can be achieved in several ways.

First, the bankruptcy supervision and management system is improved. As a subsidiary mechanism of the creditors' meeting, the insolvency supervisor has a fixed right to supervise the insolvency administrator. The insolvency supervisor can elect and supervise some of the creditors from among the creditors, supervise the insolvency administrator's affairs and put forward positive opinions, and immediately report to the court or relevant bodies such as the creditors' meeting in the event of serious misconduct.

Secondly, the methods and means of supervision must be effective and specific. The first is the right to be informed, the supervisor has the right to be informed of the work carried out by the insolvency representative, the administrator is required to report to the supervisor on all matters and progress of work, submit relevant working documents and files, and is obliged to answer any questions raised by the supervisor; the second is the right to inquire and investigate, the supervisory authority can learn about the insolvency through the insolvency representative, and can also investigate all the documents and other circumstances of the insolvency case. The supervisory authority may also investigate all documents and other circumstances of the insolvency case, in particular the authenticity and accuracy of the relevant documents [8]; then there is the right to dismiss the insolvency administrator, which is like "holding the administrator by the throat" and gives the supervisory authority a counterweight to the administrator, but this must be strictly limited to avoid abuse of power. However, strict limitations are needed to avoid abuse.

Thirdly, a sound reporting system. The insolvency representative is required to make timely reports on significant matters arising in the course of the insolvency case. This reporting system has a very important role to play in insolvency practice. Firstly, the workload of an insolvency case is extremely large and if the supervisor does not have the purpose of monitoring the work of the insolvency representative, it will result in a waste of human resources, which will ultimately be costly. The reporting system, on the other hand, can remedy that disadvantage by enabling a general orientation on the main elements of supervision. Secondly, it facilitates the supervisory body or supervisor in carrying out its supervisory work. The supervisory body or supervisor is generally unaware of most of the internal affairs of the insolvency process and is a "bystander", with the insolvency representative being the "party" and "leader" of the entire insolvency administration process. Only the insolvency representative is a "party" and "leader" in the process and has a clear grasp of the process [9]. Improving this reporting system would allow the supervisory authority or supervisor to be informed of the case and facilitate the smooth and efficient conduct of supervisory activities. In addition, the insolvency administrator is clearly defined by the insolvency law as having the responsibility to report on significant matters, but the types and contents of matters that need to be reported are not clearly defined, which can easily give rise to different interpretations in practice and is not conducive to a clear standard of adjudication, which can easily undermine the authority of the law in the event of injustice. Therefore, the matters to be reported need to be clearly and in detail specified and their practicality in insolvency proceedings needs to be ensured.

3.4. Reasonable determination of remuneration

Remuneration can consist of a number of factors, for example, basic remuneration, performance-based remuneration, additional bonuses, etc., which contain various variable factors and which, under such a composition, help to minimise the negativity and passivity of the administrator. The loss of variable factors, on the other hand, is likely to lead to negligence and shirking of responsibilities on the part of the administrator, which is likely to cause damage to the value of the property of the insolvent enterprise and is not conducive to the protection of the interests of the parties [10]. According to China's current relevant laws, the complexity of the insolvency case, the degree of diligence of the administrator, the degree of practical assistance, the level of risk and responsibility are the main factors determining the remuneration. The composition of this remuneration is more reasonable.

Our insolvency law provides that the decision maker on the remuneration of the insolvency administrator is the court. Although at the same time the law also provides for the meeting of creditors to have the right to dissent though, this right to dissent is a right to dissent that has not been finally confirmed by legislation. My personal recommendation is that the remuneration should be decided by the administrator, the creditors and the court. The administrator can first provide his own proposal on the remuneration and propose a remuneration that meets the expectations according to the complexity of the case, and then the creditors and the court will put forward their relevant opinions in turn, and can conduct certain discussions to confirm the proposal before the court finally examines and confirms the filing.

In addition, we can also refer more complex and large insolvency cases to experts for the assessment of remuneration. This system has been carried out in certain countries and regions and has led to further developments in insolvency practice with regard to the remuneration of insolvency administrators. The assessment of insolvency costs is carried out by professionally experienced experts, who are better placed to evaluate the costs and time required for insolvency than judicially experienced judges.

4. Conclusions

Chinese insolvency representative system is in line with its own unique economic environment and has taken into account the excellent legislative experience of other countries, and the establishment of the new bankruptcy law is a marked improvement over the old bankruptcy law. However, due to the relatively short period of practice, the lagging deficiencies of the law itself contradict the rapidity and complexity of modern economic development, and there are inevitably inadequate considerations in the legislation of the insolvency representative system. The irreplaceable position of the insolvency representative in the insolvency proceedings shows that we not only need to improve the shortcomings of the system in terms of legislation, but also to consider the rationality of the system in all aspects in practice, so as to ensure the smooth conduct of the insolvency proceedings.

Conflicts of Interest

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References

[1] Song, Q.G. Research on the legal supervision system of bankruptcy administrators of small and medium-sized enterprises in China. *Enterprise Economy,* 2014, 7, 180-184.

[2] He, X.Y. The current situation and the way out of bankruptcy pre-reorganization practice in China. *Journal of East China University of Political Science and Law,* 2022, 25(05), 180-192.

[3] Wang, T.Y. Brief analysis of the improvement of bankruptcy administrator system in China. *Journal of Chongqing Institute of Science and Technology (Social Science Edition),* 2012, 13, 68-69+84.

[4] Li, W. Defects and improvement of the bankruptcy administrator system in the new bankruptcy law. DOI: 10.16059/j.cnki.cn43-1008/c.2008.05.031.

[5] Su, L.G. Improvement of bankruptcy administrator compensation system in the perspective of optimizing business environment. *Hebei Enterprise,* 2021, 12, 158-160, DOI: 10.19885/j.cnki.hbqy.2021.12.046.

[6] Shang, K.; Hu, C. Insolvency administrator compensation in China from the evaluation of business environment. *Finance and Accounting Monthly,* 2020, 6, 109-115, DOI:10.19641/j.cnki.42-1290/f.2020.06.015.

[7] Hugh, S.; Rachel, L.; Neil, L.; Stefan, R.; Holly, D.; James, H.; Samuel, P. Insolvency Practitioners:Appointments, Duties, Powers and Liability. Edward Elgar Publishing: 2020-12-11.

[8] John M. Wood. Assessing the effectiveness of the UK's insolvency regulatory framework at deterring insolvency practitioners opportunistic behaviour. *Journal of Corporate Law Studies,* 2019, 19(2).

[9] Li Shengye. Modification and improvement of the administrator's system of disposing of property. *Chinese Applied Law,* 2022, 4, 177-188.

[10] Insolvency Practitioners Bill brings new protections for consumers and creditors. M2 Presswire, 2019.