Day 2 - Friday 26 April 2024

8:30 am – 9:00 am: Registration & Coffee

- Shilling Building Foyer/Lecture Theatre

9:00 am – 10:00 am: Perspectives from Asia and the Pacific Region

Chair: Dr. Zinian ZHANG (University of Glasgow)

- Jingxia SHI (Renmin University of China): *The Keepwell Deeds in the Context of Cross-Border Insolvency: A Perspective from the Landmark Decisions in PUFG and Tsinghua*
- Yangguang XU (Renmin University of China): *Key Issues of the Insolvency Law Reform in China* [online]
- Ishana TRIPATHI (O.P. Jindal Global University): *The Role of a Creditors Code of Conduct in Insolvency: Assessing Controlling Creditors and Insolvency Outcomes in India*

Jingxia SHI (Renmin University of China): *The Keepwell Deeds in the Context of Cross-Border Insolvency: A Perspective from the Landmark Decisions in PUFG and Tsinghua*

The utilization of Keepwell Deeds (KWDs) and the associated Equity Interest Purchase Undertaking (EIPUs) as mechanisms for credit enhancement in complex transaction documents has become a common practice among mainland China-incorporated companies engaged in offshore financing. Nonetheless, there exists a persistent lack of clarity concerning the legal validity and enforceability of KWDs, especially given their intention to navigate through the foreign exchange regulatory requirements imposed by Chinese government agencies.

The highly anticipated decisions/judgments delivered by the Honorable Justice Mr. Jonathan Harris at the Hong Kong High Court in the high-profile cases involving Peking University Founder Group (PUFG) and Tsinghua Unigroup (Tsinghua) represent significant milestones in the field of cross-border insolvency. Both PUFG and Tsinghua are mainland China-incorporated entities functioning as holding companies for state-owned diversified conglomerates. Despite nuanced differences, these two cases share similar background circumstances and legal issues, and both went through extensive procedural and substantive hearings spanning the years 2021 to 2023. The landmark decisions, which constitute the first instances where the judiciary formally examined key aspects related to KWDs, have garnered substantial global attention.

The author of this paper had the privilege of serving as an expert witness in both cases, offering the Hong Kong court four comprehensive legal opinions that contributed to a profound understanding of the legal complexities surrounding KWDs. Building upon this expertise, the proposed paper seeks to analyze fundamental issues related to KWDs, with a specific emphasis on their implications within the context of cross-border insolvency between Mainland China and the Hong Kong SAR. This research aims to explore both

pivotal procedural matters and intricate substantive aspects that have emerged in these two cases.

Following an introduction to the research context, the paper will first delve into the interlocutory proceedings, which primarily address the conflict between the centralized jurisdiction established under Mainland China's Enterprise Bankruptcy Law (EBL) and the exclusive jurisdiction clause (EJC) stipulated in the KWDs. The central question revolves around whether the commencement of reorganization proceedings in Mainland China could supersede a contractual EJC, thus necessitating the Hong Kong court to stay the proceedings and defer the resolution of KWDs disputes to the Beijing Bankruptcy Court. Focused on this core issue, the interlocutory decisions establish that the commencement of Beijing reorganization proceedings does not serve as an absolute impediment to creditors pursuing litigations in Hong Kong, unless compelling reasons exist to override the contractually agreed EJC.

This paper will meticulously study the factors considered by the learned judge in reaching his conclusion. These factors encompass, among others, the impact of general recognition on the EJC, the appropriateness of the court to adjudicate disputes when English Law governs and the Hong Kong court has been granted exclusive jurisdiction, the admissibility of an unrecognized Hong Kong judgment as evidence before a PRC court, the absence of effective communication mechanisms between Mainland and Hong Kong courts, and other significant issues of relevance.

Another dimension under scrutiny in this paper pertains to the substantive aspect, with a specific and meticulous focus on the legal validity and enforceability of KWDs. The central issues encompass the following: firstly, whether regulatory approval can serve as a viable defense; secondly, an in-depth analysis of how KWD providers fulfill their "best-efforts" obligations in securing regulatory approvals; thirdly, the elucidation of discernible disparities in the circumstances surrounding KWD providers before and after the commencement of Mainland reorganization proceedings; and fourthly, the methodologies for calculating damages and determining the quantum of loss in cases of contract breach, alongside other pertinent considerations.

Subsequently, this paper proceeds to pinpoint the favorable aspects of the KWDs decisions. It is essential to note that while KWDs do not function as guarantees, they generally carry the weight of being legally binding documents. The precise stipulations within KWDs, as well as considerations of timing, assume paramount significance. Furthermore, it is noteworthy that KWDs remain compliant with Mainland laws and regulations, with no indications of their unenforceability. Therefore, for investors contemplating investments involving KWDs or EIPUs, meticulous attention should be devoted to the proposed terms and the degree of assurance these terms offer in practical application.

In summary, the decisions in PUFG and Tsinghua constitute a seminal milestone in the realm of cross-border insolvency, signifying a key advancement that identifies the challenges and enhances the prospects for meaningful interaction between Mainland China and Hong Kong SAR. Given the profound importance of these groundbreaking rulings and the author's specialized expertise, it is assured that the proposed paper will be of substantial interest to a broad and diverse readership.

Yangguang XU (Renmin University of China): *Key Issues of the Insolvency Law Reform in China* [online]

The Standing Committee of the National People's Congress of China initiated the revision of the Enterprise Bankruptcy Law of 2006 in 2019. As a member of the revision committee, I participated actively in the review and revision of the law in the past 4 years. The revision is still in process, and several key issues have drawn much attention:

The first issue is about the establishment of a personal insolvency system. There are many voices of opposition regarding this issue, mainly based on the argument that there are no social and legal foundations required for personal insolvency law. However, this argument is untenable. China has made great progress in the credit investigation system and property registration system in the past decade. In particular, the strong civil enforcement system and disciplinary mechanism for dishonesty provide the basis for personal insolvency. So it is the best time to enact personal insolvency law and promote the coordination between personal and corporate insolvency rules by taking the opportunity of the ongoing revision of EBL 2006. The personal insolvency pilot project was launched in Shenzhen in 2021. Many debtors in Shenzhen have been granted a fresh start through liquidation, reconciliation, or debt adjustment proceedings. We also established the Shenzhen Insolvency Service dedicated to personal insolvency administration, to promote the equity and efficiency of the proceeding. Before the pilot project, in some provinces such as Zhejiang and Jiangsu, a system of collective resolution of personal debts has been implemented. In these cases, information technology and big data technology are applied to identify honest but unfortunate debtors, which is expected to play an important role in personal insolvency in the future. The problem is due to the vast territory and the varying stages of development in different regions and cultural factors, it is still highly controversial whether and how to establish a personal insolvency system in China, and the prospect of personal insolvency legislation is still in limbo.

Second, whether it is imperative to address the pre-packaged reorganization in the new bankruptcy law or not. One key issue regarding reorganization in China is that financially distressed enterprises tend to employ reorganization as the last resort. An important reason is because the enterprises will be liquidated according to EBL 2006 if the reorganization fails. The introduction of pre-packaged reorganization will encourage the enterprise to resolve its financial problems through the insolvency system before too late. In practice, there have been a large number of pre-packaged reorganization cases, although the EBL itself does not provide the necessary guidelines. However, the pre-packaged practice in China conflicts with EBL to some extent, which makes it necessary to address this issue in the new law. The key point is that in pre-packaged reorganization, the debtor is under insolvency protection only after the commencement of the Chapter 8 proceeding of EBL (reorganization). The drafting and voting of the plan is based on the negotiation between the debtor and its creditors, and the automatic stay does not apply before the petition is filed.

The third issue is the establishment of insolvency procedures for SMEs. There is a large number of private SMEs in China, but the EBL 2006 does not provide simplified insolvency procedures for SMEs, which means insolvency can be too expensive to afford for these

enterprises. The legislature has caught this issue and is pushing for the establishment of a simplified proceeding for SMEs. In my opinion, there are two crucial rules for this new proceeding among others. The first is the presumed consent of creditors. The creditors of SMEs usually have fewer incentives for participation. The deadlock can be avoided by the presumed consent rule. Second, the owner-manager of SMEs should be entitled to hold on to their small businesses. According to EBL 2006, it is almost impossible for the shareholder to retain their equity without the consent of creditors, which is unfit for the case of SMEs.

The revision of insolvency law is a crucial step in the reform of the market economic system and is an important signal of expanding opening up and promoting high-quality economic development. The reform and revision of insolvency law in China require the advocacy and participation of Chinese academics and practitioners and the support of their foreign counterparts.

Ishana TRIPATHI (O.P. Jindal Global University): *The Role of a Creditors Code of Conduct in Insolvency: Assessing Controlling Creditors and Insolvency Outcomes in India*

The Indian insolvency regime, at the time of its enactment envisaged a creditor-in-control process, i.e., specific types of creditors who are not related parties can control the insolvency process and make decisions in relation to the resolution and restructuring of a corporate debtor. Such creditors will form a committee of creditors and make decisions to restructure or liquidate with 66% of a simple majority vote or 90% if they wish to withdraw from the insolvency process. Moreover, the insolvency professional who manages and administers the corporate debtors as a going concern in insolvency is subject to approvals of a simple majority vote of a committee of creditors that comprises of predominantly banks and financial institutions.

At the time of its conceptualisation, the Indian insolvency law – Insolvency and Bankruptcy Code, 2016 (IBC), in the first instance looked at voting of creditors based on the debt value and allowed each creditor even in a consortium to have their vote separately calculated to cast in an insolvency resolution. Further, the IBC, at first, intended to provide dissenting creditors to a resolution certain protection including as against liquidation value but that was removed from its enacted.[1]

Since 2016, the role of creditors in resolution has come under intense scrutiny, in particular, the anti-liquidation bias that creditors to an insolvency resolution have. The bias is also in violation of the IBC since the need to restructuring and rehabilitate the corporate debtor has been established as the purpose of the IBC captured through judicial pronouncement which delays the process which is capped at 330 days.[2] Moreover, bankruptcy adjudicators are empowered to issue orders of liquidation which are infrequent owing to the process being subject to the commercial wisdom of the committee of creditors.

[1] Insolvency and Bankruptcy Bill, 2015; Insolvency and Bankruptcy Board of India (Corporate Insolvency Process) Draft Regulations 2015
[2] Swiss Ribbons v. Union of India (2019) 4 SCC 17

With choice of process being the first, the second issue is the adequate vetting of the finances that the buyer or investor (also known as the resolution applicant) since several resolutions have been faced with capital infusion concerns not according to the restructuring plans or issues of buyers or investors retracting. The third concern is the control that the committee has on the insolvency professionals' actions towards a corporate debtor in particular given that even fees are to be determined by this committee. With these concerns being paramount in five years of insolvency law, the Indian insolvency regulator in early 2021, sought comments on whether a creditors code of conduct which governs a creditors committee in insolvency should be brought into place.

In 2023, a creditor's code of conduct is still in draft form not to be brought into regulation but workshops for creditors specifically banks which serve as a guidance note on how a creditors' committee should conduct themselves in a corporate insolvency process have been brought into action by the regulator.

In the above context, this paper, in the first instance evaluates the need to regulate a creditors committee in insolvency resolution with the types of creditors and their protections and in the second part reviews the proposed code and its suitability to the Indian regime in domestic and cross border cases. The paper seeks to conclude the role of ex post outcomes of having a governance framework for creditors controlling an insolvency.

10:00 am – 10:45 am: Third Party Releases

Chair: Prof. Sarah PATERSON (London School of Economics and Political Science)

- Gerard McCORMACK (University of Leeds): *Debt Restructurings, Debt Grifting and the Limits of Contractualism*
- Alessandra ZANARDO (Ca' Foscari University): *Third-Party Releases in Restructuring Proceedings: State of the Debate and Legislation (if any) in Italy*

Gerard McCORMACK (University of Leeds): *Debt Restructurings, Debt Grifting and the Limits of Contractualism*

This paper critically examines corporate restructuring plans and schemes in the UK and US and third party releases in the context of such corporate restructurings. So far, the practice has been more extensively examined in the US rather than the UK and the practice has been castigated as 'debt grifting' i.e. third parties getting the benefit of a bankruptcy discharge without going through the formal bankruptcy process. Perhaps the most notable example is the Purdue Pharmacy case involving members of the Sackler family. The case is due to be argued before the US Supreme Court in December 2023.[3]

[3] See https://www.ft.com/content/5af08faf-1b87-47fa-b78d-4ff29eeebe4f and https://www.scotusblog.com/2023/08/justices-put-purdue-pharma-bankruptcy-plan-on-hold/ (both 10th August 2023).

The paper acknowledges some of the criticisms. It also suggests that if third party releases become more widespread in the UK, this is likely to militate against the success of the UK as an international corporate restructuring venue. This is particularly the case if the underlying debt is disputed or gives rise to social or political controversy.

Alessandra ZANARDO (Ca' Foscari University): *Third-Party Releases in Restructuring Proceedings: State of the Debate and Legislation (if any) in Italy*

The use of third-party releases in bankruptcy proceedings continues to be a hot topic in the U.S. bankruptcy courts.

Chapter 11 plans of reorganisation often provide for the release of various non-debtor third parties, including co-debtors, officers, directors, lenders, parents, guarantors, sureties, or insurance carriers. Although such releases have been used for decades—and they have been a condition of approval of the debtor's plan—they have recently generated significant public controversy as a result of several high-profile mass tort cases (such as *Purdue Pharma* or *The Boy Scouts of America*); and hostility to them, particularly when they are non-consensual[4], has grown.

Indeed, under to 11 USC § 524(e), in Chapter 11 bankruptcies, the discharge of a debtor's debt does not affect the liability of any other entity; moreover, the US Bankruptcy Code does not explicitly authorise third-party releases outside of the asbestos liability context[5]. However, 11 USC § 1123(b)(6) provides that «a plan may […] include any other appropriate provision not inconsistent with the applicable provisions of this title», and 11 U.S.C. § 105(a) provides that «[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title […]».

As a result, there is currently a split among the federal circuit courts as to whether non-consensual[6] third-party releases are permitted under the Bankruptcy Code. Most circuit courts[7], however, allow such releases under certain circumstances.

The situation in Italy is quite different. There, the debate is almost non-existent and, with regard to case-law, there is only one decision of the Italian Supreme Court of Cassation[8] regarding the previous legislation, *i.e.* Article 184 of the Italian Bankruptcy Law[9], which

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[4] Non-consensual third-party releases can be defined as provisions in reorganisation plans that release non-debtor parties from liability to other non-debtor parties without the consent of all potential claimholders.
[5] Section 524(g) (asbestos-related claims) is the only section of the Bankruptcy Code to explicitly authorize the release of claims against non-debtor entities.
[6] On the contrary, courts usually allow consensual third-party releases on the premise that parties can enter into contracts as they see fit, although there is disagreement as to what constitutes consent to a third-party release.
[7] *I.e.* second, third, fourth, sixth, seventh, eleventh circuits.
[8] *Court of Cassation*, Section I, 6 September 2019, No. 22382. See also *Court of Appeals of Milan*, 9 March 2022.
[9] According to Article 184 of the Italian Bankruptcy Law (*Royal Decree* No. 267/1942), the rights of creditors against co-debtors, guarantors of the debtor and recourse debtors remain unaffected by the confirmation of a

ruled out the validity of provisions in reorganisation/liquidation plans that release non-debtor parties from liability towards creditors. However, the entry into force of the new legislation (the so-called "Code of Business Crisis and Insolvency") in July 2022 may provide arguments to change the courts' opinion, at least with regard to certain types of third-party releases (*e.g.*, releases of intra-group guarantees).

Moreover, the answer to the question of whether third-party releases are permissible may be different if we consider compositions with creditors (*concordato preventivo*) or debt restructuring agreements (*accordi di ristrutturazione dei debiti*), where third-party releases, if included in the agreement, are typically consensual. For this type of preventive restructuring framework, the same arguments used by the US Courts to support the validity of consensual releases in Chapter 11 plans of reorganisation can be invoked.

With regard to compositions with creditors, indeed, the new Article 117 of the Italian Business Crisis and Insolvency Code is identical to the above-mentioned Article 184, but a new provision (Article 79 of the Code) has been introduced for a type of composition with creditors intended for "smaller enterprises" (*imprese minori*), farmers, professionals, and consumer debtors (the so-called "concordato minore"). This article provides that this type of composition with creditors (*rectius*: its effect of discharging the debtor's debts) does not affect the rights of creditors against co-obligors, guarantors of the debtor and debtors by way of recourse (recourse debtors), unless otherwise provided.

The question is whether the new provision enacted in relation to a specific type of composition with creditors (*concordato minore*) could lead to a "*revirement*" of the Italian Supreme Court's position in relation to all the composition agreements, irrespective of the nature and size of the debtor. In my opinion, this could be the case, because there is no reason to apply different rules to similar restructuring procedures, the regulation of which is to a certain extent the same under the new Italian legislation.

All these aspects will be explored in the forthcoming paper and presentation.

10:45 am – 11:00 am: Coffee Break

11:00 am – 12:00 pm: Guest lecture by Mr Justice Sir Antony ZACAROLI (High Court of England and Wales)

- *The Role of the Creditor Majority in Restructuring*
- Introduction: Prof. Sarah PATERSON (London School of Economics and Political Science)

12:00 pm – 13:00 pm: Lunch

- Shilling Building Foyer

liquidation or reorganisation plan. A similar provision is now included in the Business Crisis and Insolvency Code (see *infra*).