#insolvency #restructuring #5thsymposium

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The 5th International and Comparative Insolvency Law Symposium

Royal Holloway, University of London

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Perspectives from Asia and the Pacific Region

Dr. Zinian ZHANG

University of Glasgow

The Keepwell Deeds in the Context of Cross-Border Insolvency: A Perspective from the Landmark Decisions in PUFG and Tsinghua

Prof. & Dr. Jingxia Shi
School of Law, Renmin University of China (RUC)

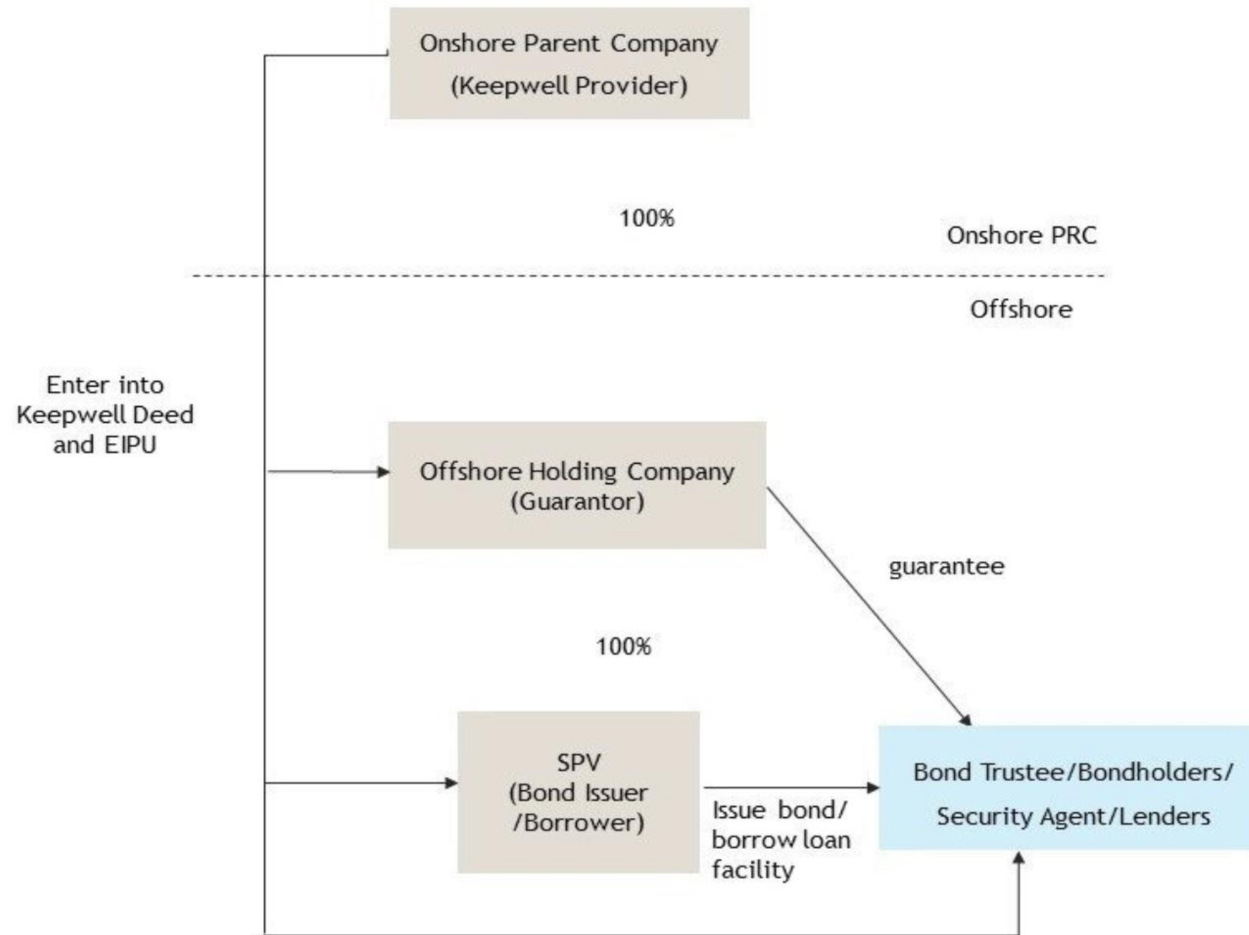
Outline of the Presentation

- Brief introduction of the background and cases history
- Procedural issue: Should Hong Kong Court stay the HK proceedings?
    - Jurisdiction
    - Which court is more appropriate?
    - Whether the Hong Kong proceedings are futile?
- Substantive issue: the validity and enforceability of the keepwell deeds and EIPUs
    - Keepwell deeds are not guarantee
    - Keepwell deeds are valid and enforceable
    - The inherent problems of keepwell deeds
    - Timing is of paramount significance
- The conclusion

I. Introduction of the case background and procedural history

- Why the keepwell deeds and associate EIPUs (equity interests purchase undertakings)?
  - To finance the PRC enterprises' business operation in the Mainland
  - The PRC regulations with respect to borrowing money in the international capital markets
- Procedural history
  - Similarities of the two cases
  - The reorganization proceedings commenced in Beijing
  - Interlocutory proceedings in Hong Kong SAR
  - Substantive judgements rendered by HK Court – Justice Harris
- The highlight of the main issues

A typical transaction structure concerning keepwell deeds



PUFG

2017 & 2018	PUFG Issuers issued offshore bonds supported by keepwell deeds and EIPU from PUFG, and guarantees from other offshore subsidiaries
Dec 2019	Commencement of reorganisation proceedings of PUFG in the PRC
Feb 2020	PUFG Issuers defaulted under the bonds and demand was made against the Guarantors who had also defaulted
Feb 2020	PUFG Obligors applied to the Hong Kong court to seek declarations with respect to their rights under the keepwell deeds
Jun 2021	PUFG Obligors submitted claims supported by keepwell deeds to the administrators of PUFG appointed by the Beijing Court, but the administrators rejected the claims without explanation, save for a claim by one plaintiff, HongKong JHC Co Limited (**"HKJHC"**)
Nov 2021	PUFG initiated proceedings in the Hong Kong courts seeking recognition and assistance in relation to its reorganisation proceedings in PRC (including seeking a stay of the Hong Kong proceedings). PUFG's application was supported by a letter of request from the Beijing Court
Dec 2021	Harris J gave a judgment with regard to the action by PUFG, which recognised PUFG's reorganisation proceedings in the PRC but dismissed the application to stay the Hong Kong proceeding relating to the keepwell deed PUFG and the administrators appealed
Feb 2022	Appeal was dismissed in the Court of First Instance
Mar 2022	PUFG and the administrators renewed their application before the Court of Appeal for leave to appeal
Oct 2022	Appeal was dismissed in the Court of Appeal
May 2023	Hong Kong court ruled that PUFG had breached the keepwell deeds in relation to one of the plaintiffs and caused loss, and made a declaration of entitlement based on the loss of such plaintiff

Tsinghua Unigroup

2015	Tsinghua Issuer issued a series of bonds which were supported by a keepwell deed and an equity interest purchase undertaking in favour of Citicorp International Limited (**"Citicorp"**), the trustee of the bonds
Dec 2020	Tsinghua Issuer defaulted on the bonds
July 2021	Commencement of reorganisation proceedings of Tsinghua in Beijing
Aug 2021	Citicorp issued a writ in Hong Kong making claims against Tsinghua, for breach of the keepwell deed and equity interest purchase undertakings
Sep 2021	Citicorp submitted a proof of debt to the administrators, which was left "pending"
Oct 2021	Tsinghua issued a summons in Hong Kong seeking various alternative orders to stay Citicorp's Hong Kong action and to require Citicorp to pursue it before the Beijing Court
May 2022	Harris J dismissed the stay application
June 2023	Harris J handed down the judgment - held that Tsinghua is in breach of keepwell obligations, and ordered damages consisting of the principal amount of the bonds, accrued interest, and certain costs

	PEKING FOUNDER	TSINGHUA
PLAINTIFF	Offshore debtor subsidiaries of keepwell provider (in liquidation)	Bond trustee
TIMING OF BOND DEFAULT	After the commencement of the reorganization process of the keepwell provider	Prior to the commencement of the reorganisation process of the keepwell provider
RELIEF SOUGHT	Declaratory judgment	Monetary judgment
OUTCOME	The court dismissed three out of four claims and made a declaration that PUFG breached two of the keepwell deeds and caused one of the plaintiffs approximately **US$167 million** in losses (note: the plaintiffs' total claim amount was over US$1.8 billion)	The court ordered Tsinghua to pay the plaintiff approximately **US$480 million**, which is the principal, interest, and related expenses of the bonds

II. Procedural issue: Should Hong Kong Court stay the HK proceedings?

- The conflict of jurisdictions
  - Beijing court: Article 21 of the EBL - centralized jurisdiction
  - HK Court: Keepwell deeds and EIPU - exclusive jurisdiction clause (EJC) – compelling reason to show in order to deprive the creditor of the rights to be heard.
- Submission to the Mainland jurisdiction by filing a proof of debt
  - PUFG: filings were rejected by the administrator
  - Tsinghua: the administrator kept silent, still pending
  - Article 58 of the EBL: the PRC court has the final say with respect to the claims
  - Justice Harris: submission of a claim in foreign insolvency proceedings does NOT create an absolute bar to a creditor seeking adjudication of the claim in another jurisdiction.
  - Well-established English position that a liquidation stay has no extra-territorial effect.
  - Order: Recognizing Mainland insolvency proceedings but not staying HK proceedings

- Which court is more appropriate to determine the keepwell disputes?
  - English law as the governing law, coupled with EJC granted to HK court.
  - The ascertainment of foreign law by the PRC court.
  - The common law courts: adversarial advocacy providing a dialectical process – the most effective technique for the determination of legal issues
  - Harris: Beijing court is NOT as well placed lto apply English law as HK court.
- Whether the HK proceedings are futile?
  - The recognition and enforcement of HK judgements in the Mainland
  - The is greater uncertainty because of the jurisdiction issue
  - Tsinghua Unigroup: litigate before the Beijing Court while submitting HK judgements as evidence.
  - The HK judgement is of value to the plaintiffs
  - How much evidentiary weight will be given remains uncertain.

III. The substantive issue: the validity and enforceability of the keepwell deeds and EIPUs

- The landmark decisions – first in kind regarding the Keepwell deeds.
  - Keepwell deeds are not guarantee
  - But keepwell deeds are valid and enforceable
- The Contractual interpretation: The principles guiding the court in determining the meaning of contested provisions in contracts
  - The court must focus on the meaning of the relevant words in their documentary, factual and commercial context.
  - If there is an ambiguity, or in other words, there are rival meanings, the court can give weight to the implications of the rival constructions by reaching a view as to which is more consistent with business common sense.
  - Taking into consideration the commercial context, purpose and realties
  - commercial common sense and purposive construction

- KWDs were presented as having significant value and were likely to be treated as such by prospective lenders.
- The KWDs concern sophisticated and carefully documented financial transactions involving significant sums of moneys.
- Reasonable assumptions:
  - KWDs were intended to create substantive rights
  - Even if they had less financial value, and
  - any qualification to such rights was likely to be carefully circumscribed
- However, the KWDs have a number of inherent shortcomings.
  - First, financial regulations in the Mainland create difficulties for a company wishing to transfer currency out of the Mainland.
  - Second, the KWDs provides no mechanism for the Trustee to monitor compliance.
- The KWDs may be of limited practical value.

- Whether the debtor conduct “best efforts” to acquire the regulatory approval?
  - The nature of defense
  - it is for the Company to prove on the balance of probabilities that despite using its best efforts it could not obtain the necessary regulatory approvals required to make the payments.
  - what approvals were required is a matter of Mainland law
  - the interpretation of the Keepwell Deeds and the EIPUs is a matter of English law.
  - how a “best efforts” obligation applies if no efforts were taken.
- Why the outcome in PUFG and Tsinghua are so different despite the similarities of issues
  - The factual difference between the two cases: slight
  - However, timing is of paramount significance: facts-specific
    - The time of bond default
    - The time of commencing reorganization proceedings
- The keepwell deeds are keeping well, but with its inherent problems.

IV. Observations and concluding remarks

- The conflict between centralized jurisdiction and EJC in the contracts
- Scrutinize the keepwell obligations
- Keepwell deeds are capable of being enforced, including in the PRC courts.
- Creditors should take note of the limitations of “best efforts” obligations and the nuances of different keepwell obligations.
- Timing is key when evaluating the “best efforts” provisions in keepwell deeds
- Strong keepwell or not? Inherent problems of this financing structure.
- Recognition of HK court judgments v. submit as evidence in the mainland China
- The 2021 Arrangement between Mainland and HK
- The interaction between Beijing court and HK court & possible next step for enforcement

Key Issues of the Insolvency Law Reform in China

Prof. Xu Yangguang

School of Law, Renmin University of China

Briefing of the Implementation of China's Insolvency Law

- The current effective Enterprise Insolvency Law of China has been enacted in 2006 for 18 years.
- **the mechanism for companies to enter insolvency proceedings is smoother.**
- The fluctuation in the number of bankruptcy cases from year to year exemplifies this.The annual number of bankruptcy cases in China was below 5,000 in 2007, exceeding 10,000 in 2017, surpassing 15,000 in 2018, and is nearly 30,000 in 2023. The Chinese courts concluded a total of 29,000 bankruptcy cases in 2023, reflecting a significant year-on-year surge of 68.8 percent.

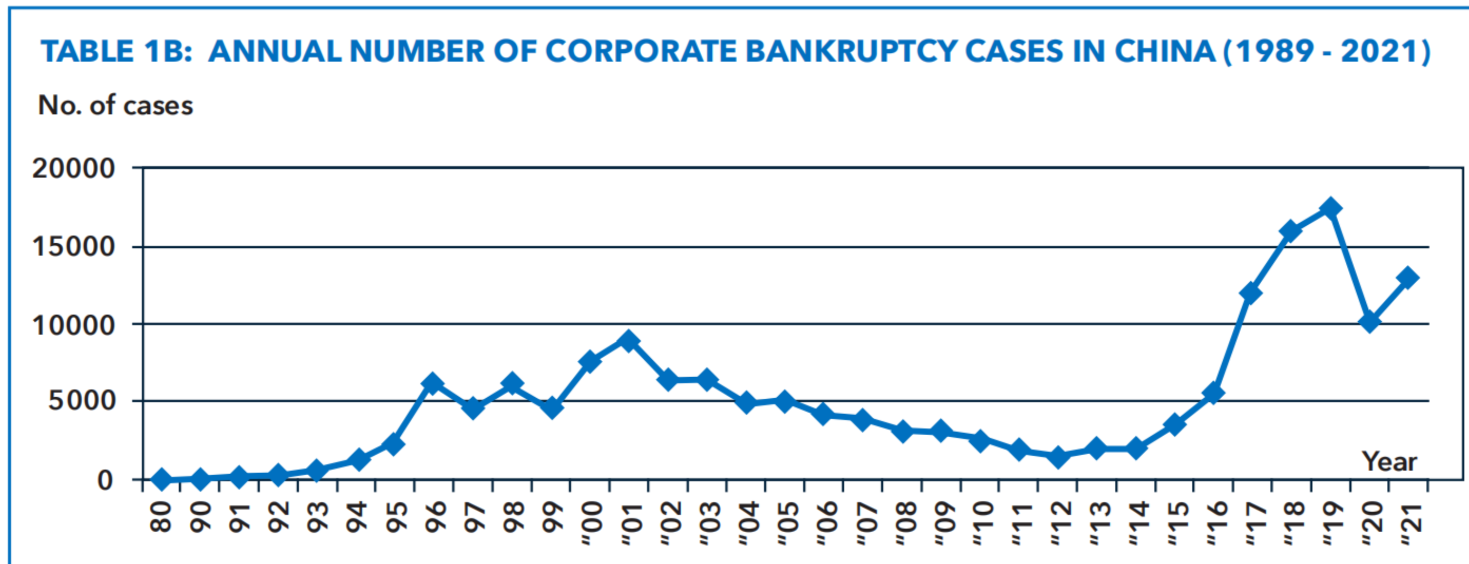
Briefing of the Implementation of China's Insolvency Law

Table 1a: Number of completed enterprise bankruptcy cases in China by year (2017-2021)

Year	2017	2018	2019	2020	2021
Number of cases	12,000+	16,000+	17,399	10,132	14,000+

Source of statistics: Annual Report of the Supreme People's Court

For completeness, the number of cases from 1988 to 2016 as reported in the 2017 Paper, including cases before 2007 under the EBL (Trial Implementation), are also reproduced as follows:



Briefing of the Implementation of China's Insolvency Law

- **the professional construction of insolvency trial in Chinese courts has made great progress.**
- **17 Bankruptcy courts (No.17 is Wuhan Bankruptcy Court)**
- **more than 90 insolvency tribunals**

No	NAME OF SUB-COURT	SUPERVISING COURT	PROVINCE	REGION	ESTABLISHMENT DATE
1	Shenzhen Bankruptcy Court	Shenzhen Intermediate People's Court	Guangdong	East China	14 Jan 2019
2	Beijing Bankruptcy Court	No. 1 Intermediate People's Court of Beijing Municipality	Beijing	North China	30 Jan 2019
3	Shanghai Bankruptcy Court	No. 3 Intermediate People's Court of Shanghai Municipality	Shanghai	East China	1 Feb 2019
4	Tianjin Bankruptcy Court	No. 2 Intermediate People's Court of Tianjin Municipality	Tianjin	North China	19 Dec 2019
5	Guangzhou Bankruptcy Court	Guangzhou Intermediate People's Court	Guangdong	South China	20 Dec 2019
6	Wenzhou Bankruptcy Court	Wenzhou Intermediate People's Court	Zhejiang	East China	28 Dec 2019
7	Chongqing Bankruptcy Court	No. 5 Intermediate People's Court of Chongqing Municipality	Chongqing	Southwest China	31 Dec 2019
8	Hangzhou Bankruptcy Court	Hangzhou Intermediate People's Court	Zhejiang	East China	31 Dec 2019
9	Jinan Bankruptcy Court	Jinan Intermediate People's Court	Shandong	East China	15 Apr 2020
10	Qingdao Bankruptcy Court	Qingdao Intermediate People's Court	Shandong	East China	22 Apr 2020
11	Nanjing Bankruptcy Court	Nanjing Intermediate People's Court	Jiangsu	East China	12 Jun 2020
12	Xiamen Bankruptcy Court	Xiamen Intermediate People's Court	Fujian	East China	18 Aug 2020
13	Suzhou Bankruptcy Court	Suzhou Intermediate People's Court	Jiangsu	East China	18 Dec 2020
14	Chengdu Bankruptcy Court	Chengdu Intermediate People's Court	Sichuan	Southwest China	9 Apr 2021
15	Haikou Bankruptcy Court	Haikou Intermediate People's Court	Hainan	South China	27 Dec 2021
16	Changchun Bankruptcy Court	Changchun Intermediate People's Court	Jilin	Northeast China	21 Jun 2022

Briefing of the Implementation of China's Insolvency Law

- **the information platform for handling insolvency cases in Chinese courts is relatively mature.** **(https://pccz.court.gov.cn)**

全国企业破产重整案件信息网
National enterprise bankruptcy information disclosure platform
我是债权人 我是投资人 我是管理人 设为首页 收藏
首页 债务人信息 公开案件 公开公告 裁判文书 新闻动态 典型案例
困境拯救
促进投资 涅盘重生
INVESTMENT PROMOTION NIRVANA REBIRTH
请输入关键词 搜索 高级搜索
债务人信息 最新招募投资人 最新公开 全国分布 更多
蒙自煜升房地产开发有限公司 房地产 【2024-04-16】
- 经营范围：房地产开发经营；房地产业务咨询服务。（依法须经批准的项目，...
- 主要资产：蒙自轴承厂棚户区改造项目（“天德中兴”），项目位于蒙自市学...
- 招募截止日期：2024-04-22

暂无

原平宏祥选煤科技有限公司 能源 【2024-04-12】
- 经营范围：煤炭储存加工及销售；选煤技术开发、咨询、设计、转让；机械设...
- 主要资产：公司煤炭储存加工、500万吨选煤生产线完备、工业用地占地2745...
- 招募截止日期：2024-06-10

韩艾生
暂无

焦点追踪
云南云维重整案
网上服务

Briefing of the Implementation of China's Insolvency Law

- **China's administrative organs increasingly attach importance to and support courts in handling insolvency cases.**
- We have established a government-court coordination mechanism to address key and difficult issues that need to be resolved by the government in insolvency trials.

- Report on Inspecting the Implementation of the Enterprise insolvency law of the People's Republic of China (中国全国人民代表大会常务委员会执法检查组关于检查《中华人民共和国企业破产法》实施情况的报告)

http://www.npc.gov.cn/c2/kgfb/202108/t20210818_312967.html

Key Issue: Establishment of personal insolvency system

- China's current insolvency law does not provide for an personal insolvency. Personal insolvency in China is piloted in two different forms in local areas.
- the implementation of the Shenzhen Special Economic Zone Personal insolvency Regulations since 2021.
  - The Shenzhen Bankruptcy Court has accepted 227 insolvency applications and successfully concluded 184 personal insolvency cases.
  - Bankruptcy Affairs Administration of Shenzhen Municipality has been established and well functioning for three years.
- the mechanism of collective resolution of personal debts has been implemented since 2018.

Key Issue: Establishment of personal insolvency system

- Our proposed natural person insolvency chapter
  - permissible exemption/discharge (the 3 years exemption period)
  - the circumstances of non-exemption (mainly related to debtor fraud)
  - the types of non-exemption debts (mainly marriage and family debts, tax debts, fines and penalties)
  - insolvency management departments across the country.
- Whether China can ultimately establish a personal insolvency system in 2025, which new insolvency law passed next year, depends not on whether the draft rules are complete, but on whether the concept of insolvency system can be updated by various sectors of society.

Key Issue: Insolvency of SMEs

- Now the nationwide judicial exploration of the reform of the bankruptcy system for small and micro enterprises has been conducted on a larger scale at present. It is conducted in a systematic manner within the framework of promoting the establishment of an optimal business environment, taking into account the UNCITRAL legislative guide and the World Bank relative report.
- The special chapter on the bankruptcy of small and micro enterprises will incorporate distinct provisions compared to those concerning the bankruptcy of large and medium-sized enterprises, specifically in terms of the trial period, announcement and notification procedures, as well as asset disposal methods.

Key Issue: Insolvency of SMEs

- deemed approval in creditors' meeting voting.
  - the establishment of debt committees and holding of creditor meetings in the insolvency proceedings of MSEs should be avoided unless deemed necessary.
  - If there are matters that require voting, a deemed approval mechanism can be established in case creditors lack sufficient motivation to participate.
  - it is essential to establish a mechanism for safeguarding the rights and interests of stakeholders and implementing a penalty or sanction system for any violations.

Key Issue: Insolvency of SMEs

- the preservation of the rights and interests of debtor contributors .
  - The preservation of the rights and interests of the contributors to SMEs is essential in ensuring the unity of ownership and operation during their reorganization.
  - The strict adherence to absolute priority rules in restructuring by large enterprises may not be applicable to small and micro enterprises.
  - The relative priority principle, which was established for the purpose of SMEs restructuring, is now required as a rational basis for safeguarding contributors' interests.

Key Issue: Insolvency of SMEs

- the preservation of the rights and interests of debtor contributors .
  - Assessing the significance of the original contributors to the enterprise is a crucial prerequisite for implementing the relative priority rule. The determination of the contributor's necessity for participation involves assessing their "survival value," a decision that is recommended to be made through careful review and judgment by the court.
  - it is crucial to ascertain the good faith of the original contributor and their willingness to rescue.
  - the reservation of the rights and interests of the original shareholders is a conditional one, which should be specified and supervised by either the court or administrator in terms of its conditions and extent.

Key Issue: Cross-border insolvency

- The current insolvency law in China only provides Article 5 for the cross-border insolvency system.
- In 2023, the Beijing insolvency Court recognized the effectiveness of a insolvency procedure in Germany based on this provision and provided very sufficient relief.
- In 2021, the Supreme People's Court of China and the Hong Kong Special Administrative Region signed the Minutes of the Meeting on Mutual Recognition and Assistance in insolvency Proceedings.
- The current attitude of the Chinese legislature is to establish a comprehensive cross-border insolvency regime in China with reference to the UNCITRAL Model Law on Cross-border Insolvency.

Key Issue: other

- Other key issues being considered by China's legislature.

  - pre-packaged reorganization system
  - substantial merger insolvency system of affiliated enterprises
  - insolvency system of financial institutions.

Thank you very much

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The Role of a Creditors Code of Conduct in Insolvency: Assessing Controlling Creditors and Insolvency Outcomes in India

Ishana Tripathi

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Legislation and Regulation

Powers of creditors has seen many different roles for restructuring under legislation and through regulations issued by the Indian central bank – in general, without court sanction, very limited scope of resolution has happened.

- Introducing the role of creditors in workouts, winding up-liquidations, restructuring (post independence to 2016)
- Separate regime for secured creditors to enforce security interest and private asset reconstruction based resolution in 2002.
- Empowered through laws and regulations, adequate protections through court litigation and overtime tribunalisation for banks and financial institutions in 1994 till 2016.
- Insolvency law is resolution first and liquidation second, now enables settlement as well. 2019 also introduced prudential norms for debt works – no real case to present its success.

Creditor Powers and Workouts: Pre 2016

- Restructuring or schemes of arrangement: often subject to litigation, stakeholder misalignment and met with high capitalization or refinancing issues amongst creditors
- Any debt reorganization often required equity dilution being suggested by banks which was often met with resistance and a large contributor to this was boards being promoter / founder friendly (this has today because a discussion about corporate governance in insolvency): *Jet Airways, Bhushan Steel, Essar Steel*
- Absence of automatic moratorium, consistent asset deterioration because of lengthy litigation and **creditor work-outs not working out**, became primary part of bankruptcy reforms – moved entirely away from creditor-in-possession or debtor-in-possession. Now, bankruptcy is a *creditor in control process.*

Creditor Powers and Conduct: Post 2016

- As a creditor in control regime for resolution, the process is driven by a duly constituted Committee of Creditors (CoC) within the first month of insolvency resolution.
- Two protections provided:
  - one is to ensure that there is commercial wisdom
    - Courts cannot question the payments determined as a part of the resolution, it is CoC discretion as long as certain payouts are met such a payment of insolvency costs
  - the other is that certain creditors such as trade creditors and unsecured banks and financial institutional creditors have payouts in priority of payments

Concerns for Checks and Balances

- Determination of resolution plans and negotiations with resolution applicants are lengthy – violative of timelines under the law of 180-330 days
- Voting percentages sometimes are entirely of one creditor
- Insolvency costs are negotiated between the creditor committee and the resolution professional
- Going concern costs or interim finance also to be determined by the CoC
- Dissenting creditor protections are subject to priority payment but not on commercial value, resolution plans are determined by the majority creditor
- *The idea of the insolvency legislation to allow for private workouts within a legal framework and court sanction to an outcome.*

A Code of Conduct: Present Form

- CoC subject to self regulation and if any creditors have concerns, they may litigate against the debtor (insolvency professional) and the CoC
- In 2021, issues of having to check the conduct of the CoC were brought about and a code of ethics and regulation were proposed by the insolvency regulator, primarily on account of certain types of creditors not be offered efficient remedies or selection of resolution applicants.
- The code of conduct in its current form does not have any inputs from banks or financial institutions – stakeholders it is meant to govern. It proposes: fair judgment, transparent process and equitable treatment. *However, how much regulation is sufficient regulation?*

A Code of Conduct: Proposed Form

- CoC's does not allow insolvency professionals to take actions in case of delays on account of the CoC. NCLT's often allow for extensions since there is a primary bias against liquidation.
- CoC's have on multiple particularly in complex insolvencies demonstrated commercial sense by even proposing debt repayment plans, therefore removing self-regulation at this stage would call potential for further judicial intervention
- A standard cannot be set bereft of evaluating parallel regulatory issues since financial institutions are often governed by a securities regulator whereas banks would be governed by the central bank / banking regulator.
- *Self regulation would contain the spirit of the law. Over regulation may not.*

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Third Party Releases

Prof. Sarah PATERSON

London School of Economics and Political Science

Third Party Debt Releases

Prof. Gerard McCormack
University of Leeds

Underlying legal principles

- a company, even within a group of companies, separate legal person with rights and liabilities peculiar to itself.
- international business invariably conducted through a corporate group structure.
- chain of related company guarantees
- UK debt restructuring - Part 26 Schemes and Part 26A restructuring plans introduced in 2020 which introduces cross class cram-down

Claims against 3rd parties

- Scheme/plan may compromise creditor's claim against a third party i.e. person other than the company in respect of whom the scheme/plan is proposed
- May be necessary to give effect to the arrangement proposed
- Principle is commonly invoked in the context of a scheme/plan proposed by a borrower, where other group companies have granted guarantees
- Guarantor's right of indemnity - 'ricochet claim' would defeat the purpose of the scheme, since debtor would ultimately remain liable for amount purportedly released by the scheme
- Often co-obligor or co-issuer structure

Turner and Newall (T & N) asbestos liability

- scheme between T&N and employees/ex employees
- Ex/employees had claims for personal injuries arising out of their exposure to asbestos
- Claims included in the scheme were restricted to those covered by employers' liability insurance
- Insurers disputed liability on grounds of alleged misrepresentation
- Agreed to pay money to T&N administrators on basis that binding scheme approved by the court
- Claimants would agree not to bring claims against insurers in return for a dividend out of fund

T & N

- Rights of T&N under policies were transferred to claimants and these rights were compromised under the scheme
- Argued no compromise between T&N, and its creditors
- Held rights of claimants against insurers were sufficiently connected with claimant rights against T&N so as to bring scheme within legislation
- Scheme was a tripartite matter, involving T&N, insurers and claimants
- Entirely logical jurisdiction to approve schemes which varies creditor claims against company extended to requiring them to bring into account rights of action against third parties designed to recover the same loss.
- Release of such third party claims merely ancillary to arrangement between company and its own creditors

Lehman case

- In Lehman, finance company held certain securities as trustee but records not sufficiently detailed to enable precise identification within reasonable period of persons for whose benefit securities were held
- Could scheme be used to plug gap in record-keeping?
- Scheme under which trust beneficiaries compelled to give up their entitlement to their own property held by company on their behalf
- Held scheme jurisdiction not intended to encompass proprietary rights in this way

UK as a venue for international mass tort litigation

- *Vedanta Resources* and *Okpabi* held arguable that UK parent could be liable for operations of overseas subsidiaries
- Actual or potential injuries and disease to persons as well as damage to natural and physical environment
- Possibility of UK being used as a venue for restructuring such liabilities through schemes/plans in the same way that UK used as a venue for restructuring international financial debt
- 'Social debt' likely to generate more contentious issues than purely financial debt
- Militates against prospects of schemes/plans achieving international recognition

Schemes/plans and international recognition

- Scheme/plan might conceivably impose monetary limits on claims of foreign tort claimants and/or lay down truncated claim adjudication procedures.
- ‘Adequate protection’/‘sufficient protection’ requirement under UNCITRAL Model Law
- If norm not met, qualifies recognition and relief that may be granted in respect of foreign proceedings
- Model Law not implemented ‘fairness’ and ‘adequate protection’ potentially important components of recognition/relief of UK proceedings
- Not sufficient evidence scheme/plan will be recognised where debtor has assets and likely to produce benefits for creditors, then judicial sanction likely withheld

Summing up

- Scheme/plan process favours consensus over conflict
- Doctrines work reasonably well when underlying liability not in serious dispute.
- Disputes can become embittered when resolving disputed liability over tortiously generated debt
- Competing social interest considerations
- Bargains may be coercive and developed by a small group of key stakeholders
- Log-rolled through other constituencies
- Presented on an ‘emergency’ or ‘necessary’ basis to court
- Success of UK as forum shopping venue
- If evidence working to disadvantage of employees or consumers resident typically in jurisdictions where debtor has assets, unlikely that scheme/plan will be recognised in that jurisdiction attractiveness of UK as restructuring venue to that particular forum shopper will fade away

Third-Party Releases in Restructuring Proceedings:

State of the Debate and Legislation (if Any) in Italy

Alessandra Zanardo
Ca' Foscari University of Venice

Third-party releases...

Is it a hot topic in Italy?

- Consensual/Non-consensual third-party releases (voluntary/involuntary)

- Non-debtor releases of **direct/derivative** claims

N.B.: Releases by the debtor's estate against third parties (*see* 11 U.S.C. § 1123(b))

Non-consensual

«Non-consensual third-party releases are provisions in reorganisation plans that release **non-debtor parties** from liability to **other non-debtor parties** without the consent of all potential claimholders»

Consensual

«**Non-debtors** consensually release claims they may have against **other non-debtors**»

«Article 117 of the Business Crisis and Insolvency Code
(Effects of the **composition** for creditors)

1. The confirmed composition is binding for all the previous creditors [...]. However, **they retain their rights *vis-à-vis* the co-debtors, the debtor's guarantors and the debtors by way of recourse.**
2...»

Can we imagine a power of the court similar to that of 11 U.S.C. § 105(a)?

See also 11 U.S.C. **§ 524(e)**

Concerning composition with creditors
(pursuant to the **former Article 184 of the Italian Bankruptcy Law)**

(Cass., I, 6.9.2019, No. 22382)

«It is therefore necessary to exclude the possibility of extending the discharge of the composition agreement to co-debtors on the basis of an express provision contained in the proposal, since the regulation of the effects of the composition agreement is governed by law and therefore, unlike the provision in Article 184(2) of the Bankruptcy Law, **is not at the disposal of the parties**»

…to be continued

«The provision of Article 184(2) of the Bankruptcy Law constitutes an **express derogation** from the principle of the transferability of beneficial effects between debtors provided for in Article **1301 of the Civil Code** for voluntary remission (of debt) and by Article 1941 of the Civil Code for sureties, which is considered to be constitutionally valid by reference to Articles 3 and 42 of the Constitution, [...] since the guarantor, on the one hand, pays what he has undertaken to pay and, on the other hand, suffers the effects of the composition agreement by way of recourse like any other creditor: such regulation is based on the purpose of favouring the acceptance of the composition proposal by the creditors»

Are there elements **today** – also in the light of the provisions of the Business Crisis and Insolvency Code – that might lead to a revision of the position of the Italian Supreme Court**?**

Cf.:

- Article 1301 of the Civil Code
- **Article 79(5)** of the Business Crisis and Insolvency Code (and the **different** text of the former Article 11(3) of Law No. 3/2012)
- **Article 74(4)** of the Business Crisis and Insolvency Code (for matters not provided for in the «concordato minore» section, the provisions of the Business Crisis and Insolvency Code on composition with creditors shall apply *mutatis mutandis*)

«Article 79(5) of the Business Crisis and Insolvency Code
(Majority for the approval of the «concordato minore»)

1...
2...
3...
4...
5. The composition does not affect the rights of the creditors *vis-à-vis* the co-debtors, the debtor's guarantors and the debtors by way of recourse, **unless it is otherwise provided for**»

(former) Article 11(3) of Law No. 3/2012

«The agreement does not affect the rights of creditors *vis-à-vis* the co-debtors, the debtor's guarantors and the debtors by way of recourse»

Q.: Could the new provision adopted in relation to a specific type of composition with creditors ('concordato minore') lead to a '*revirement*' of the position of the Italian Supreme Court in relation to all the composition agreements, irrespective of the nature and size of the debtor?

A.: There is no reason to apply different rules – as regards the release of guarantees – to similar restructuring procedures, the regulation of which is to a certain extent identical or similar under the new Italian legislation

Anything else?

- Can it be argued that Article 117 of the Business Crisis and Insolvency Code does not **expressly** prohibit the release of guarantees and could therefore be interpreted as a rule whose sole purpose is to exclude that the discharge automatically extends to guarantors & Co.**?**

- Can the '**best-interest-of-creditors**' principle be invoked**?**

In a different sense...

«Article 59 of the Business Crisis and Insolvency Code
(Co-debtors and unlimited partners)

1...
2. In the event of the extension of the **agreements** to non-adhering creditors, they retain their rights *vis-à-vis* the co-debtors, the debtor's guarantors and the debtors by way of recourse.
3...»

'Direct protection' for creditors who do **not** adhere to the agreement

…to be continued

«Article 59 of the Business Crisis and Insolvency Code
(Co-debtors and unlimited partners)

1...
2...
3. Unless otherwise agreed, the restructuring agreements shall be effective *vis-à-vis* the *unlimited partners*, who, **if they have provided security, shall remain liable in this respect, unless is not otherwise provided for**»

First version of the Business Crisis and Insolvency Code (December 2017)

«Article 122
(Effects of the composition for creditors)

1. The confirmed composition is binding for all the previous creditors [...]. However, **they retain their rights *vis-à-vis* the co-debtors, the debtor's guarantors and the debtors by way of recourse.**

2. Unless otherwise agreed, the company's composition is effective *vis-à-vis* the unlimited partners, who, **if they have provided security and unless otherwise agreed,** remain liable in this respect»

Two examples

(partly regulated by the Italian legislator...)

Liability actions against corporate bodies for breach of fiduciary duties...

‘Liquidation Composition’ with creditors

«Article 115 of the Business Crisis and Insolvency Code (Actions of the judicial liquidator in the **event of disposal of assets**)

1...
2. The judicial liquidator exercises or, if pending, continues to exercise the company’s liability action. **Any contrary agreement or any other provision contained in the proposal or in the plan are unenforceable against the liquidator and the company’s creditors.**
3. In any event, […] this does not affect the right of any creditor of the company to exercise or continue the liability action provided for in Article 2394 of the Civil Code»

Direct creditor claim for breach of fiduciary duties

Intra-group guarantees
(in particular, upstream guarantees)

Restructuring of enterprise groups

Is *third-party release* permissible in the context of group crisis regulation in order to pursue the '**best-interest-of-creditors**' principle**?**

…to be continued

Cf.:

- Article 284 of the Business Crisis and Insolvency Code (group composition with creditors)

- Article 285 of the Business Crisis and Insolvency Code (content of the group plan(s))

«The plan(s) may also provide for contractual and reorganisation transactions, including intra-group transfers of assets […]»: **compatibility with third-party releases**?

Will anything change after the approval of a new decree amending the Business Crisis and Insolvency Code, which is expected (very) soon**?**

(as far as I know) **Probably not**

Thank you very much for your attention**!**

Gerard McCORMACK
University of Leeds

Alessandra ZANARDO
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coffee break

#insolvency #restructuring #5thsymposium

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@YseultMarique @eugevaccari86

The Role of Creditor Majority in Restructuring

Mr Justice Sir Antony ZACAROLI
High Court of England and Wales

The 5th International and Comparative Insolvency Law Symposium

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KEEP CALM AND HAVE LUNCH
Coffee