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PRC Enterprise Bankruptcy Law and Practice in China: 2007 to a record-breaking 2017

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Acknowledgement

INSOL International is very pleased to publish this special report titled “PRC Enterprise Bankruptcy Law and Practice in China: 2007 to a record-breaking 2017” by Prof. Wang Xin Xin, Dean of Bankruptcy Law Research Centre of Renmin University, Beijing; Prof. Xu Yang Guang, Vice Professor of Renmin University, Beijing and Mr. Alan CW Tang, Head of SHINEWING Specialist Advisory Services, Hong Kong.

The Enterprise Law of the PRC came into effect in 2007. Since then, it has been observed that the progress made so far has been staggering with a record number of bankruptcy cases being filed and various new initiatives that have been introduced.

To achieve this success, the PRC Government, private sector officials, academics, and insolvency practitioners have all cooperated in full and contributed significantly. Since 2008, the PRC Supreme People’s Court together with several other organisations has been jointly organising a Bankruptcy Symposium annually to provide a platform where the insolvency and related professionals could discuss matters of interest in an open forum.

This paper discusses some of the key issues that were discussed at the 8th Symposium which includes – the judicial interpretation of the law; analysis of the reasons as to why bankruptcy is not used in the PRC; the development of the administrator system and the bankruptcy reorganisation and practice including cross-border considerations.

INSOL International sincerely thanks Prof. Wang Xin Xin; Prof. Xu Yang Guang and Alan CW Tang for jointly writing this excellent paper. The information contained in this report will no doubt be very helpful to INSOL members because it may otherwise not be available to them.

January 2018

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PRC Enterprise Bankruptcy Law and Practice in China: 2007 to a record-breaking 2017

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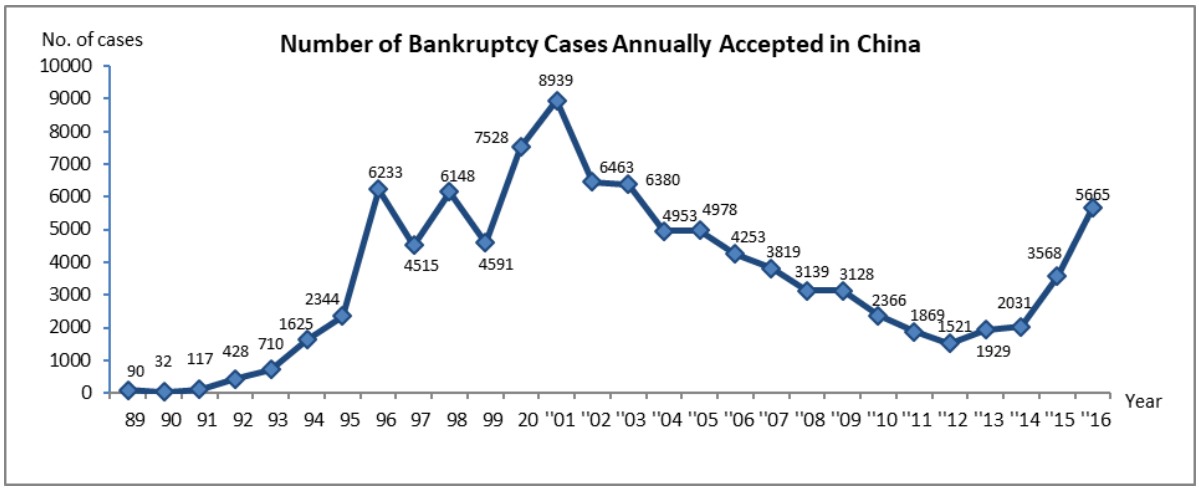
Introduction of writers: Prof. Wang Xin Xin - Dean of Bankruptcy Law Research Centre of Renmin University, Beijing, President of Beijing Bankruptcy Law Society and Member of PRC Enterprise Bankruptcy Law Drafting Committee; Prof. Xu Yang Guang - Vice Professor of Renmin University, Beijing, Vice Dean of Bankruptcy Law Research Centre of Renmin University and Vice President and Secretary of Beijing Bankruptcy Law Society; Alan CW Tang – Head of SHINEWING Specialist Advisory Services, Hong Kong and former Director of INSOL International.

Highlight

To mark the 10th anniversary of the new Enterprise Bankruptcy Law of the PRC, and with continuous success in market economy reform, the Chinese legislature and the judiciary attached great importance to implementation and development of bankruptcy law. As a result, the bankruptcy system in practice has improved substantially and the number of bankruptcy cases keeps increasing correspondingly. Countrywide specialist bankruptcy tribunals have been set up; a national system of bankruptcy administration has been established; the bankruptcy administrator profession is beginning to mature; results of corporate reorganization and out-of-court restructurings are satisfactory; a web-based data access platform for bankruptcy cases (as well as other judicial cases generally) has been launched and web-based online auction platforms have been established to dispose of and realise bankruptcy assets. Draft legislation for personal (natural person) bankruptcies (for trial implementation) is being considered in the Shenzhen Special Economic Zone. Progress in the last 10 years has been staggering and 2017 has seen a record number of bankruptcy cases and with various new initiatives having been introduced.

The hard numbers

The number of enterprise bankruptcy cases (including reorganization and liquidation cases) since the introduction of the "old" Bankruptcy Law (effective 1988) to 2016 is depicted in the chart below:-



Available preliminary statistics suggest that the number of cases for 2017 is 8,984, exceeding the previous peak of 8,939 in 2001.

Beijing Bankruptcy Law Symposium

Under initially the auspices of the Supreme People's Court (the "SPC"), and organized by the Renmin University of China Law School, Bankruptcy Law Research Centre of Renmin University and Beijing Bankruptcy Law Society[1] and other co-hosts and sponsors, top bankruptcy judges, government officials, academics and practitioners throughout the country have gathered almost on an annual basis in Beijing since 2007 to discuss Bankruptcy Law, its implementation and practice. The 8th Bankruptcy

* The views expressed in this report are the views of the authors and not of INSOL International, London.

[1] Beijing Bankruptcy Law Society is a government-registered academic society co-founded by Renmin University of China Law School and Capital University of Economics and Business Law School since 2010.

Law Symposium to mark the 10th anniversary of the Enterprise Bankruptcy Law was held in Beijing on 3 and 4 June 2017, with the China Council for the Promotion of International Trade Legal Department as the key sponsor, carrying the theme of "Bankruptcy Law – History and Outlook". More than 800 delegates from all over China attended, with the keynote address delivered by Mr. Du Wan Hua (member of Judicial Committee of SPC)[2]. More than 200 technical research papers, articles and reports were published to mark this occasion. The scale, scope and depth of these papers, articles and reports are overwhelming.

This paper highlights some of the key issues discussed at the 8th Symposium. Recounting firstly the history of bankruptcy legislation, this paper begins to deal directly with the "hard-core" problem of only relatively few bankruptcy cases having been "accepted"[3] by the people's courts, with a detailed analysis of the reasons for such a phenomenon and proposed solutions to help check the problem. A discussion on specialist bankruptcy tribunals is followed by explanations of how the administrator system works and problems encountered by practitioners. Bankruptcy reorganization is then discussed before major developments in introducing advanced information technology to handle bankruptcy cases, including the setting up of national data-sharing networks as well as sale of bankruptcy assets via web-based internet platforms, are explained. This paper then concludes with a brief discussion on cross-border issues and current research and publication efforts by the profession. Where available, appropriate updates since the 8th Symposium have been included. We hope this paper will give a comprehensive summary of major key issues and developments of PRC bankruptcy law and practice to date.

1. Legislation of bankruptcy law and judicial interpretation

1.1 History of bankruptcy law legislation

In December 1986, the Enterprise Bankruptcy Law of the People's Republic of China (For Trial Implementation)[4] (the "Old Law") was adopted at the 18th Meeting of the Standing Committee of the Sixth National People's Congress. The Old Law (effective from November 1988) applied to only state-owned enterprises and reflects the need for a market exit mechanism during the reform of the state-owned enterprise sector and the economy at that time.

In April 1991, the Fourth Session of the Seventh National People's Congress adopted the Civil Procedure Law of the People's Republic of China (the "Civil Procedure Law"). Chapter 19 of the Civil Procedure Law "Procedure for Bankruptcy and Debt Repayment of Legal Person Enterprises" applied to legal person enterprises not owned by the state. This Chapter 19 and the Old Law constituted the bankruptcy "regime" in China at that time.

In August 2006, the 23rd meeting of the Standing Committee of the 10th National People's Congress of the People's Republic of China adopted the Enterprise Bankruptcy Law of the People's Republic of China (the "Enterprise Bankruptcy Law" or "EBL")), which came into effect on 1 June 2007 and repealed the Old Law at the same time. In October 2007, Chapter 19 of the Civil Procedure Law was also repealed.

The Enterprise Bankruptcy Law is premised upon the Chinese culture, noting China's national conditions and draws references from advanced legislation and judicial experiences of other countries. With the stated objective of the law being to "regulate the procedure for enterprise bankruptcy, fairly settling claims and debts, safeguarding the lawful rights and interests of creditors and debtors, and maintaining the order of the socialist market economy"[5], the Enterprise Bankruptcy Law encompasses the three processes of "reorganization (重组), compromise (和解）and bankruptcy liquidation （破产）" and has introduced the "administrator" （管理人）system. The Enterprise Bankruptcy Law applies to all legal enterprises as well as other specific enterprises or entities under Articles 134 and 135.

Article 134 expressly states that financial institutions such as commercial banks, securities companies and insurance companies are subject to the Enterprise Bankruptcy Law; but the State Council may stipulate specific measures or guidelines for implementation on a case by

[2] Refer to http://www.law.ruc.edu.cn/article/?52804.html
[3] Accepting" means registration of the application for hearing by the court - not "approving" the application as such.
[4] 《中华人民共和国企业破产法（试行）》， official English translation posted on http://www.china.org.cn; all English titles used in this paper are also from this site (where available) unless otherwise stated.
[5] Article 1 of the EBL (http://china.org.cn)

case basis. Article 135 extends the bankruptcy liquidation procedures to non legal person enterprises such as sole proprietorships and partnerships when they enter into bankruptcy liquidation.

1.2 Judicial interpretation on the Enterprise Bankruptcy Law by the SPC

The SPC has judicial interpretation powers instead of legislative powers as stipulated by the Resolution of the Standing Committee of the National People's Congress Providing an Improved Interpretation of the Law[6] (10 June 1981). During the implementation of the Enterprises Bankruptcy Law, a series of judicial interpretations issued by the SPC also constitute bankruptcy legislation and form the basis of bankruptcy case decisions by courts.

Firstly, the Supreme Court issued a judicial interpretation on the bankruptcy administrator system. The Enterprise Bankruptcy Law sets up a system of bankruptcy administrators. The court will appoint an administrator when accepting the bankruptcy petition and the enterprise subject to the petition will be managed by the administrator, who will perform functions and duties as per the requirements of the Enterprise Bankruptcy Law.[7] Considering the specific situation of the debtor enterprise and after consulting professionals (would-be administrators), the Court may designate qualified personnel as the administrator to be appointed from accounting firms, law firms or bankruptcy liquidation firms. A "liquidation committee" comprising Government officials and / or professionals may also be appointed as the administrator. Article 22 of the Enterprise Bankruptcy Law stipulates that "a bankruptcy administrator shall be designated by the people's court" and "the measures for designating administrators and determining their remunerations shall be formulated by the SPC".

In 2007, the SPC issued its first judicial interpretation "Provisions of the Supreme People's Court on Designating the Administrator during the Trial of Enterprise Bankruptcy Cases"[8], which established a Roster of Administrators within the jurisdiction of each relevant court as well as the process of appointing a bankruptcy administrator by either random selection or competitive bidding. Another judicial interpretation issued at the same time by the SPC in 2007 relating to the "Provisions of the Supreme People's Court on Determination of the Administrator's Remunerations"[9] sets the basis of remuneration of bankruptcy administrators as well as the method of payment.

In 2011, the SPC issued a judicial interpretation with respect to the "Provisions of the Supreme People's Court on Certain Issues Relating to the Application of the Enterprise Bankruptcy Law of the People's Republic of China (1)"[10] on bankruptcy petition and acceptance. At the beginning of the implementation of the new Enterprise Bankruptcy Law, as a result of difficulties with understanding new legal concepts of the law and its application, enterprises could not be put into bankruptcy easily. There were also in practice diverse views on the legal requirements for bankruptcy applications. In 2011, the SPC therefore issued these Provisions which dealt with and "clarified" mainly 3 issues: -

i. proper causes of bankruptcy and especially causes to apply for bankruptcy in order to protect all parties' rights to file bankruptcy petitions;

ii. duties of petitioner to take up burden of proof; and

iii. the system and procedures for accepting bankruptcy petitions and supervision thereof.

This judicial interpretation was meant to motivate more bankruptcy petitions and acceptances.

Lastly, in 2013 the SPC issued a judicial interpretation clearly defining the property of the debtor enterprise in bankruptcy. During implementation of the Enterprise Bankruptcy Law

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[6] 《全国人大常委会关于加强法律解释工作的决. No official translation found; this translation is from http://www.ipkey.org, which is an EU government sponsored website.

[7] Article 25 of the Enterprise Bankruptcy Law sets out the functions and duties of administrators.

[8] 《最高人民法院关于审理企业破产案件指定管理人的规定》. This translation is from official website of China Securities Regulatory Commission.

[9] 《最高人民法院关于审理企业破产案件确定管理人报酬的规定》. This translation is from official website of China Securities Regulatory Commission.

[10] 《关于适用<中华人民共和国企业破产法>若干问题的规定（一）》. This translation is published on the website of People's Court Press, http://www.globalchinalaw.com.

especially involving property of the debtor enterprise, there are many other applicable laws such as Contract Law, Real Right Law[11], Company Law, Tort Law, Securities Law and Civil Procedure Law, etc, which make the situation much more complicated. As a result, courts in different jurisdictions may have different opinions when identifying property of the debtor enterprise, which may prejudice creditors' rights. To solve this problem, "Provisions of the SPC on Certain Issues relating to the Application of the Enterprise Bankruptcy Law of the People's Republic of China (II)"[12] was issued by the SPC in 2013 to give detailed guidance on legal issues and practical applications when identifying property of the debtor enterprise.

Besides, the SPC is considering issuing further judicial interpretations to provide courts with guidance on "group" and related companies' bankruptcy, reorganisation and cross-border bankruptcy, etc. The SPC also makes references to the "UNCITRAL Legislative Guide on Insolvency Law", "UNCITRAL Model Law on Cross-Border Insolvency" ("Model Law") and advanced experiences of other countries when drafting such statutory provisions and judicial interpretations.

2. Reasons and proposed solutions for insufficient use of bankruptcy in China

To enhance reform of the Chinese market economy, to ensure "survival of the fittest" and orderly exit of failing enterprises, promulgation and successful implementation of the Enterprise Bankruptcy Law is a major application measure. The Enterprise Bankruptcy Law is premised upon market economy rules and assimilates advanced legislative and judicial experiences overseas. There have been however, "challenges" of its use and application as the number of bankrupt cases filed[13] decreased. Recently with the combined efforts of the central government, local government, academics and practitioners, the situation of "insufficient" number of bankruptcy cases[14] has improved substantially.

Table 1：Number of bankruptcy cases annually accepted in China in recent years

Year	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
Number	4253	3819	3139	3128	2366	1869	1521	1929	2031	3568	5665

As per the data of Table 1, the number of bankruptcy cases did not increase as expected by many since 2007, following implementation of the Enterprises Bankruptcy Law. From 2007 to 2014, the number of new accepted bankruptcy cases decreased sharply to 1,521 cases in 2012 for the whole of China. To address this "problem" of limited application of the EBL in the Chinese market economy, the China Bankruptcy Law Symposium in 2013 was organized with the theme "Difficulties and Breakthrough of China Enterprise Bankruptcy Law - Reasons of Decreasing Number of Bankruptcy Cases and How to Deal With It". A report was then submitted to the SPC summarizing the reasons for decreasing number of bankruptcy cases and with suggestions to deal with and tackle the "problem".

Highlights from this report are discussed below.

2.1 Reasons

Court - some courts do not have thorough understanding about the role of the Enterprise Bankruptcy Law in regularising society and the economy; and are still working on the old government administrative "closure" concepts and practices and fail to accept bankruptcy as a lawful concept. Therefore, these courts try to find all sorts of reasons to refuse to accept petitions of bankruptcy cases. Another reason is the immature procedures and systems of acceptance and monitoring of bankruptcy cases; as well as the unreasonable performance evaluation system on judges dealing with bankruptcy cases[15].

[11] 物权法, this translation is from SPC official website.
[12] 《关于适用<中华人民共和国企业破产法>若干问题的规定（二）》. This translation is published on the website of People's Court Press, http://www.globalchinalaw.com.
[13] It should be noted that all bankruptcy cases (including reorganization) have to be filed and administered through the courts.
[14] The number of bankruptcy cases through the courts is less than 1% of all enterprises which "close" (by various means) in any one year. In China, there is no avenue for "voluntary" liquidation cases to commence – all cases must go through the courts.
[15] Performance of judges on the whole draws heavy references from number of cases referred to, handled and completed during any year by any single judge.

Social - the lack of corollary Government support policies after enterprises enter into bankruptcy procedures also deters courts from accepting bankruptcy petitions. For example, because of a lack of government funding and comprehensive social security arrangements, employees seldom get full compensation for unemployment reliefs, and bankruptcy administrators do not get paid their proper remuneration. Besides, for internal (personal) political considerations, some government departments would not wish to take the responsibility to tackle problems of enterprise failures especially when there are no quick solutions to the employee compensation and unemployment reliefs – thus forcing the court to bear heavy burdens and face employees' demands, parades and protests. Some courts therefore are just not willing, or do not dare, to accept bankruptcy cases.

Debtors / creditors - most debtor enterprises are not motivated to file to bankrupt themselves. When enterprises become insolvent, creditors will choose to sue and take immediate enforcement actions to try to fully recover individual creditor's liabilities. If no recovery is to be expected, creditors may simply give up filing any bankruptcy petition against the debtor enterprise due to complicated procedures and little potential recovery. For creditors who try to petition against the debtor enterprise, they only find their application being refused by the court, thus reducing creditors' incentive and motivation to file bankruptcy petitions against debtors. Because debtor enterprises bear no legal duty and penalty when they do not apply for bankruptcy on time as they should do, they have no pressure and no motivation to do so. Instead, debtor enterprises will choose to have their business licence revoked by Government by simply not filing a proper annual review and examination returns in two consecutive years; and refuse to bankrupt the insolvent enterprises as a way to avoid repaying debts.

Legislation - current legislation does not have clear guidance on bankruptcy petitions and acceptance. This is particularly so on reasons and applicable situations for creditors to file a bankruptcy petition against the debtor, resulting in many practical difficulties. Unclear procedures of accepting bankruptcy petitions and a lack of adequate monitoring by higher level courts also provide room for courts to refuse to accept bankruptcy petitions and applications.

2.2 Proposed solutions

2.2.1 *Conceptual* - conceptually, we need to change the general view and attitude on bankruptcy, secure its recognition generally and realise that the Enterprises Bankruptcy Law is one of the most important laws in the market economy and no other law can replace its "regulatory" function. With more research into bankruptcy theories, experience in real-life bankruptcy cases, and a much broadened education and propaganda programme, the old concept and practice of "placing strict control on bankruptcy acceptance" should be abandoned and replaced with the new concept of accepting bankruptcy cases simply as set by the law when legal requirements are met, so that creditors' rights may be better protected and the market economy system will operate smoothly.

2.2.2 *Court* - to address the issue of courts refusing to accept bankruptcy petitions, we suggest that specific bankruptcy tribunals should be set up, improve the appraisal and evaluation system for judges dealing with bankruptcy work and to train professional and experienced bankruptcy judges.

2.2.3 *Local governments* - we suggest two measures to address improper interventions in bankruptcy cases by local governments:-

i. more education and propaganda work on the important role of the Enterprises Bankruptcy Law and successful enterprises bankruptcy cases should be emphasized to inspire governments' recognition that enterprise revival may be achieved through bankruptcy; and bankruptcy is an inevitable mechanism in the market economy and takes up an important role in economic reform.

ii. there should be clearer and strict demarcation between government administrative / executive powers and judicial powers of courts in bankruptcy administration to restrain excessive government intervention to a reasonable limit and to reduce such negative influence on implementation of the Enterprises Bankruptcy Law.

2.2.4 Conversion of enforcement cases to bankruptcy cases

To address the current difficulties in converting court enforcement cases (involving insolvent debtors) to bankruptcy cases, we suggest legal reforms in three respects:

i. revise relevant parts of the Civil Procedure Law regarding enforcement of individual creditor's rights to allow and cater for particular situations of distribution (on a *pro-rata* percentage basis) to all creditors during the execution / enforcement process under Article 191 "if the debtor has neither dissented from nor complied with the order of payment within the period specified in the preceding paragraph, the creditor may apply to the people's court for execution". Enforcement of individual creditor's rights should not be allowed with respect to legal enterprises that are likely to be converted to bankruptcy under the Enterprises Bankruptcy Law.

ii. state clearly which parties should or would be obliged to present bankruptcy petitions during execution / enforcement to resolve the issue of lack of initiative to apply for bankruptcy.

iii. establish procedures to allow courts to convert appropriate enforcement cases to bankruptcy cases on its own volition.

Further discussions on court conversions are stated below.

2.2.5 Asset preservation measures after accepting bankruptcy petitions

To address the situation of different courts having issued different asset preservation orders over assets of a debtor enterprise, we have two suggested solutions:

i. all courts should strictly follow and comply with Article 19 of the Enterprise Bankruptcy Law and relevant judicial interpretation. After being informed that bankruptcy petition has been accepted by another court, all other courts should suspend their respective asset preservation measures or orders made against the debtor enterprise.

ii. the Legislative Affairs Commission of the National People's Congress Standing Committee should issue a judicial interpretation to clearly state that all asset preservation measures or orders made by parties other than the courts will be released automatically after commencement of the bankruptcy process.

2.2.6 Immature system of bankruptcy administrators

To address problems concerning the current administrator system, we have five suggestions:

i. strictly limit the situations where liquidation committees[16] are to be appointed as administrators;

ii. improve on the methods of appointing administrators;

iii. introduce an administrator "grading system" and combine it with the administrator evaluation system;

iv. establish a national association of bankruptcy administrators; and

v. set up specific (government) funds to remunerate administrators for bankrupt enterprises with no or little assets.

Further discussions on administrators are stated below.

2.2.7 Issues concerning reorganisation

To address current issues concerning reorganisation cases, we have three suggestions:

[16] Probably for political consideration, "liquidation committees" comprising mainly officials from different Government departments are often appointed as the administrator for most large / high profile bankruptcy cases.

i. to set clear judicial guidelines through legislation or judicial interpretations for "pre-packed" reorganization cases;

ii. promote the "debtor-in-possession" system during the reorganisation process; and

iii. explore the business "hive-down" / disposal model for reorganisation.

Further discussions on reorganisation stated below.

2.2.8 Taxation

Currently, many debtor enterprises face large tax bills in the reorganization process and as a result of waiver of creditors' claims being treated as "profits" with direct and immediate adverse cash flow consequences. Resolving tax issues in reorganization cases is a very important requirement and collaboration with the Ministry of Finance and State Administration of Taxation o try to reach an agreement is necessary so that official directions or rules may be published, with instructions to tax authorities throughout the country when handling bankruptcy cases.

2.2.9 Bankruptcy of privately - owned businesses

To tackle practical problems concerning bankruptcy of privately-owned business enterprises, we have three suggestions:

i. promote individual (natural person) bankruptcy law;

ii. clarify distinction between and determination of civil claims and criminal liabilities; and

iii. active adoption of practice of "piecing of corporate veil" to pinpoint personal responsibilities.

In respect of individual (natural person) bankruptcy, draft legislation is being considered at the Shenzhen Special Economic Zone.

2.2.10 Summary bankruptcy procedures

With reference to the successful experience of the judiciary in Zhejiang Province[17], we suggest that summary bankruptcy procedures be introduced to deal with less complicated cases on a national basis.

3. Measures introduced to encourage more bankruptcy cases and their effects

The Central Government now takes proper implementation of the Enterprise Bankruptcy Law very seriously. The Central Government has adopted and publicised fundamental policies for structural reform and has stated that the government will provide all necessary resources for the bankruptcy regime to be promoted to be part of the market economy process, and to accelerate handling of bankruptcy cases. As a result, central and local governments are working hard to provide the necessary operative platform for enhanced bankruptcy work, and have issued relevant implementation policies and introduced a creative policy of collaboration between governments and courts.

As noted above, in 2011, the SPC issued "Provisions of the Supreme People's Court (1) on Several Issues concerning the Application of the Enterprise Bankruptcy Law of the People's Republic of China" to explain and clarify various fundamental issues on bankruptcy petition and acceptance and to reform the registration system of bankruptcy cases, thus removing obstacles for bankruptcy petition procedures. On 28 July 2016, the SPC issued "Notice on Certain Issues Regarding Registration and Acceptance of Bankruptcy Petitions"[18]. This notice provides further guidance on the registration and acceptance of bankruptcy petitions and sets up a system to advance bankruptcy cases to the trial stage.

[17] Courts in certain jurisdictions (e.g. Zhejiang, Jiangsu, Shenzhen, Wenzhou) have attempted various "modifications" of the EBL on a trial basis to test-out possible "enhancements".

[18] 《关于破产案件立案受理有关问题的通知》. No official translation found. This translation is from King & Wood Malleson's website.

A system of converting court enforcement cases to bankruptcy cases has been introduced by the SPC, thus providing the legal basis for and smoothing the transition between enforcement and bankruptcy processes. The SPC issued an "Interpretation on the Application of the Civil Procedure Law of the People's Republic of China"[19] in January 2015. Article 513 states "during the enforcement, if a business entity that is subject to enforcement falls under the situations set forth in Paragraph 1 of Article 2 of the Enterprise Bankruptcy Law, the people's court of enforcement shall, with the consent of one of the applicants for enforcement or of the person subject to enforcement, rule to suspend the enforcement on the person subject to enforcement, and refer the documents relating to the enforcement to the people's court at the location where the person subject to enforcement is domiciled"[20]. To provide standard guidance to courts when dealing with the transfer of enforcement cases to bankruptcy cases, the SPC has issued "Guiding Opinions for Several Issues on Transferring Execution Cases for Bankruptcy Review"[21] in January 2017.

Web-based digital information technology has been introduced and applied to further secure and protect proper registration of bankruptcy cases. On 1 August 2016, the Information Website of National Bankruptcy Enterprises' Recombinational Cases created by the SPC at http://pccz.court.gov.cn/pcajxxw/index/xxwsy was put into use. The website provides an online working platform for judges and administrators as well as an online appointment "booking" system for filing bankruptcy petitions. Use of this website protects the legal rights of parties seeking to file for bankruptcy cases and it also effectively monitors the whole process of bankruptcy registrations. There are more discussions on the use of digital information technology below.

The SPC promotes the setting up of specialist bankruptcy courts in the whole country and training of professional bankruptcy judges. With more professional bankruptcy judges and more newly set-up bankruptcy courts[22], the efficiency and quality of bankruptcy trials have improved noticeably. More discussions on bankruptcy courts follow below.

Because of active promotion and propaganda, the concept of rescuing distressed enterprises and repaying debts of an insolvent enterprise to all creditors on a *pari passu* (pro-rata) basis is beginning to be widely understood and accepted. The cultural stigma of avoiding bankruptcy has changed substantially and basic concepts and operation of the Enterprise Bankruptcy Law have become more widely understood and recognised. More and more local governments, creditors and debtors have more awareness to turn to the bankruptcy system to resolve problems of insolvent enterprises and to protect rights of stakeholders.

Consequently, the number of bankruptcy cases has started to increase since 2013 and keeps increasing annually. In 2016, the number of new accepted cases has increased by 53.8% compared with 2015. The top three provinces with substantial numbers of bankruptcy cases are Zhejiang, Guangdong and Jiangsu, and the total number of new accepted cases in these three provinces alone account for 48% of the total new accepted bankruptcy cases nationally. The SPC continues to promote and encourage the acceptance of new bankruptcy cases. For the year to 31 December 2017, preliminary statistics show that there were more than 8,900 new accepted compulsory liquidation and bankruptcy related cases.

4. The setting up of specialist bankruptcy tribunals

Whether to set up any specialist tribunal for bankruptcy cases would involve consideration of the legal basis for such setting up, the configuration of professional experts, determination of jurisdiction of bankruptcy cases, as well as many other factors. Furthermore, the unique nature of bankruptcy cases is a fundamental factor relating to the necessity and the rationality of setting up specialist bankruptcy tribunals.

4.1 Theoretical basis for setting up specialist bankruptcy tribunals

First is the "melting pot" effect of the Enterprise Bankruptcy Law and hence the need to set up a

[20] 《关于适用<中华人民共和国民事诉讼法>的解释》. This translation is from SPC's gazette.
[20] No official translation found; this translation is from http://www.ipkey.org, which is an EU government sponsored website.
[21] 《关于执行案件移送破产审查若干问题的指导意见》. This translation is published on http://www.globalchinalaw.com, which is the website of People's Court Press.
[22] The first bankruptcy court was set up in Shenzhen in 1994.

specialist bankruptcy tribunal. The substantive and procedural contents of the Enterprise Bankruptcy Law cover civil and commercial law, economic law, social law, procedure law, administrative law, taxation law, criminal law, international law, and other areas of law because of the complexity of the issues involved and their interactions. In administering bankruptcy cases, the intensive extent of collaboration and communication required among different government organs fully reflect the complexity of the Enterprise Bankruptcy Law, and requiring at the same time proper communication between the court and the relevant government departments. Meanwhile, the presiding judge is expected to recognise, apply and take property law, contract law, securities law, company law, tax law, financial law, and many other legal applications into consideration. The “melting pot” effect of bankruptcy law reflects the complexity of bankruptcy cases and the strong demand for specialist and professional knowledge of the presiding judge.

Second is the finality effect of bankruptcy procedures. Commencement of bankruptcy proceedings means that all creditor-debtor relationships with the relevant debtor enterprises will ultimately be determined, with the result of either elimination of the debtor enterprise (bankruptcy liquidation) or its rescue (reorganization and compromise). Many people hold the view that bankruptcy is a way to avoid repaying debts. This view is probably related to and the result of the absence of bankruptcy tribunals with proper judiciary professionalism. Therefore, establishing a specialist bankruptcy tribunal responsible for administering standardized trials and safeguard the lawful rights and interests of all stakeholders is fundamental to eliminating concerns about the possible negative finality effect of the bankruptcy regime.

The third one is the plurality characteristic of bankruptcy proceedings. In the bankruptcy process, other than the debtor and creditors, there are also the administrator, the creditors' meeting, and potential investors and many other stakeholders who would also be deeply involved. In addition, there is involvement of the creditors' committee and the local government (including but not limited to the liquidation committee having been appointed as the administrator). What is more, the plurality characteristic of the bankruptcy procedure will generate the plurality of interests. Thus, from the perspective of the judiciary, many local courts are not willing to accept bankruptcy cases, as judges are reluctant to be part of such plurality characteristics and to have to be responsible for resolving issues if not problems with such diverse intense interests, and working with complex rules and difficult multilateral coordination.[23]

4.2 Achievements in setting up bankruptcy tribunals

The SPC of China also attaches great importance to the setting-up of specialist bankruptcy tribunals. Mr. Du Wan Hua of the SPC also has repeatedly pointed out: "it is necessary for the people's court to establish a liquidation and bankruptcy tribunal and to strengthen the establishment of a team of specialist bankruptcy judges"; "establishing a specialist tribunal is an important task of the people’s court currently and in the near future”. On June 21, 2016, the SPC formally issued “Work Plan of the Supreme People’s Court on Establishing Liquidation and Bankruptcy Tribunals in Intermediate People's Courts”[24]. Up to November 2017, the number of national tribunals specializing in liquidation and bankruptcy proceedings has increased from only 5 in the beginning of 2015 to 97, including 3 higher people’s courts, 63 intermediate people’s courts, 31 people’s courts, covering 23 provinces and autonomous regions nationwide.

The functions of China's liquidation and bankruptcy tribunals mainly include the following:

(i) dealing with enterprise compulsory liquidation and enterprise bankruptcy cases;

(ii) studying and reviewing of the handling of enterprise compulsory liquidation and enterprise bankruptcy cases;

[23] 徐阳光：《破产审判庭设置的正当性证成》，载《人民法院报》2016 年 5 月 25 日第 7 版。
“Justification and Legitimacy of Establishing Liquidation and Bankruptcy Tribunals” by Xu Yangguang, posted on page 7 of People’s Court Daily on 25 May 2016

[24] No official translation found. This translation is from http://en.pkulaw.cn, which is a widely used website specializing on PRC legal article translation.

(iii) providing guidance to lower bankruptcy courts; and

(iv) coordinating inter-court administration of enterprise compulsory liquidation and enterprise bankruptcy cases;

(v) managing and training administrators.

Following the setting up of various bankruptcy tribunals, 3,602 bankruptcy cases were completed in 2016, an increase by 43.4% compared with 2015. From January to July of 2017, the number of completed bankruptcy cases is 1,923, an increase of 28.3% compared with the same period last year. In particular, such improvement of professionalism of the bankruptcy judiciary has greatly promoted the quality and enhanced efficiency of the people's courts to deal with “zombie” enterprises legally. For instance, the liquidation and bankruptcy tribunals of the Intermediate People's Court of Guangzhou, Guangdong province have actively cooperated with the State-owned Assets Supervision and Administration Commission of the State Council (“SASAC”) at different levels since 2016 to identify and inspect various "zombie" companies. This action has already resulted in 164 provincial and municipal state-owned "zombie" companies having been reviewed, and with 104 of them having been put under the bankruptcy process.

5. The development and innovation of the bankruptcy administrator system

The Enterprise Bankruptcy Law establishes a market-oriented, law-based and internationally oriented administrator system, in place of the administrative-oriented “liquidation team system” under the Old Law. The SPC has set up a series of rules and regulations about the administrator system in terms of qualification, method of selection and remuneration, accompanied with relevant judicial interpretations. Nevertheless, during the past decade, although the administrator system has developed noticeably, improvements are still required in many aspects.

5.1 The roster of administrators

Fostering the market of administrators so as to establish a team of professional administrators is one of the goals that the legislative and judicial implementation of the Enterprise Bankruptcy Law is pursuing. Given the practical diversities in China, however, it is inevitable that the vast expense in territory, with enormous differences among areas, and disequilibrium in economic development have generated significant variances in the number of bankrupt cases accepted by local courts. Using the year of 2005 as an example, there were only 7 provinces that handled over 300 bankruptcy cases each, including Hebei, Jilin, Jiangsu, Shandong, Hubei, Hunan and Guangdong. Jilin alone handled 524 cases. However, simultaneously, bankrupt cases in Hainan, Tibet, Ningxia were no more than 10 each. Similarly, the number of intermediary bankruptcy agencies (including lawyers, accountants and liquidation firms) also varies significantly in terms of location. Therefore, when the SPC issued the “Provisions of the Supreme People’s Court on Designating the Administrator during the Trial of Enterprise Bankruptcy Cases” (the “Provisions”) in 2007, it was necessary to ensure that this provision would be applied across the country but also taking into consideration of local regional differences and imbalances.

Statistics show that by the end of 2006, there were approximately 12,400 law firms and 6,245 accounting registered as bankruptcy administrator firms in China. And in 2005, 4,978 bankruptcy cases were accepted by courts in China. Given such imbalance, the following problems had to be addressed:

(i) how would a court choose and designate administrators from numerous professional intermediary institutions;

(ii) how to set the basic principles for designating an administrator to a case;

(iii) how to fairly and efficiently designate an administrator when accepting the bankruptcy application.

To address these concerns, the roster of administrators has been set up[25].

In addition to rosters for firms, some courts have also established a roster for individual bankruptcy administrators on a personal basis, who would be individual professionals of firms on the roster for firms.

The higher people's court of each province, autonomous region and municipalities directly under the central government have established, from amongst law firms, accounting firms, bankruptcy liquidation firms within their respective jurisdiction, and with reference to the number of enterprise bankruptcy cases, their own Roster of Administrators. Latest figures from the SPC show a total of 5,536 registered intermediary agencies, including rosters for both firms and individual administrators in November 2017.

5.2 Selection of administrator

The Enterprise Bankruptcy Law empowers the people's court to appoint administrators for specific cases. Detailed methods of appointment are formulated in accordance with the relevant provisions, with fairness and efficacy as two fundamental principles.

First, the people's court which accepts the enterprise bankruptcy case shall appoint the administrator from its local roster of administrators. For commercial banks, securities companies, insurance companies and financial institutions, as well as those bankruptcy cases with major national impact, complex legal relationship, and wide dispersion of property, the relevant people's court may designate administrators from the roster of (i) its supervising higher people's court; (ii) other courts under the same supervising higher people's court or (iii) courts from other higher people's court jurisdictions. The people's court may make public announcements to invite administrators in the rosters throughout the whole country to participate in the bidding and competition. However, there should be no less than three competing firms in the process. It is worth noting that, the Higher People's Court of Jiangsu Province has chosen four basic level courts to be pilot courts to appoint administrators to all of their bankruptcy cases from administrators from all over the country and through a process of bidding and competition. This has practically broken the geographical barriers and restrictions for the appointment of administrators. Importantly, this has been a positive attempt and provided valuable experience for the improvement of the system of appointing administrators.

For cases where the facts are clear, the relationship between creditor's rights is simple and the debtor's property is mostly tangible and location-wise concentrated, the people's court may appoint an individual from an administrator firm in the local roster as the administrator. In practice, however, this is rarely done. Under certain circumstances (usually involving listed companies or major enterprises within particular industries), the people's court may designate a liquidation committee as the administrator for the case. The people's court may appoint members of the liquidation committee to be selected from the relevant government departments, social intermediary firms on the local roster of administrators and financial asset management companies. Also, in accordance with the relevant laws and administrative regulations, the People's Bank of China and the relevant financial supervision, regulatory and administration commissions also have the right to appoint their representatives to participate in this liquidation committee.

Finally, one simple way of selection of the administrator is direct appointment from the list of names in the roster of administrators according to order, or through balloting. It is worth noting that, the Higher People's Court of Zhejiang Province has reformed the method of designating administrators at an early stage by a mixture of competition and balloting, balancing the relationship between fairness and efficacy.

[25] 参见《最高人民法院民二庭负责人就<最高人民法院关于审理企业破产案件指定管理人的规定>和<最高人民法院关于审理企业破产案件确定管理人报酬的规定>答记者问》，载最高人民法院网站：http://www.court.gov.cn/zixun-xiangqing-35522.html .
Please refer to " Responsible Judge of Civil Adjudication Tribunal No.2 answers the press's questions regarding the' Provisions of the Supreme People's Court on Designating the Administrator during the Trial of Enterprise Bankruptcy Cases' and 'Provisions of the Supreme People's Court on Determination of the Administrator's Remunerations'", which is posted on the website of SPC: http://www.court.gov.cn/zixun-xiangqing-35522.html .

Introduced only in the Enterprise Bankruptcy Law, the administrator system is new. Experiences gained in the last ten years have helped to recognize problems of the system and to find directions of improvement. The legislative concept of the administrator system should shift its focus from *pro-forma* fairness to substantive fairness. To enable effective implementation of Enterprise Bankruptcy Law, the preferred emphasis on *prima facie* system fairness should give way to both efficacy and fairness. At the same time, appointment of administrators should advance from random and *ad-hoc* selection methods to selection of administrators with regard to their professional expertise, with reference to the nature and complexity of the cases in question, and through an established system of competition for major bankruptcy cases. Innovation of new appointment methods and comprehensive reform of the system of designating administrators is required. [26]

5.3 Remuneration of administrator

Remuneration of administrators is set by the court based on a prescribed scale on a percentage basis with reference to assets realised in the case. In other countries, there are two main bases to determine administrator's remuneration: a time-cost basis or a percentage on the assets realised. Each method has its own advantages and disadvantages, but the SPC has finally chosen the latter basis. Several reasons may be mentioned for this choice. Firstly, comprehensive application of a time-cost method is pre-mature, due to a lack of supporting systems, high moral risks and general poor social recognition. Secondly, the percentage basis is simple and easy to calculate the remuneration and hence it is easier for the public to understand and accept. Thirdly, the percentage remuneration basis may be used as an incentive mechanism to encourage the administrator to recover more assets, which is beneficial to enhance the interests of creditors; and fourthly, most countries and regions of the world have adopted the percentage basis. However, with improvement of relevant laws and social credibility, the time-cost method may be introduced when conditions are ripe.[27]
The other basis to determine remuneration is for the court and the creditors' meeting to determine the administrator's remuneration. Most countries or regions stipulate that the remuneration is determined by the courts, such as the United States, Germany, Italy, Japan, South Korea, and Taiwan. But in some other countries, the remuneration is determined by creditors' meetings such as Britain, Australia, Canada and Hong Kong. At the same time, however, for these countries / regions, when the creditors' meeting fails to determine the remuneration, the decision will then be made by the courts. Payment of administrators' remuneration should be with priority out of property of the debtor enterprise. Thus, if the administrator is overpaid, it may directly affect return to the creditors. In order to protect creditors' rights, it is reasonable to involve creditors in the process of determining the remuneration. The creditors' meeting shall have the right to review and agree the remuneration of the administrator. If creditors' meeting disputes the remuneration of the administrator, it has the right to submit the dissent to the people's court. It is thus obvious that there are inherent conflicts of interest between creditors and the administrator. At the beginning of a bankruptcy case, this is a particular problem as the creditors' meeting has not yet been held. In summary, the creditors' meeting has the right to know, negotiate and dissent with regard to the administrator's remuneration; and the people's court has the right to decide.

Finally, problems with cases with no or insufficient assets to pay the remuneration of the administrator have not been fully resolved yet. To tackle this problem, there are three general types of solutions in China. One method is for the interested parties (e.g. petitioning creditor) to make payment in advance; the second one is to apply for aid funding from local government fiscal budget, for example in Shenzhen, Chongqing, Shandong, Jiangsu and Zhejiang; and the third method is to set up mutual aid funding as in Shaoxing City of Zhejiang Province and Guangzhou, via local professional associations of administrators which have been established. For this mutual aid fund, certain proportions of the administrator's remuneration in other cases with sufficient assets will be withheld and injected into the aid fund, which is administered by

[26] 王欣新:《管理人制度的发展与创新》,载《人民司法》2017 年第 19 期。"Development and Innovation of Administrator System" by Wang Xin Xin posted on 17th issue of 2017 "The People's Judicature".

[27] 参见《最高人民法院民二庭负责人就<最高人民法院关于审理企业破产案件指定管理人的规定>和<最高人民法院关于审理企业破产案件确定管理人报酬的规定>答记者问》,载最高人民法院网站:http://www.court.gov.cn/zixun-xiangqing-35522.html . Please refer to " Responsible Judge of Civil Adjudication Tribunal No.2 answers the press's questions regarding the' Provisions of the Supreme People's Court on Designating the Administrator during the Trial of Enterprise Bankruptcy Cases' and 'Provisions of the Supreme People's Court on Determination of the Administrator's Remunerations'", which is posted on the website of SPC: http://www.court.gov.cn/zixun-xiangqing-35522.html .

the local administrator's association. Administrators associations have been established in Guangzhou, Wenzhou, Jinan, Xiamen, Hangzhou and Chengdu. Of course, a nationwide fund set up by the central government to subsidise these "asset-less" bankruptcy cases will be a major step forward.

6 Bankruptcy reorganization in practice

It is widely accepted that reorganization is the most powerful process to save business enterprises from bankruptcy (liquidation). It combines two closely-related objectives which are repayment of debts and rescue of the enterprise. On the one hand, it will regularise the debtor enterprise's relationship with creditors by resolving the debt crisis, eliminating the cause of bankruptcy and preventing the enterprise from entering into bankruptcy liquidation. On the other hand, it will preserve the enterprise or its business value, with ultimately more returns to creditors as compared to bankruptcy. Reorganization not only maintains and protects the rights of creditors, shareholders of the enterprise and relevant interested parties, it also prevents the possible knock-on effect of successive collapse of suppliers, distributors and related enterprises with cross-guarantee arrangements as well as unemployment and resulting in social instability. Comprehensive use of various legal means to prevent and solve a series of related social problems likely to be created by enterprise bankruptcy is significant for China to establish a harmonious society of market economy. In addition, the reorganization system can also provide an opportunity for government's moderate involvement in important economic activities through the judicial process, which helps to reduce social losses and safeguard the overall interests of society. This is why the reorganization system has been introduced and developed so rapidly in China. After the establishment of the reorganization system under the Enterprise Bankruptcy Law, hundreds of enterprises have been regenerated. Since the implementation of the Enterprise Bankruptcy Law, over 50 listed companies have entered the reorganization process.

6.1 Basic features of reorganization

6.1.1 Timing

Timing for the application for reorganization is more advanced than for the compromise and bankruptcy liquidation procedures; and with more diversified interested parties who can make the application. Occurrence of specific bankruptcy events is a pre-requisite for applying for compromise or liquidation; but reorganization can be applied at any time with or without any such bankruptcy events thus providing much more time and flexibility for the debtor enterprise to be reorganised[28]. Other than the debtor enterprise itself and its creditors, its shareholders may, under certain conditions, apply to commence reorganisation[29]. In addition, the financial supervision, regulatory and administration commissions of the state council may apply to the court for reorganization of financial institutions.[30] When the court accepts the application, all debt repayment arrangements must stop, interest on debts stops accruing, and execution on all property of the debtor enterprise subject to mortgage guarantee should stop.[31] What is more, all property preservation measures and orders are cancelled,[32] thus relieving the debtor enterprise from the burden of debt repayment and restoring a legally secured operational opportunity during this period of moratorium. In practice, however, there has not been one single reorganization case with application filed prior to occurrence of the bankruptcy events. This reflects the fact that enterprises in difficulties still fail to make full use of the reorganization rescue process.

6.1.2 Participation by stakeholders

The debtor enterprise, its creditors, shareholders and other stakeholders may participate in the reorganization process. There are a variety of reorganization measures to achieve the aim of business rehabilitation, paying off debts and avoiding bankruptcy. Other than seeking extension of time for debt repayment and debt waivers, it is important to put forward a reorganisation plan for the debtor enterprise, including reducing the shareholders' stake in the

[28] 见《企业破产法》第 2 条第 2 款。See Article 2(2) of the EBL.
[29] 见《企业破产法》第 70 条。See Article 70 of the EBL.
[30] 见《企业破产法》第 134 条。See Article 134 of the EBL.
[31] 见《企业破产法》第 46 条。See Article 46 of the EBL.
[32] 见《企业破产法》第 19 条。See Article 19 of the EBL.

enterprise, freely transferring all or part of its equity interests to potential new investors, reduction or increase in the registered share capital, issuing new shares or bonds to potential investors, adopting debt to equity swap, sale of business or asset swap measures. The main purpose of reorganization is to maintain the enterprise's business, and not limited to the enterprise itself. So, it is possible to dissolve and liquidate the original enterprise and establish a new enterprise to take over its business, involving separation and merger of enterprises. When a debtor enterprise is in the process of reorganization, new loans and debts incurred for continuing its business operations may be treated as "common interest" debts, which will rank in priority of repayment ahead of old debts. This is essential to eliminate worries and concerns of new creditors, who are required to provide new funding to support operations during the process of reorganisation[33].

6.1.3 Restrictions on enforcement

The enforcement and exercising of rights over secured assets by secured creditors is restricted. This is a significant difference between the reorganization procedure and other bankruptcy procedures where rights of secured creditors may normally be freely exercised.[34] The purpose of this restriction is to ensure that the debtor enterprise is not affected by the seizure or liquidation of the secured assets thus adversely impacting on production and operations, which reorganization is seeking to save.

6.1.4 Cram - down

One feature of the reorganization procedure is its cram-down effect. As long as all voting creditor classes and the shareholder class have approved the reorganization plan with the legal majority votes, the reorganization plan is binding on all parties including those who did not agree to the reorganization. Moreover, in the event of having one of these voting classes not agreeing on the reorganization plan (but all other classes have agreed), and if the draft reorganization plan is in accordance with legal requirements, the debtor enterprise or the administrator may apply to the court for compulsory sanction.[35] The court may make a compulsory sanction (cram-down) order as long as all legal interests of the opposing class are not compromised. This is to avoid the failure of reorganization and scuttling of the enterprise's rescue due to the opposition of minority stakeholders.

6.1.5 Debtor in possession

Reorganization permits the practice of debtor-in-possession management ("DIP"). During the period of reorganization, the debtor enterprise may apply to the court for its management to participate in drafting the reorganization plan, and, if so approved by the court and subject to supervision of the administrator, to manage the assets, business and affairs of the debtor enterprise on their own and be responsible for the formulation and implementation of the reorganization plan[36]. This can eliminate resistance to reorganization from debtor enterprises, shareholders and senior management personnel such as directors; guarantee management's interests, encourage them to apply for reorganization as early as possible in the debt crisis in order to reduce the loss of creditors, and also actively co-operate with the administrator for success.

Moreover, unlike the lawyers or accountants who are to be appointed as the administrator, management of the debtor enterprise are more familiar with the business and operations of the enterprise when they are to be responsible for the formulation and execution of the reorganization plan. However, unlike the American bankruptcy law, DIP is not "automatic" under the Enterprise Bankruptcy Law (rather the administrator takes over management automatically). DIP requires application by the debtor enterprise and approval by the court. The current practice is that it is the administrator (and not management) who is mainly responsible for the management of the debtor enterprise under reorganisation. Reasons for this include

(i) relatively short time since the implementation of the Enterprise Bankruptcy Law;

[33] 见《企业破产法》第 42 条。See Article 42 of the EBL.
[34] 见《企业破产法》第 75 条。See Article 75 of the EBL.
[35] 见《企业破产法》第 87 条。See Article 87 of the EBL.
[36] 见《企业破产法》第 73 条。See Article 73 of the EBL.

(ii) systems and procedures to operate the EBL have not yet been fully properly set up;

(iii) a general lack of the concept of bankruptcy culture in society; and

(iv) general business integrity and trust is not strong enough, which leads to suspicion from creditors and a lack of confidence in this DIP model.

With the increasing popularity and wide spread practice of China's bankruptcy law, many scholars in China are now advocating more DIP operation in reorganisations.

6.2 Directions for development of reorganization in practice

6.2.1 Continuous exploration and innovation of reorganization model

Experience of the practice of reorganization to date suggests that some enterprises may be better reorganized as a whole ("Wholesale Model"); while others are more suitable for the reorganization by way of transfer or sale of its key assets or business ("Sale Model").

The Sale Model refers to the transfer or sale (hive-down) of all or part of the debtor enterprise's major assets and relatively profitable business ("Core Business") to potential investors so that the Core Business will continue to operate under new ownership. Proceeds from such a transfer or sale, together with realization of the remaining assets will be used to repay the creditors to complete the reorganization process. Emphasis is to salvage and continue with the Core Business of the debtor enterprises, rather than preserving its corporate shell and status. The Sale Model has unique and important social functions, particularly in solving many problems otherwise encountered in the Wholesale Model; as well as overcoming relevant legislative deficiencies. Practically speaking, the Sale Model is easier to be used to formulate a reasonable and feasible reorganization plan, to eliminate disputes over valuation in the Wholesale Model, to implement the reorganization plan as soon as possible, and to help resolve the debtor enterprise's remaining debt liability.[37] The Sale Model has been adopted already in Zhejiang, Shandong, etc. with general overall success.

6.2.2 Market oriented principles and the rule of the law

There will be more emphasis to adopt market oriented principles and to respect and practise the rule of law in the reorganization process. The Enterprise Bankruptcy law itself is legislation in response to the development of the market economy, which fundamentally demands proper use of the rule of law. Thus, application of the EBL in line with market orientation is the only approach to achieve its legislative purpose. The rule of law underlines and forms the basis of a market economy; so it is only when the rule of law is applied and practised in the implementation of a reorganization would market economy results be achieved. This could mean working against and confronting improper influences from all aspects, especially the improper administrative intervention forces from the old system. Two keys to guarantee the implementation of Enterprise Bankruptcy Law under marketization and the rule of law are: first, to follow the basic principles of market economy activities, namely the principles of voluntary participation, fairness, equality, honesty, fully respecting the rights and intentions of all the parties concerned, open and fair negotiation and exercising of independent votes on matters by all stakeholders to make important decisions in the bankruptcy proceedings; second, we should respect and follow the basic principle of the rule of law, which is to guarantee transparency, fairness and justice in the bankruptcy process, and to align and adjust the rights and interests of all parties in a fair and reasonable manner by operation of free market mechanism and the rule of law. We must therefore, adhere to the basic principles of market mechanisms and the rule of law, to ensure that all stakeholders involved in the bankruptcy proceedings, especially the court and government at all levels, to abandon their old ideas and practices. It is only when the mind set and the mode of operation under the former non-marketization approach during the period of "old law" and policy bankruptcies[38] are

[37] 王欣新：《重整制度理论与实务新论》，载《法律适用》2012 年第 11 期；徐阳光、何文慧：《出售式重整模式的司法适用问题研究——基于中美典型案例的比较分析》，载《法律适用·司法案例》2017 年第 4 期
"Theories and Practice of Reorganization System" by Wang Xin Xin posted on 11th issue of 2012 "Journal of Law Application"; "Research on the Judicial Application of 'Sale Model' in Reorganisation – Comparison and Analysis of typical cases in China and US" by Xu Yang Guang and He Wen Hui posted on 4th issue of 2017 "Journal of Law Application – Judicial Cases"

[38] Many state-owned enterprises were put into policy bankruptcies in the 1990's as part of the SoE reform programme instigated

transformed can proper implementation of the Enterprise Bankruptcy Law be institutionalised, and in line with the principles of marketization and applying the rule of law.[39]

6.2.3 Transparency, fairness and justice of the bankruptcy process

During the reorganization procedure, we should ensure that exercise of fairness and justice of law is premised upon transparency as its platform; with realization of substantive justice based on (and not just) procedural justice. We should also truly respect creditors' and other interested parties' rights to be fully informed of the bankruptcy process, to be able to exercise the right of dissent, participation and supervision, fully respecting the wishes of the interested parties and their free choices. One important objective of the "Information Website of National Bankruptcy Enterprises' Recombinational Cases" (全国企业破产重整案件信息网) established by the Supreme Court (see below) is to promote the transparency, fairness and justice of bankruptcy proceedings through the platform to disseminate information about the bankruptcy process of various cases.

6.2.4 Approval of reorganisation plan

Application of Article 87(2) of the Enterprise Bankruptcy Law and exercise of these powers by courts to cram-down reorganization plans on dissenting stakeholders should be done only with great care. According to the Enterprise Bankruptcy Law, the reorganization plan may be sanctioned by the court under normal approval or compulsory approval. Normal approval refers to approval whereby the plan is submitted to the court, and the plan is approved with the statutory requisite majority votes by creditors' meetings and the shareholder group (if necessary). Compulsory approval refers to the approval of the court when the reorganization plan fails to be approved with the statutory requisite majority voting by certain classes in the creditors' meeting and / or by the shareholders class. For the former, the legislation has not stipulated the specific conditions for approval; but for the latter, those conditions are specified in Article 87, but without provisions to fully protect the interested parties who may be adversely affected, or for any dissenting views to be channelled through any appeal avenues. The "Several Opinions on Further Strengthening Trial Work Regarding Financial Cases"[40] issued by SPC stipulates in Article 12 that, "give full play to rescue function of the reorganization system, promote enterprises with renewable value to regenerate ... the procedure of reorganization should adhere to the market-oriented direction, pay more attention to the business integration and asset restructuring, and strictly apply the compulsory privilege authority to the reorganization plan in strict accordance with the law".

Reorganization under the Enterprise Bankruptcy Law should include two aspects, namely, business operation restructuring and debt rescheduling. If the debtor enterprise's reorganization plan only consists of the element debt rescheduling, without any obvious or reasonable business operation restructuring or asset realignment, and with only little manoeuvrability, the court should be cautious when approving this kind of reorganization plan, since the purpose and effect of such reorganization may be just to simply reduce (evade) debt. In these cases, the reorganization plan of the enterprise should be decided by creditors and other interested parties in accordance with the provisions of Article 87(2) of the Enterprise Bankruptcy Law. In cases where the creditors' interests are being disadvantaged, it is improper for the court to exercise the compulsory approval to cram-down on the dissenting interested parties.

7. Informatization in bankruptcy cases

How to deal with "zombie enterprises" fairly and efficiently is a common problem in many modern market economy countries. The SPC hosted a press conference on 3 August 2017 on progress of implementation of the Enterprise Bankruptcy Law generally and its application to deal with "zombie enterprises" in particular. During the press conference, Mr. He Xiaorong,

and o-ordinated by Central Government.

[39] 王欣新：《破产法挽救困境企业的成功范例——东北特钢重整计划顺利通过并获批》，载《辽宁日报》 2017 年 8 月 14 日 A05 版。
"Successful Case of Rescuing Enterprises by Enterprises Bankruptcy Law – The Reorganisation Plan of Dongbei Special Steel Group Co., Ltd was approved" by Wang Xin Xin posted on A05 page of Liaoning Daily on 14 August 2017.

[40] No official translation found. This translation is from http://en.pkulaw.cn, which is a widely used website specializing on PRC legal article translation.

the Presiding Judge of Civil Court (No.2) of the SPC, highlighted emphasis of the SPC to improve the system of handling bankruptcy cases, setting-up bankruptcy courts and utilizing "big data" and digital techniques.[41]

The trial practice of introducing the approach and application of the "big data" concept and information technology into bankruptcy cases is a revolution in the Chinese bankruptcy regime. "Applying measures such as informatization to promote the implementation of the Enterprise Bankruptcy Law" has been written in the "Chinese Outcome List of the Meeting between the Chinese and U.S. Presidents in Hangzhou"[42]. This is an ice-breaking advancement for Chinese courts to start to use "big data" and informatization to solve problems concerning "zombie" companies (and others), demonstrating Chinese courts' wisdom and contributions to perfect the bankruptcy law, and improving the business environment in accordance with law. In recent years, the SPC attaches great importance to the positive role of "big data" and information technology in the disposal of "zombie" companies, with applications in terms of identification of target zombie enterprises to be put into bankruptcy; ensuring quality, efficiency and standardization in the bankruptcy judgments, and with realization of premium asset values. The application of information technology techniques in all aspects such as standardization of judicial criteria has made breakthrough progress, winning high praises and acclamations from the international community, tackling age-old problems in many traditional bankruptcy regimes, and offering Chinese solutions to the many judicial problems in bankruptcy cases in international society.[43]

7.1 Construction of information platform of enterprise bankruptcy reorganization cases

On 1st August of 2016, the "Information Website of National Bankrupt Enterprises' Recombinational Cases" (全国企业破产重整案件信息网) http://pccz.court.gov.cn/pcajxxw/index/xxwsy established by the SPC was officially launched. This consists of three platforms: (i) data base of national bankrupt enterprises' reorganisation cases; (ii) working platform of judges in bankruptcy cases and (iii) working platform of administrators[44].

The data base for national enterprise's bankruptcy reorganization cases is a platform for the court to release information about bankruptcy reorganization. Potential investors can have access to disclosed information about the debtor enterprises and their businesses. In addition, investors may also state their investment intentions and plans through this platform on the internet and communicate with the administrator and conduct other due diligence activities as appropriate. Relevant stakeholders such as creditors, debtors, and investors may also exercise their related rights stipulated by the Enterprise Bankruptcy Law via this platform, including making reservations for filing bankruptcy petitions, filing creditor's proofs of debt (claims), submitting dissent notices, and participating in creditors' meetings with online voting etc. The working platform of judges in bankruptcy cases and the working platform of the administrator are supporting systems with updates on the progress of the different legal functions of the court and the administrator.

This network links creditors, debtors, investors, other interested parties and the people's court closely by "full coverage of bankruptcy cases, interested parties and legal processes", which can not only ensure efficient commencement of the bankruptcy procedure, but also be beneficial to implementing the proper legal procedures each step of the way for bankruptcy cases; thus, achieving fair protection to all according to the law.

The "Information Website of National Bankrupt Enterprises' Recombinational Cases" is not only a working platform of the judges and the administrator, but also an open platform on the internet for the public to obtain information about bankruptcy cases, as well as, being the judicial platform for different stake holders to participate in the bankruptcy procedure. For

[41] Refer to《最高法通报破产审判妥处"僵尸企业"有关情况》，载《人民法院报》2017 年 8 月 4 日第 1 版
"SPC reports progress of dealing with zombie enterprises by bankruptcy trials" posted on 1st page of People's Court Daily on 4 August 2014.

[42] This translation is posted on website of Xinhuanet.

[43] 贺小荣：《让破产信息化为处置"僵尸企业"贡献中国智慧》，载《人民法院报》2017 年 8 月 4 日第 1 版。
"Informationization Bankruptcy makes contribution to dealing with Zombie Enterprises" by He Xiao Rong posted on 1st page of "China Court" on 4 August 2017.

[44] The number of "hits" for these 3 platforms since March 2017 has been 106 million, 18,192 and 6,376 respectively.

example, an applicant wishing to file a bankruptcy petition can make an online reservation to file the case, which will then provide a basis for effective supervision by a superior court of the subordinate court's handling of the petition. In addition, creditors' meetings can be held online via this internet platform. According to the traditional mode of handling bankruptcy cases, convening creditors' meetings requires a lot of time and cost; but the use of the internet to hold creditors' meetings can allow creditors from around the world to participate at the same time without geographic restrictions, which will significantly cut down the costs and improve the efficiency of bankruptcy cases. Since March 2017, there have already been 22 creditors' meetings held via this platform, with a total of 50,216 creditors participating and involving debts of RMB120 billion.[45]

7.2 Innovative implication of online auction of bankruptcy assets

In China, the traditional enforcement is judicial auction by auction houses and this practice prevailed until 2013 when the Higher People's Court of Zhejiang Province started to collaborate with the Taobao platform of Alibaba for network judicial auction purposes. Ever since, this method has become the preferred way to dispose of property in court enforcement procedures. On 30 May 2016, the SPC issued the "Provisions on Several Issues Concerning Online Judicial Auction by People's Courts"[46] to make it clear that, with effect from 1 January, 2017, "a people's court that disposes of property by auction shall take the way of online judicial sale, except under the circumstance for which other disposal methods shall be taken as prescribed by any law, administrative regulation, or judicial interpretation or whereby online auction is inappropriate", and "online judicial sale shall be disclosed to the public on the internet auction platform during the whole process to accept social supervision". This will help to allow full exposure to the public and with transparency, create a good auction environment and help the judicial auction innovation and reform. On 25 November 2016, the Supreme Court issued the "Announcement of the Supreme People's Court on the List of Internet Service Providers for Judicial Auction"[47] and named 5 listed service providers (and launching relevant web-sites): Taobao at www.taobao.com; JingDong at www.jd.com; website of the people's court for execution property at www.rmfysszc.gov.cn; website of public auction at www.gpai.net; and website of the China Association of Auctioneers at www.caa123.org.cn.

The online judicial auction was originally aimed to dispose of property in the civil enforcement procedures; this has latterly incorporated the disposal of property and assets in bankruptcy cases. However, in view of the original purpose of the online auction setting for civil proceedings, it is not reasonable to simply refer to the rules and regulations of such online auction for bankruptcy property. The Provisions on "Several Issues Concerning Online Judicial Auction by People's Courts" has not specified regulations or rules about the online auction for bankruptcy estates. Therefore, certain rules applicable to online auction generally are not in conformity with the requirements of bankruptcy proceedings, such as the number of the aborted auctions allowed, the extent of the reserve price reduction and setting of starting reserve price etc.

As a result of efforts from the Enterprise Bankruptcy Law Research Center of Renmin University of China and the Higher People's court of Zhejiang Province, the People's Court of Fuyang District, Hangzhou City of Zhejiang Province has been used as a pilot court to co-operate with the Alibaba judicial auction platform. After several rounds of consultation between the district people's court and with related technical support, on 27 May 2017, the Alibaba judicial auction platform for bankruptcy assets came into use. After such an upgrade, the Alibaba judicial auction platform has set up an online auction program for "normal" court execution cases and online auction for bankruptcy proceedings in parallel. For the bankruptcy asset auction platform, the vendor of the assets for auction is the administrator, as supervised by the people's court. On 27 May 2017, the land-use rights of certain landed property of Zhejiang Taike co., Ltd., (浙江泰科铁塔有限公司), were listed in this Fuyang court platform for the first time. On June 13, 2017, such land-use rights were sold at a total price of RMB65.54 million, at a premium of RMB10.45 million (18.97%) over the starting auction price.

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[45] 贺小荣：《让破产信息化为处置"僵尸企业"贡献中国智慧》，载《人民法院报》2017 年 8 月 4 日第 1 版。
"Informationization Bankruptcy makes contribution to dealing with Zombie Enterprises" by He Xiao Rong posted on 1st page of "China Court" on 4 August 2017 - with subsequent updates to December 2017..

[46] 《最高人民法院关于人民法院网络司法拍卖若干问题的规定》. This translation is from SPC's white paper.

[47] 《关于司法拍卖网络服务提供者名单库的公告》. This translation is from en.pkulaw.cn, which is a widely used website specializing on Chinese judicial article translation.

On August 16, 2017, due to efforts from the Bankruptcy Law Research Center of Renmin University of China and the Higher People's Court of Zhejiang Province, the Taobao bankruptcy administrator auction platform was officially launched. The People's Court of Fuyang District also became the pioneer to use the platform. In November 2017, the Shenzhen Intermediate People's Court successfully auctioned off two aircraft via this platform in a bankruptcy liquidation case.

Thus, a special digital channel for the auction of bankruptcy assets has formally been established, signifying major progress in using information technology in the bankruptcy liquidation process. As Mr. He Xiao Rong of the SPC says, digitisation and use of "big data" can maximize the benefit of creditors and debtors in bankruptcy procedures. In bankruptcy administrations, maximization of the interests of creditors, on the one hand, depends on whether bankruptcy reorganization can attract strategic investors to participate in the debtor enterprise's reorganization; on the other hand it also relies on securing the best value of the assets in bankruptcy liquidation. Using "big data" and information technology will not only attract strategic investors worldwide to participate in reorganisations, but also maximize the value of the bankruptcy assets through online auction, and protecting the legitimate rights and interests of all parties involved.

8. Cross - border considerations

China has always participated actively as a member in Working Group V (Insolvency Law) of the United Nations Commission on the International Trade Law ("UNCITRAL"). Professor Wang Xin Xin is the one of Chinese representatives in the Working Group, as he is also a member of the Drafting Committee for the Enterprise Bankruptcy Law. Reference was made to the UNCITRAL Model Law when the Enterprise Bankruptcy Law was being drafted, particularly with regard to objective, design and structure of the law. For example, the Enterprise Bankruptcy Law upholds the preferential position of secured creditors generally but sets different restrictions to the exercise of such rights after commencement of the reorganization, compromise and liquidation procedures. The Enterprise Bankruptcy Law also treats onshore creditors and offshore creditors alike and on a *pari passu* basis. Drafting of UNCITRAL's Instructions on Insolvency of Enterprise Groups and the Instructions on Insolvency of Micro, Small and Medium-sized Enterprises are also expected to have positive effect on drafting of further Chinese bankruptcy laws and judicial interpretations for the Enterprise Bankruptcy Law.

In the course of drafting the Enterprise Bankruptcy Law, consultation papers were provided by INSOL International to the Drafting Committee, which also had detailed discussions with at least two Presidents of INSOL International at the time. Similarly, consultation papers were also provided to the Drafting Committee by the Insolvency Practitioners' Committee of the (then) Hong Kong Society of Accountants.

For cross-border insolvency cases, Article 5 of the Enterprise Bankruptcy Law states the principal rule that "once the procedures for bankruptcy are initiated according to this Law, it shall come into effect in respect of the debtor's property outside of the territory of the People's Republic of China" and "where a legally effective judgment or ruling made on a bankruptcy case by a court of another country involves a debtor's property within the territory of the People's Republic of China and the said court applies with or requests the people's court to recognize and enforce it, the people's court shall, according to the relevant international treaties that China has concluded or acceded to or on the basis of the principle of reciprocity, conduct examination thereof and, when believing that the said judgment or ruling does not violate the basic principles of the laws of the People's Republic of China, does not jeopardize the sovereignty and security of the State or public interests, does not undermine the legitimate rights and interests of the creditors within the territory of the People's Republic of China, decide to recognize and enforce the judgment or ruling"[48]. As such, under the Enterprise Bankruptcy Law, applications may be made to foreign courts for China proceedings to be recognized overseas; likewise applications for overseas insolvency proceedings under foreign insolvency laws to be recognized in China may also be applied for via an appropriate people's court.

On 12 August 2014, Bankruptcy Judge Gloria M. Burns of United States Bankruptcy Court in

[48] Article 5 of the EBL (http://china.org.cn).

New Jersey approved the petition by the representative of Zhejiang Topoint Photovoltaic Co., Ltd. (浙江尖山光电股份有限公司) which was under the reorganisation process supervised by the Haining Court in Zhejiang Province, China. The judge accepted the reorganisation process in China as qualified to be a "foreign main proceeding" under Chapter 15 of the U.S. Bankruptcy Code and that protection should be offered by the US Court. This US court judgment is the first case that a US court recognises the validity of bankruptcy proceedings in China. The Chinese courts have been actively dealing with a number of applications for foreign insolvency proceedings to be recognised in the PRC; and it is expected that a ruling in at least one case will be made in early 2018.

In the meantime, Chinese judiciary authorities are closely studying the UNCITRAL Model Law, as well as the experience of other foreign jurisdictions on legislation of cross-border insolvency and related laws. Provisions under Article 5 of the Enterprise Bankruptcy Law will be strictly complied with when people's courts examine applications for recognition of overseas insolvency proceedings in China. It is clear that provisions to deal with cross-border insolvencies under the EBL are still rough. The Chinese judicial authorities should set out detailed provisions within the present framework of the Enterprise Bankruptcy Law on cross-border insolvency proceedings with specific references to and procedures for determining issues concerning jurisdiction of courts, application of relevant law, assistance to be given to and recognition of foreign insolvency proceedings as well as collaboration on cross-border bankruptcy proceedings by reference to the Model Law and insolvency law and practice overseas.

9. Research and publications

Other than the Beijing Bankruptcy Law Symposium, the Law Research Center of Renmin University and Beijing Bankruptcy Law Society have co-hosted with local courts in Zhejing Province and Jiangsu Province six sub-forums and seminars under auspices of the Beijing Symposium over the years. Themes of these sub-forums and seminars include: (i) "Difficulties of and way forward for Enterprise Bankruptcy Law - reasons for decreasing number of bankruptcy cases and how to deal with it"; (ii) "Bankruptcy reorganisation"; (iii) "Property and realty bankruptcies"; (iv) "Zombie enterprises and bankruptcy"; (v) "Financial institution bankruptcy" and (vi) "Administrators - practice and innovation". The Research Centre and the Society in collaboration with Law Press have also established a "Bankruptcy Law Library" with publications under five sub-series: (i) research papers and reports published for the Beijing Bankruptcy Law Symposium; (ii) academic articles and research reports; (iii) "Classic Translations" - Chinese translations of overseas published reports and articles; (iv) "Practical Procedural Guide" - with research reports and papers on practical issues written by experienced judges and administrators and (v) "Bankruptcy Tea House" containing light articles sharing general views, comments and opinions on bankruptcy matters. Twenty books under the Bankruptcy Law Library have been published to date and these have helped to advance research on bankruptcy law and general development and implementation of bankruptcy law in China.

10. Conclusion

This article makes a summary overview of China's bankruptcy legislation and judicial practice, and presents the achievements as well as problems of China's bankruptcy law. The history of China's bankruptcy legislation is relatively short, just 31 years even if we count from 1986, when the Old Law was promulgated. However, the Enterprise Bankruptcy Law has been one of the early and important pieces of legislation premised upon the market economy theories since China's "opening-up" in 1979.

With full co-operation between Government and the private sector; and academics with practitioners, bankruptcy law and practice have experienced substantial achievements over a short time. Central Government has stated as a policy that a suitable environment should be established for the proper implementation of the Enterprise Bankruptcy Law as part of the "economy marketisation" process. The concept of bankruptcy has been relatively more widely accepted generally; and practice of the bankruptcy regime has begun to bear fruits – only to note that the law stills needs to be improved on and there are still many practical problems in implementation. From central to local government as well as courts, proper implementation and improvement on the bankruptcy regime is a matter of key attention for many.

It is particularly worth mentioning that China's legislative and judicial organs pay high respects to the roles of experts and academics in promoting development in bankruptcy legislation and judicial practice. We hope this paper has succinctly summed up key issues in current bankruptcy law and practice in China for reference by overseas practitioners. We strongly believe that, with full cooperation between academics and practitioners in joint efforts to achieve marketization and promote general acceptance of practising the rule of law principle, wide acceptance and digitization of the practice of Enterprise Bankruptcy Law, the China bankruptcy regime is bound to make substantial achievements, which may become China’s contribution to the international insolvency legal system.

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