

Can the Day Understand the Night?
Brief Introduction into Problems of the Current Insolvency System in China

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How do you describe summer night? From my Chinese point of view, the picture in my mind was the moon in the dark sky, whereas during my travel in Norway I have witnessed the sun in the midnight. People from different geographic regions (China and Norway) could have totally different points of view (the moon and the sun) towards the common phenomenon (summer night). That metaphor also mirrors possible different understandings held by people from different jurisdictions on specific legal issues. Sometimes the difference can be day and night.

There would be no problem if people from different jurisdictions did not have to talk to each other. Nevertheless, in accordance with the World Investment Report 2014 issued by United Nations Conference on Trade and Development (UNCTAD), 39 per cent of global FDI flows to developed countries, while those to developing economies reached 54 per cent of the total and the rest went to transition economies. In the way of purchasing foreign affiliates from developed countries located in their regions, transnational corporations (TNCs) from developing economies and transition economies together contribute 39 per cent to global FDI outflows.¹ To interpret the aforementioned economic information in the context of insolvency law, the cross-border elements in the course of global economic contact make different insolvency systems from different jurisdictions interactive.

I. Foreword

The foreword explains the motivation to write this article, which is associated with a case. Due to the excess capacity and anti-dumping and anti-subsidy investigation on China's photovoltaic products² imported into the U.S.A. and EU, the solar power industry in China plunged since 2011.³ Suntech Power is such an example. In 2001, Wuxi Suntech was founded in Wuxi, Jiangsu Province, China. In 2005, Suntech Power Holdings Co. Ltd. was registered in Cayman Islands (Suntech Power). The original purpose reason of establishing the Suntech Power was to facilitate privatization of Suntech by purchasing the state-owned stocks and the ultimate goal was to be listed on the New York Stock Exchange (NYSE), which was

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In this entire article, the Mainland China purely serves as a geographic term to describe the geopolitical area under the jurisdiction of the People's Republic of China (PRC), generally excluding the PRC Special Administrative Regions of Hong Kong and Macao.

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¹ UNCTAD, the World Investment Report 2014, at ix

² Photovoltaic products generate electricity by converting solar energy through semi-conducting materials that exhibit the photovoltaic effect.

³ Wei Zheng, Yu Bingqing, Study of the Current Photovoltaic Development in China and Its Solutions (in Chinese), in: Sino-Global Energy, Vol.18, Issue.6, 2013, p.15-16

realized by the end of 2005.⁴ The aforementioned recession of the photovoltaic industry resulted in multiple cross-border insolvency proceedings concerning Suntech Power in China,⁵ the Cayman Islands and the United States⁶.

On 17 November 2014, the United States Bankruptcy Court for the Southern District of New York (S.D.N.Y.) recognized the Cayman proceeding as the foreign main proceeding.⁷ The recognition is controversial in several aspects. First of all, the petition was filed in New York merely based on a New York bank account established one day prior to the petition for recognition.⁸ One of Suntech Power's American creditors, Solyndra, contended that a bank account could not suffice to render the eligibility of Suntech Power as the debtor under 11 U.S.C. § 109(a),⁹ which was considered applicable to cases filed under the Chapter 15 by the United States Court of Appeals Second Circuit in *re Barnet*.¹⁰ [Discussion on the relationship between 11 U.S.C. § 109(a) and the Chapter 15 cases falls outside the ambit of this article but I've provided some relevant information in the Footnote 11 for further reference.¹¹]

⁴ Li Yulong(ed.), *Legal Analysis of Private Equity Cases* (in Chinese), Law Press, 2009, p. 3-4

⁵ On 20 March 2013, the Mainland court accepted the application of reorganization of Wuxi Suntech (the Wuxi proceeding). See Wu Xi Intermediate Court Successfully Concluded the Suntech Reorganization Proceeding, the Reorganization Plan Has Been Almost Completely Implemented, 7 January, 2014, p.4, available at:

<http://wxzy.chinacourt.org/public/detail.php?id=5228>

⁶ On 5 November 2013, provisional liquidation of Suntech Power was initiated in Cayman Islands (the Cayman proceeding). On 21 February 2014, a petition was filed for recognition of Suntech Power's provisional liquidation proceeding pending in Cayman Islands as a foreign main proceeding or non-main proceeding before the United States Bankruptcy Court for the Southern District of New York (S.D.N.Y.) In *re Suntech Power Holdings Co., Ltd.*, Case No.: 14-10383(SMB), Written Opinion Signed On 17 November, 2014, available at

http://www.nysb.uscourts.gov/sites/default/files/opinions/247366_67_opinion.pdf

⁷ In *re Suntech Power Holdings Co., Ltd.*, Case No.: 14-10383(SMB), Written Opinion Signed On 17 November, 2014, p.3

⁸ Objection of the Solyndra Residual Trust to Chapter 15 Petition of Suntech Power Holdings Co., Ltd. (in provisional liquidation) for Recognition of Foreign Main Proceeding Pursuant to Section 1517 of the Bankruptcy Code, In *re Suntech Power Holdings Co., Ltd.* (in Provisional Liquidation), Case No. 14-10383 (SMB), Related Docket Nos. 1, 2, 3, 4, at D Suntech Has Not Qualified as a Debtor Under 11 U.S.C. § 109(a), ii Suntech Cannot Rely on \$500,000 Recently Placed in the KCC Trust Account as "Property"; See also Findings of Fact and Conclusions of Law Granting Petition for Recognition as Foreign Main Proceeding and Denying Cross-motion to Change Venue, In *re Suntech Power Holdings Co., Ltd.*, Case No.: 14-10383(SMB), Written Opinion Signed On 17 November, 2014, at D New York Proceeding, 2. The Chapter 15 Case

⁹ Objection of the Solyndra Residual Trust to Chapter 15 Petition of Suntech Power Holdings Co., Ltd. (in provisional liquidation) for Recognition of Foreign Main Proceeding Pursuant to Section 1517 of the Bankruptcy Code, In *re Suntech Power Holdings Co., Ltd.* (in Provisional Liquidation), Case No. 14-10383 (SMB), Related Docket Nos. 1, 2, 3, 4, at Factual Background, p.7

¹⁰ See In *re Barnet*, 737 F.3d 238 (2^d Cir. 2013) and Hon. Adler, Louise De Carl, *Managing the Chapter 15 Cross-Border Insolvency Case A Pocket Guide for Judges* (2nd ed.), Federal Judicial Center, 2014, p.9).

¹¹ Chapter 15 adopted the UNCITRAL Model Law almost in verbatim. Nonetheless, there is no threshold under the Model Law, requiring a foreign debtor must have a business or property in the state, where the petition of recognition is filed. Therefore, the Second Circuit's conclusion that section 109(a) applies in Chapter 15 cases has received criticism by commentators. (See Seife, Howard and Vazquez, *Francisco, The Octaviar Saga: The Chapter 15 Door Opens, Closes, and then Reopens on the Foreign Representatives*, in: *Norton Journal of Bankruptcy Law and Practice*, Vol.23, No.5, October 2014, p.576. *Re Octaviar* is the remand case of *Re Barnet* and thus followed the holding in *re Barnet*.) It has been argued that the decision in *re Barnet* "limits international

Secondly, as of the commencement of the Cayman proceeding, it was pointed by Solyndra, one of Suntech Power's American creditors that

- "- Suntech was headquartered in China;
- All of Suntech's managers and employees resided outside of the Cayman Islands
- Suntech's (technically, those of its wholly-owned subsidiaries) manufacturing facilities were located in China;
- All of Suntech's creditors, suppliers, and customers were located outside the Cayman Islands;
- As the debtor's primary assets, all of Suntech's bank accounts were maintained in Hong Kong and the Mainland China"¹²

The New York court admitted that up to 5 November 2013, when the Cayman proceeding was commenced, Suntech Power did "not conduct any activities in the Cayman Islands and maintained its principal executive offices in Wuxi, China from where it managed the Suntech Group".¹³ Nevertheless, the court followed the decision of the Court of Appeal for the second circuit in *re Fairfield Sentry Ltd.*,¹⁴ holding that a debtor's COMI should be determined based on its activities at the time the Chapter 15 petition is filed, i.e. on 21 February 2014. In addition, the court laid emphasis on the liquidation activities of the Joint Provisional Liquidators by quoting *re Fairfield Sentry Ltd.*, holding that "any relevant activities, including liquidation activities and administrative functions may be considered in the COMI analysis".¹⁵ The court indicated that the Appointment Order entered by the Cayman Court, which commenced the Cayman proceeding, appointed and authorized the Joint Provisional Liquidators to do all acts on behalf the debtor,

cooperation under chapter 15" and "is ill-suited for deciding the jurisdictional requirements for a chapter 15 case". (See Swick, R. Adam, Harle, Paul, Section 109(a)'s Jurisdictional Requirements Applied to Chapter 15, in: 33-MAR Am. Bankr. Inst. J. 30, 2014, p. 32). The decision is contrary to the former case law. For example, in *re Toft*, 453 B.R. 186 (Bankr. S.D.N.Y. 2011), at 193 and in *re Fairfield*, 458 B.R. 665 (Bankr. S.D.N.Y. 2011), at 679, no.5. Later in *re Bemarmara*, it is held that "This Court does not agree with the decision of the Second Circuit. And it is the Court's belief that there is a strong likelihood that the Third Circuit, likewise, would not agree with that decision." In *re Bemarmara Consulting A.S.*, No. 13-13037 (KG) (Bankr. D. Del. Dec. 17, 2013) *Re Barnet* will still have the binding effect on any court within the Second Circuit until the Bankruptcy Code is revised or the Supreme Court reconsiders the issue, although the Second Circuit has forwarded copies of its opinion of *Re Barnet* to Congress in order to report the technical deficiencies in the Bankruptcy Code. (In *re Barnet*, 737 F.3d 238 (2^d Cir. 2013), at Conclusion. In accordance with the Long Range Plan for the Federal Courts adopted by the Judicial Conference, 91e: All courts of appeals should be encouraged to participate in the pilot project to identify technical deficiencies in statutory law and to inform Congress of same. In: Report of the Proceedings of the Judicial Conference Of the United States, Sept.19, 1995, p.62)

¹² Objection of the Solyndra Residual Trust to Chapter 15 Petition of *Suntech Power Holdings Co., Ltd.* (in provisional liquidation) for Recognition of Foreign Main Proceeding Pursuant to Section 1517 of the Bankruptcy Code, In *re Suntech Power Holdings Co., Ltd.* (in Provisional Liquidation), Case No. 14-10383 (SMB), Related Docket Nos. 1, 2, 3, 4, p.2

¹³ In *re Suntech Power Holdings Co., Ltd.*, Case No.: 14-10383(SMB), Written Opinion Signed On 17 November, 2014, at Discussion C. COMI, p.25

¹⁴ "[A] debtor's COMI is determined as of the time of the filing of the Chapter 15 petition," but, "[t]o offset a debtor's ability to manipulate its COMI, a court may also look at the time period between the initiation of the foreign liquidation proceeding and the filing of the Chapter 15 petition." In *re Fairfield Sentry Ltd.*, 714 F.3d 127, (2^d Cir. 2013), at 133, 137.

¹⁵ In *re Fairfield Sentry Ltd.*, 714 F.3d (2^d Cir. 2013), at 137

enabled the shift of COMI from China to Cayman Islands. Within less than four months between the initiation of the foreign liquidation proceeding and the filing of the Chapter 15 petition, necessary steps have been taken by the Joint Provisional Liquidators to centralize the administration of the proceeding in the Cayman Islands.¹⁶

Coleman and Johnson have done comprehensive analysis on the timing issue concerning COMI in the American jurisprudence, which highlighted that “at its core, COMI is a pre-insolvency concept.”¹⁷ I would like to add a few points to their contribution. Based on objective observation, to allow assessment of COMI to start later after the commencement of insolvency proceedings, it will breed expansion of the scope of factors that can be taken into account to determine COMI so that liquidation activities and administrative functions can be validated as effective factors for the COMI determination. Consequently, more factors can be actually utilized for COMI relocation. Despite of the complex cross-border insolvency scenarios, COMI is an international standard, upon which a certain degree of consensus has been reached between the two international instruments specializing at cross-border insolvency law, i.e. the Regulation¹⁸ and the Model Law. Although those two instruments diverse from each other in many ways (please check the enclosed Annex for reference, which forms an indispensable part of this article),¹⁹ with respect to timing to determine COMI, the EU Regulation (recast) provides that it should be 3 months prior to the request for opening of

¹⁶ In *re Suntech Power Holdings Co., Ltd.*, Case No.: 14-10383(SMB), Written Opinion Signed On 17 November, 2014, at Discussion C. COMI, p.27

¹⁷ Coleman, Sarah, Johnson, Jen, Journey to the Center of the Economic Universe: How the Current U.S. COMI Timing Determination Misses the Mark, 23 No. 6 J. Bankr. L. & Prac. NL Art. 4, December 2014, p.6 (westlaw file)

¹⁸ In this article, the Regulation refers to the Regulation on insolvency proceedings [Council Regulation (EC) 1346/2000, hereinafter EC Regulation] and the Regulation of the European Parliament and of the Council on insolvency proceedings (recast) [Position of the Council at first reading with a view to the adoption of a Regulation of the European Parliament and of the Council on insolvency proceedings (recast) 2012/0360 (COD), hereinafter the EU Regulation (recast)] altogether in order to utilize the simplified expression to conduct comparison with the Model Law. On 12 March 2015, the Council officially adopted its position at first reading with a view on the Regulation (EU) of the European Parliament and of the Council on insolvency proceedings (recast) [2012/0340 (COD)], which obtained the political agreement by the Council (Justice and Home Affairs) on 4 December 2014. The amended text adopted by the Council at first reading [Position of the Council at first reading with a view to the adoption of a Regulation of the European Parliament and of the Council on insolvency proceedings (recast) 2012/0360 (COD), 16636/14, Brussels, 26 February 2015 (OR. en), hereinafter the EU Regulation (recast)] was the latest version of the new EU-wide rules on insolvency proceedings. The Council's adoption will enable the European Parliament to grant its approval at second reading of the text by the plenary in May or June 2015. Although technically speaking, the EU Regulation (recast) is still a draft because the EU Regulation (recast) will enter into force 20 days after its publication in the Official Journal, the text of the latest version adopted by the Council should be in near-final form. Hence, in this entire article, revision on the current EC Regulation will be introduced based on the version adopted by the Council, which was released on 12 March 2015. See also <http://www.consilium.europa.eu/en/press/press-releases/2015/03/12-insolvency-proceedings-new-rules-to-promote-economic-recovery/>

¹⁹ In the Annex, the main lines of the three regimes have been briefly outlined and summarized comparatively in the form of table.

insolvency proceedings²⁰ and it is required pursuant to the Guide and Interpretation of the Model Law (2013) that it shall be at the date of commencement of the foreign proceeding.²¹ It is evident that both of them opt for a pre-insolvency approach. The United States has adopted the Model Law almost verbatim by incorporating Chapter 15 into its bankruptcy code, including the concept of COMI, which can be deemed as a commitment to an international standard. If there is inconsistency between the rule of domestic statutory and a particular section of Chapter 15, the problem of proper interpretation arises. Fully aware of its international origin, Hon. James M. Peck considered that 11 U.S. Code § 1508²² should be regarded as “a license to depart where appropriate from the well-settled rule of statutory interpretation.”²³ Otherwise, it would compromise the goal of achieving uniformity and facilitating cross-border cooperation in insolvency matters and would reduce certainty and predictability in the application of the international standard.

Thirdly, in *re Suntech Power*, the intent to shift COMI from China to the Cayman Islands was not hidden. The attorney representing one of the debtor’s largest creditor groups called China “the last place that one would go”²⁴ and indicated that

“The Chinese court’s jurisdiction was in doubt, and China has different concepts of the rules of law and creditors’ rights compared to those found in the Cayman Islands and the United States.”²⁵

Interestingly in the same year, the United States Bankruptcy Court District of New Jersey in *re Zhejiang Topoint photovoltaic CO. Ltd.*, considered all parties concerned in the United States had received due and proper notice of the petition and thus granted recognition of the joint bankruptcy proceedings pending in China²⁶ as the main proceedings and the relevant reliefs, including suspension on disposal of assets within New Jersey.²⁷ It seems that the opinions on China’s insolvency system in the United States are not univocal.

²⁰ EU Regulation (recast), Recital (31) (with the objective of preventing fraudulent or abusive forum shopping), Article 3(1), para.2

²¹ Guide and Interpretation, para.141, 149, 159

²² 11 U.S. Code § 1508, Interpretation: In interpreting this chapter, the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions.

²³ In *re JSC BTA Bank*, 434 B.R. 334, 340 (Bankr. S.D.N.Y. 2010): “Section 1508 represents an instruction to take into account more than the words used within a particular section of chapter 15 and is a license to depart where appropriate from the well-settled rule of statutory interpretation that a court should prefer specific provisions over the general when striving to uncover the meaning of a statute.”

²⁴ In *re Suntech Power Holdings Co., Ltd.*, Case No.: 14-10383(SMB), Written Opinion Signed On 17 November, 2014, at Background, B. Foreign Proceeding, p.6; C. COMI, p.29

²⁵ In *re Suntech Power Holdings Co., Ltd.*, Case No.: 14-10383(SMB), Written Opinion Signed On 17 November, 2014, at Background, B. Foreign Proceeding, p.5-6

²⁶ The People’s Court of Haining City, Zhejiang Province, (2014) Jiaying Haining Bankruptcy(Pre) No.4

²⁷ The bankruptcy proceedings involved Zhejiang Topoint Photovoltaic Co. Ltd. and its three affiliates, Zhejiang Jiutai New Energy Co. Ltd., Zhejiang Yutai Solar Materials Co. Ltd. and Zhejiang Willsolar Photoelectric Materials Co. Ltd. Recognition was granted altogether on 12 August 2014. Their jointly administered proceedings are (i) *Zhejiang Topoint Photovoltaic Co., Ltd.*, Case No. 14-24549-GMB; (ii) *Zhejiang Jiutai New Energy Co., Ltd.*, Case No. 14-24555-GMB; (iii) *Zhejiang Yutai*

Of course China's insolvency system does not develop without problems. In the following sections, I would like to briefly address some of them and in particular, clarify the reasons in order to promote mutual understanding.

II Decline of Insolvency Cases

Adopted on 27 August 2006, the current insolvency system in China is established based on the Enterprise Bankruptcy Law (hereafter the current EBL)²⁸, which replaced the former 1986 EBL and came into force on 1 June 2007. Evolving synchronously with economic reform in China, the current EBL replaced its predecessor, 1986 Enterprise Bankruptcy Law (1986 EBL), which was only applicable to the state-owned enterprises,²⁹ and provides a unified regime, covering all types of incorporated enterprises.³⁰ The current EBL is also a more debtor-friendly regime. In addition to the liquidation proceedings, it provides reorganization mechanisms for the purpose of giving a second chance to those economically viable but distressed businesses, by referring to the eminent models in other jurisdictions, including, Chapter 11 of the US Bankruptcy Code and

Solar Materials Co., Ltd., Case No. 14-24557-GMB; and (iv) *Zhejiang Willsolar Photoelectric Materials Co., Ltd.*, Case No. 14-24559-GMB.

²⁸ Official English version is available at:

http://www.npc.gov.cn/englishnpc/Law/2008-01/02/content_1388019.htm (Last visited on 31 August, 2014)

²⁹1986 EBL, Article 2: This law applies to the enterprises owned by the whole people. In pursuant to the Constitution Law of P.R.C. 1986 EBL, Article 7: The State-owned economy, namely, the socialist economy under ownership by the whole people. Therefore, 1986 EBL actually applied to the state-owned enterprises alone.

³⁰ Before the new EBL came into effect, non-state-owned companies were treated separately subject to other legislations. They were: (1) The Civil Procedure Law, adopted on April 9, 1991, embraced one new chapter (Chapter XIX), entitled Procedure for Bankruptcy and Debt Repayment of Legal Person Enterprises, which provided the general legal foundation for bankruptcy of the non-state-owned enterprises. (2) Chapter VIII Bankruptcy, Dissolution and Liquidation of Companies of the Company Law, which was adopted on December 29, 1993, addressed the issue of corporate insolvency and no longer emphasized difference of ownership. (3) Judicial Interpretations issued by the Supreme People's Court of P.R.C.: (a) 1991 Several Opinions of the Supreme People's Court on Several Issues Concerning Implementing the Enterprise Bankruptcy Law (for trial implementation), issued on November 7, 1991, which interpreted the 1986 EBL with 76 articles, are almost twice as long as the bankruptcy law itself. It was concerned primarily with procedural rules in relation to the EBL. (b) 1992 Several Opinions of the Supreme People's Court on Several Issues Concerning Implementing the Civil Procedure Law (hereinafter the 1992 Several Opinions on CPL), issued on July 14, 1992, which had 14 articles regarding the bankruptcy enterprises and also provided some details for the bankruptcy chapter of the Civil Procedure Law and made some substantial supplements. (c) 2002 Provisions on Some Issues concerning the Trial of Enterprise Bankruptcy Cases of the Supreme People's Court, Interpretation No. 23 [2002], issued on July 30, 2002, which had 106 articles and was a very comprehensive interpretation with respect to the 1986 EBL. It superseded the earlier interpretations (the 1991 Several Opinions on EBL and the 1992 Several Opinions on CPL) if there was any inconsistency in the formers. The highlight of the 2002 Provisions on Bankruptcy Cases was that it applied to both SOEs and non-SOEs.

Chapter XIX of the 1991 Civil Procedure Law was deleted later on 28 October 2007. The bankruptcy part was also removed from the former Chapter VIII of the Companies Law in 2005. As for the judicial interpretations, most of them have been annulled, except for 2002 Provisions on Some Issues concerning the Trial of Enterprise Bankruptcy Cases of the Supreme People's Court, Interpretation No. 23 [2002].

German insolvency law.³¹ The current EBL also introduced a new legal profession, bankruptcy administrators, into China's insolvency system, who are designated to undertake critical administrative functions and supervisory responsibilities.³²

Judicial interpretations issued by the Supreme People's Court,³³ which help to resolve the insolvency-related problems in practice, also plays a crucial role in the current insolvency system. They are mainly:

(a) Provisions of the Supreme People's Court on Designating the Administrator during the Trial of Enterprise Bankruptcy Cases (Interpretation No.8 [2007], issued on 12 April 2007, hereinafter Provisions of Designating the Administrator);

(b) Provisions of the Supreme People's Court on Determination of the Administrator's Remunerations (Interpretation No.9 [2007], issued on 12 April 2007, hereinafter Provisions of the Administrator's Remunerations);

(c) Provisions of the Supreme People's Court on Some Issues about the Application of Law for the Enterprise Bankruptcy Cases That have not Been Concluded When the Enterprise Bankruptcy Law of the People's Republic of China Comes into Effect (Interpretation No. 10 [2007], issued on 25 April 2007, hereinafter Provisions for Cases not been Concluded);

(d) Official Reply of the Supreme People's Court on How to Handle a Case Where a Creditor Applies for Bankruptcy Liquidation against a Debtor Whose Relevant Persons' Whereabouts are Unknown or Whose Asset Conditions are Unclear (Interpretation No.10 [2008], issued on 7 August 2008, hereinafter the Official Reply);

(e) Provisions (I) of the Supreme People's Court on Several Issues concerning the Application of the Enterprise Bankruptcy Law of the People's Republic of China [Interpretation No. 22 [2011], issued on 29 August 2011, hereinafter Provisions (I)]

(f) Reply of the Supreme People's Court on Issues concerning Whether to Accept the Lawsuits Filed by Tax Authorities to Confirm Their Creditor's Rights to the Late Fees for Tax Arrears of Bankrupt Enterprises (Interpretation No. 9 [2012], issued on 26 June 2012)

(g) Reply of the Supreme People's Court on Whether the Liquidation of Sole Proprietorships May Refer to the Procedure for Bankruptcy Liquidation as Prescribed in the Enterprise Bankruptcy Law (Interpretation No. 16 [2012], issued on 11 December 2012)

(h) Provisions (II) of the Supreme People's Court on Several Issues concerning the Application of the Enterprise Bankruptcy Law of the People's Republic of China [Interpretation No. 22 [2013], issued on 5 September 2013, hereinafter Provisions (II)]

³¹ Shi Jingxia, Twelve Years to Sharpen One Sword: The 2006 Enterprise Bankruptcy Law and China's Transition to a Market Economy, 16 Norton Journal of Bankruptcy Law and Practice, Vol. 16, No. 5, October 2007, p.666

³² The current EBL, Chapter III

³³ In China the legal effect of the judicial interpretations is not very clear in theory but quite obvious in practice. The Constitution Law of P.R.C. does not authorize the Supreme People's Court to make the judicial interpretation. The Legislation Law of P.R.C. (article 42 and 43) prescribes that the power of legal interpretation belongs to the Standing Committee of the National People's Congress. The Supreme People's Court may request the Standing Committee of the National People's Congress to give legal interpretation. The Supreme People's Court issued a rule itself to justify the legal effect of the judicial interpretations. In pursuant to the Rules of Supreme People's Courts on the Judicial Interpretation, issued on June 23, 1997, revised on March 23, 2007 (No.12 [2007] of the Supreme People's Court), the judicial interpretation is made by the Supreme People's Court when people's courts meet the problems of application of laws in the trial. It also stimulates that the judicial interpretations have the same effect as laws. The judges simply apply the judicial interpretations in making decisions without doubting their effects.

Nevertheless, according to the data released by the Supreme People's Court in 2014, from 2007 that the current EBL was implemented to 2012, the amount of insolvency cases accepted by the courts continue to decrease at an average rate of 12.23% every year.³⁴ In 2012, there were 735,000 domestic enterprises in total that were deregistered or cancelled with the government bureau,³⁵ but only 20.52% of them utilized judicial insolvency proceedings and one decade ago it was 17.09% higher.³⁶ With more specific and systematic arrangements under the current insolvency system, the reasons that the caseload of insolvency proceedings continues to decline on an annual basis are complicated and multifaceted.

III The Competing System: Participation in Distribution

The EBL, just like its literal meaning, only applies to an enterprise as legal person (or a legal person enterprise).³⁷ A natural person is excluded from the scope of the EBL. In 1992, prior to the current EBL that came into effect in 2007, the Supreme People's Court issued a judicial interpretation, Opinions of the Supreme People's Court on Some Issues Concerning the Application of the Civil Procedure Law of the People's Republic of China (hereinafter the 1992 Opinions),³⁸ which provides so-called "participation in distribution" system.³⁹ Under the 1992 Opinions, the judgment debtors refer to natural persons and organizations other than the enterprises, which complemented the scope of application under the 1986 EBL. The participation in distribution system can be triggered when the assets of a judgment debtor are found insufficient to satisfy the judgment in the course of enforcement. The other creditors, after filing for petition against the same judgment debtor or having obtained the relevant enforcement basis, can apply for participation in distribution of the judgment debtor's assets seized in that

³⁴ Ma Jian, Statistic Analysis on Insolvency Cases Accepted by People's Court from 2003-2012 (in Chinese), in: Legal Information, 2014 (03), p.23

³⁵ State Administration for Industry and Commerce of the P.R.C., Analysis Report on Domestic Enterprises Life Circle (in Chinese), June 2013, p.3, available at: <http://www.saic.gov.cn/zwgk/tjzl/zxtjzl/xxzx/201307/P020130731318661073618.pdf>

³⁶ Ma Jian, Statistic Analysis on Insolvency Cases Accepted by People's Court from 2003-2012 (in Chinese), in: Legal Information, 2014 (03), p.24

³⁷ Not all kinds of enterprises are qualified as legal person. In accordance with Article 2 of Regulations of the People's Republic of China for Controlling the Registration of Enterprises as Legal Persons (effective as of July 1, 1988), any of the following enterprises which are qualified as legal persons shall register as such in accordance with the relevant provisions of the present Regulations:

- (1) enterprises owned by the whole people;
- (2) enterprises under collective ownership;
- (3) jointly operated enterprises;
- (4) Chinese-foreign equity joint ventures, Chinese-foreign contractual joint ventures and foreign-capital enterprises established within the territory of the People's Republic of China;
- (5) privately operated enterprises;
- (6) other enterprises required by the law to register as legal persons.

EBL, Article 2: Where a legal person enterprise cannot pay off his debts due and his assets are not enough for paying off all the debts, or he apparently lacks the ability to pay off his debts, the debts shall be liquidated according to the provisions of this Law.

³⁸ The 1992 Opinions, No.22 [1992] of the Supreme People's Court

³⁹ The 1992 Opinions, art. 297-299

enforcement proceeding.⁴⁰ In 1998, a U-turn occurred after the Supreme People's Court issued the Provisions of the Supreme People's Court on Several Issues Regarding Enforcement of the People's Courts (For Trial Implementation, hereinafter the 1998 Trial Provisions).⁴¹ In accordance with the 1998 Trial Provisions, the participation in distribution system can also apply to those enterprises dissolved, deregistered and shut down without liquidation, whose assets are not sufficient to pay off all the debts.⁴²

The 1992 Opinions and the 1998 Trial Provisions are still effective. Moreover, in 2004, Provisions of the Supreme People's Court on Multiple Creditors that Participate in Distribution (Draft for Public Consultation) was released. Till now that judicial interpretation still has not come into effect and one of the key reasons is that it is difficult to achieve a consensus on the participation in distribution system within the Supreme People's Court.⁴³ On top of that, there are negative attitudes held by the judges and the academics towards the participation in distribution system, which can be deemed as a leeway from formal insolvency proceedings and provokes threat to the sound development of the current EBL.⁴⁴ Pursuant to article 16 of the current EBL, only payment to individual creditors that is done after the people's court accepts an application for bankruptcy shall be deemed as invalid. Therefore, even if some creditors file for opening of bankruptcy proceedings against the same debtor later, the assets that have been enforced through the participation in distribution system cannot be ordered to return because neither the current EBL nor other legislations provide such a legal basis to revoke a legitimate action. Besides, pursuant to the current EBL, only the creditors and the debtor can initiate the insolvency proceedings.⁴⁵ There is possibility that creditors who decline to file a bankruptcy petition but take advantage of the participation in distribution system in order to obtain more assets than that they can receive through the insolvency proceedings.⁴⁶ This is contradictory with the core function of bankruptcy law, which is, as remarked by

⁴⁰ The 1992 Opinions, art. 297

⁴¹ The 1998 Trial Provisions, No.22 [1992] of the Supreme People's Court

⁴² The 1998 Trial Provisions, art.96

⁴³ Chen Zhixin (Judge of Xiamen Jimei District People's Court), Dilemma and Way Out of Civil Participation in Distribution System, in: Journal of Shanghai University of Political Science and Law (The Rule of Law Forum)(in Chinese), Vol.29, No.6, Nov. 2014, p.84

⁴⁴ Liu Guixiang (Director of Execution Bureau of the Supreme People's Court), Huang Jinlong (Presiding Judge of Execution Bureau of the Supreme People's Court), Distribution of Functions of Participation in Distribution System and Insolvency System, in: People's Court Daily, 30 April 2014, at 8; Wang Guanghua (President of Sui Xian People's Court of Henan Province), Participation in Distribution System and Insolvency System are Different in Nature (in Chinese), in: People's Court Daily, 30 April 2014, at 8; Chen Zhixin (Judge of Xiamen Jimei District People's Court), Dilemma and Way Out of Civil Participation in Distribution System, in: Journal of Shanghai University of Political Science and Law (The Rule of Law Forum)(in Chinese), Vol.29, No.6, Nov. 2014, p.82-87; Wang Xinxin, Participation in Distribution System Should Not Conflict with Insolvency System, in: People's Court Daily, 30 April 2014, at 8; Xu Haoshang, Ou Yuanjie, Separation of Functions of Participation in Distribution System and Insolvency System: Restructuring the Participation in Distribution System (in Chinese), in: People's Judicature, 2014 (17), p.102-107;

⁴⁵ The Current EBL, Article 7

⁴⁶ Wang Xinxin, Participation in Distribution System Should Not Conflict with Insolvency System, in: People's Court Daily, 30 April 2014, at 8

Jackson, “a collective debt-collection device”.⁴⁷ Instead, it encourages the creditors to individually grab the assets under no obligation to “share with other creditors, who maybe slower to take action”,⁴⁸ which can lead to unfair distribution among all the creditors as a whole. In addition, unlike the strict notice procedures as required under the current EBL, some of the creditors cannot even know about the proceeding and then lose the opportunity to make claims. Further, it will result in no possibility of rescue. Under the participation in distribution system, the courts do not have to take into consideration the conditions of the enterprise business but simply determine whether the debt is due. Plus, individual collection can consume the exhaustible assets of the debtors in an inefficient way, which leaves no resources to replenish the estate of the debtor.

IV. Involvement of the Government

Discussions about involvement of Chinese government in handling insolvency cases often begin and end with a series of complaints about external interference. In my view, those complaints fail to capture the complex reality of China. In this section, I’d like to explore the forms and the reasons of the government involvement based on the relevant case law.

In China, involvement of the government in the insolvency proceedings can exist in various forms. The most evident one is the liquidating committee. Under the current EBL, in addition to law firms, certified public accountant firms, bankruptcy liquidation firms or any other social intermediary agencies, the administrator can also be a liquidating committee,⁴⁹ which is an inheritance from the 1986 EBL.⁵⁰ In accordance with the judicial interpretation, the members of a liquidating committee can be appointed from the relevant government departments, from the social intermediary agencies included in the roster of administrators, from financial asset management companies as well as from the people’s bank and the financial regulatory institution under relevant laws and administrative regulations.⁵¹ In the Tianyi (San-an) case, it was a listed company, 45.43% of whose equity structure is state-owned shares⁵² and was ordered to reorganization.⁵³ The liquidating committee was appointed, which was composed of the local State Assets Supervision and Administration Committee (SASAC), the local Labor and Social Security Bureau, the local central branch of the People’s Bank of China, the local branch of China Banking Supervision and Administration Committee (CBSAC), in addition to an accounting firm and a law firm.⁵⁴ The same happened to the Huayuan case, which was a listed company directly subordinated

⁴⁷ Jackson, Thomas H., *The Logic and Limits of Bankruptcy*, Washington D.C.: Beard Books, 2001, p.8

⁴⁸ Bartell, Laura B., *Visualizing Bankruptcy, U.S.:* Lexis Nexis, 2011, Chapter 1 [1/2]

⁴⁹ The EBL, article 24

⁵⁰ 1986 EBL, article 24

⁵¹ Provisions of the Supreme People’s Court on Designating the Administrator during the Trial of Enterprise Bankruptcy Cases, article 19

⁵² Draft Report on Connected Transaction Concerning Tianyi’s Acquisition of Assets through Issuing Stocks, 2008, available at: <http://business.sohu.com/20080119/n254757501.shtml>

⁵³ [2007] Hubei Jinzhou Intermediate People’s Court Civil Bankruptcy No.14-5

⁵⁴ Li Shuguang & Wang Zuofa, *Review of the P.R.C. Bankruptcy Law in 2009*, INSOL International Technical Series Issue No.11, March 2010, p.5.

to State-owned Assets Supervision and Administration Commission of the State Council (SASAC),⁵⁵ the court designated a liquidating committee that was mainly composed of CBSAC Shanghai Bureau, China Securities Supervision and Administration Committee Shanghai Bureau, Shanghai Financial Office, SASAC Shanghai Branch.⁵⁶ The judges, who participated in the Huayuan case, briefly explained the reason of that assignment. Reorganization of the listed company involved a series complicated problems and had to coordinate with different government departments. For example, considering the state-owned shares in the debtor's capital structure, the reorganization should be subject to supervision of State Assets Supervision and Administration Committee. Meanwhile, the debtor was also a listed company, which should be regulated by China Securities Regulating Commission. The main creditors of the debtor were banks and thus needed the assistance from the People's Bank of China and China Banking Supervision and Administration Committee. However, the coordinating ability of the social intermediary agencies is relatively weak at this moment. That's why the judges understood that the appointment of the liquidating committee might cause controversy but still found it necessary to include the relevant government departments into the liquidating committee in order to facilitate the reorganization proceedings, which was "in line with China's current national conditions".⁵⁷

The government may also be requested to participate in the insolvency proceedings, which mostly relates to policy issues. Based on the case law, in particular, in the reorganization cases, the courts sought assistance from the government in matters of tax as well as all kinds of administrative approvals, such as concerning real estate, foreign merger and acquisition as well as employee replacement. Under the current EBL, tax is the second on the rank of the order of paying off debts in the liquidation proceedings.⁵⁸ With respect to how to tackle tax issues in the course of reorganization, the current EBL does not provide specific rules but the tax authorities issued the Measures for the Enterprise Income Tax of Enterprise Reorganizations.⁵⁹ In the case of Jiande Xuehong Home Textiles Co., Ltd., the debtor was reorganized by introducing an external investor. If the debtor was charged tax according to Measures for the Enterprise Income Tax of Enterprise Reorganizations, it would put more financial burdens upon the debtor's shoulder. In that case, the problem can be solved if the reorganization with the help of an external investor can be shifted into the category of investment promotion and capital attraction, which should be subject to preferential tax policy and consequently lowered the costs. The court negotiated with the government for several times and finally persuaded the government to accept the

⁵⁵ Gao Changjiu, Tang Zhengyu, Fu Wang, Legal Dilemmas Encountered in the Course of Listed Corporation Reorganization: Taking ST Huayuan as Example (in Chinese), Nomocracy Forum, 2010, p.45. Please note the authors are judges who participated in the reorganization proceedings of the Huayuan case.

⁵⁶ Zhang Haizheng, Kuang Jingting, Corporate Reorganization Case Analysis under China's New Bankruptcy Law, in: International Corporate Rescue, Vol.11, issue3, 2014, p.177

⁵⁷ Gao Changjiu, Tang Zhengyu, Fu Wang, Legal Dilemmas Encountered in the Course of Listed Corporation Reorganization: Taking ST Huayuan as Example (in Chinese), Nomocracy Forum, 2010, p.46

⁵⁸ The EBL, Article 113

⁵⁹ [2010] Announcement of the State Administration of Taxation No. 4

arrangement.⁶⁰ In the reorganization case of Zhoushan Huatai Petrol Company, a Hong Kong company was accepted as one of the strategic investor, who agreed to purchase the shares of the debtor. However, investment from Hong Kong was regarded as foreign investment, which should go through time-consuming administrative procedures for approval. For the purpose of promoting the efficiency of reorganization, the court coordinated with the government to complete the administrative procedure as soon as possible.⁶¹ In the case of Tang Ying Garment Co. Ltd., the government made an undertaking upon the request of the court, which was incorporated into the reorganization plan. The main capital of the debtor was its real estates, including the land and buildings. However, the government did not issue related ownership certificates to those real estates, which entailed the ownership of the debtor of those real estate was in question and the interests of the creditor may be affected. The court held discussion with the government for several times and the government finally agreed to issue related certificates as soon as possible and change the land status used for commercial purpose so as to raise the value of the land. Further, the government made written promise in the reorganization plan that the government would purchase the real estates if it failed to issue related certificates within two years, which enabled the reorganization plan to be passed at a high rate.⁶² On 26 June 2014, Shanghai No.1 Intermediate People's Court accepted the petition for reorganization concerning Shanghai Chaori Solar Energy Science & Technology Co. Ltd. (Chaori),⁶³ which was a private photovoltaic company under financial distress based in Shanghai. Although Chaori was also restructured in the way of acquisition of debtor's equity by outside investors, it is stated in the Chaori's draft reorganization plan that the government participated in the proceedings in order to cooperate with the court in matters of employee replacement, the court designated a law firm and an accounting firm as the administrators.⁶⁴

Sometimes the involvement of the government in the insolvency proceedings directly links to financial support. As aforementioned, owing to the widespread crisis of the China's photovoltaic industry, a series of photovoltaic enterprises went insolvent in China. LDK, registered in Jiangxi Province, was a private company that manufactured photovoltaic (PV) products. According to the information published on the company's website, it was the first company of that province in China listed on the New York Stock Exchange and used to be a significant revenue contributor to that province.⁶⁵ The business of LDK also deteriorated in 2011. The salary of the employees had to temporarily be paid by the local government.⁶⁶ In 2012, a budget bill was passed, which allowed the local government to pay for part of the debts of the private company with fiscal funds. To ease the media uproar incurred, the government had to delete the content of

⁶⁰ 2013 Top Ten Typical Enterprise-related Cases in Zhejiang Province, 13 January, 2014, available at: <http://www.zjcourt.cn/content/20140113000001/20140113000008.html>

⁶¹ (2010) Zhoushan People's Court Ordinary Commercial Bankruptcy No.1

⁶² (2011) Ningbo Fenghua People's Court Commercial Bankruptcy No.1

⁶³ (2014) Shanghai No.1 Intermediate People's Court Civil IV (Commercial) Bankruptcy No.1-1

⁶⁴ (2014) Shanghai No.1 Intermediate People's Court Civil IV (Commercial) Bankruptcy No.1-4

⁶⁵ The English website of Saiwei: http://www.ldksolar.com/com_about.php

⁶⁶ Guo Fang, Jian Wenchao, Saiwei and the "Kidnapped" Government (in Chinese), in: China Economic Weekly, Issue 30, 2012, p.25

the bill from its official website.⁶⁷ By the end of 2014, LDK has not filed the petition for bankruptcy in the Mainland China, whereas its holding company applied for winding up in Cayman Islands in February 2014.⁶⁸ LDK is an extreme case. In 2013, a company in Zhejiang Province, which produces solar glass, was petitioned for reorganization. Considering the practical necessity arising from the reorganization case, the court sent a letter of request to the local government in order to discuss about employee replacement and the replacement fees prepaid by the government, in which it also suggested that the local government participate in the liquidating committee. The local government, however, refused to take the responsibility of prepaying the replacement fees and considered that it was more appropriate for qualified insolvency practitioners to be appointed as administrator. As result, the court dismissed the application for reorganization because the court considered that the feasibility of reorganization was not very high.⁶⁹

China's insolvency proceedings involve frequent interplay between the courts and the governments. Compared to the judiciary, the government has been given very extensive powers in administering affairs. Against that background, judicial independence alone is not sufficient to safeguard the sound and efficient operation of the insolvency proceedings (for instance, problems like taxes, employee resettlement, policy-based loans cannot be settled without the proper support of the governments⁷⁰) and the courts have to seek cooperation from the government. According to Peerenboom, there is no standard model for judicial independence.⁷¹ Accordingly, an individual country should not be condemned to choose different paths to establishment of rule of law because it is a long-term domestic process involving different balance of struggle among competing interest groups.⁷² In addition, in the course of cooperation, both the courts and the governments in China have the same objective. As pointed by Zhou Xiaochuan, Governor of People's Bank of China, "in the process of reform, China attaches special importance to social stability".⁷³ For example, maintaining social stability is a principle that is incorporated into the notice concerning instructions on bankruptcy reorganization of listed companies, which was issued by the Supreme

⁶⁷ Guo Ruyi, Xinyu Government Deleted from Its Website the Bill to Pay Saiwei's Debt with Fiscal Funds (in Chinese), 19 July, 2012, available at:

<http://business.sohu.com/20120719/n348571532.shtml>

⁶⁸ LDK Investor Press Releases, LDK Solar Welcomes Appointment of Joint Provisional Liquidators in Cayman Islands, <http://investor.ldksolar.com/phoenix.zhtml?c=196973&p=irol-newsArticle&ID=1905143>

⁶⁹ (2013) Zhejiang Huzhou Intermediate People's Court Bankruptcy Preliminary No.1

⁷⁰ Pan Junfeng, Study of Judicial Reorganization Practice: from the perspective of reorganization cases handled by the courts in Jiangsu Province (in Chinese), in: Wang Baoshu (ed.), Chinese Yearbook of Commercial Law, Law Press, 2011, p.209

⁷¹ Peerenboom, Randall, Judicial Independence in China: Common Myths and Unfounded Assumptions, in: Randall Peerenboom (ed.), Judicial Independence in China: Lessons for Global Rule of Law Promotion, New York: Cambridge University Press, 2010, p.71-72

⁷² Peerenboom, Randall, Judicial Independence in China: Common Myths and Unfounded Assumptions, in: Randall Peerenboom (ed.), Judicial Independence in China: Lessons for Global Rule of Law Promotion, New York: Cambridge University Press, 2010, p.88

⁷³ Zhou Xiaochuan, Debate on Rescue in the Midst of Financial Crisis (in Chinese), in: Journal of Financial Research, no.9, 2012, p.5

Court.⁷⁴ In the case of Wuxi Mingte Chemical Fiber Co., Ltd., which involved reorganization concerning a non-public company, the judge held the similar opinion as the judge in the Huayuan case, considering that involvement of government by participating in the liquidating committee has played an irreplaceable role in the reorganization case because the government can cooperate with the court in resolving the social conflicts and ensuring social stability.⁷⁵ Further, there are economic incentives for the governments to get involved in the insolvency proceedings. As pointed out by Zhou, the criteria of promotion of local officials have shifted from political achievements to economic contributions since 1980s.⁷⁶ Hence, the local government is highly motivated to boost growth of local economy. In 1962, an economist, Arthur Melvin Okun, published his paper based on empirical observation, in which it states that for every 1% increase in unemployment, a country's gross domestic product (GDP) will decrease by 2% to 4% from its potential.⁷⁷ His theory was later referred to as Okun's law. As pointed out by Knotek, Okun's law can be affected by a number of factors and consequently it might not be very precise but more useful as a forecasting tool to show the tendency.⁷⁸ In 2014, IMF conducted empirical research based on the data of a group of advanced economies—the G7 economies plus Australia and New Zealand from 1989 to 2012 and confirmed that consistent with Okun's Law, forecasts of real GDP growth and the change in unemployment are negatively correlated.⁷⁹ Bankruptcy and unemployment are directly connected, which thus may have direct influence on the political promotion of local officials. However, the fact that insolvency system only reminds the local governments of unemployment or bad performance on developing local economy is according to Wang and Xu, nothing but misunderstanding of the function of insolvency system,⁸⁰ which to allow hopeless enterprise to exit the market in a prompt and efficient way and to help to facilitate rescue economically viable but distressed businesses. It must be acknowledged that currently in the Mainland the advantages of the governments in facilitating the insolvency proceedings are quite evident. Nevertheless, in the context of market-oriented economy, interference of the government courts in dealing with insolvency cases should be proportionate.

V. Cautious Attitudes of the Courts towards Insolvency Cases

⁷⁴ Notice of the Supreme People's Court on the Summary of Minutes of the Symposium on the Trial of Cases concerning Bankruptcy Reorganization of Listed Companies, No. 261 [2012] of the Supreme People's Court, art.1(3)

⁷⁵ [2010] Jiangsu Wuxi Intermediate People's Court Bankruptcy No.6

⁷⁶ Zhou Lian, The Incentive and Cooperation of Government Officials in the Political Tournaments: An Interpretation of the Prolonged Local Protectionism and Duplicative Investments in China (in Chinese), in: Economic Research Journal, 2004(06), p.34

⁷⁷ Okun, Arthur M. 1962. Potential GNP: Its Measurement and Significance, in: American Statistical Association, Proceedings of the Business and Economics Statistics Section, p. 98–104.

⁷⁸ Knotek, Edward S., II, How Useful is Okun's Law?, 2007, p.73-103, available at:

<http://www.kc.frb.org/publicat/econrev/pdf/4q07knotek.pdf>

⁷⁹ Ball, Laurence, Jalles, João Tovar and Loungani, Prakash, Do Forecasters Believe in Okun's Law? An Assessment of Unemployment and Output Forecasts (IMF Working Paper), February 2014, available at: <https://www.imf.org/external/pubs/ft/wp/2014/wp1424.pdf>

⁸⁰ Wang Xinxin, Xu Yangguang, Dilemmas and Solutions to China's Bankruptcy Law: Reasons of Decrease on the Numbers of Acceptance of Bankruptcy Cases and the Relevant Treatment (in Chinese), 19 Nov. 2014, available at <http://www.chinaqingsuan.com/news/detail/7702/page/2>

The cautious attitudes of the courts towards insolvency cases are mainly concerned with reluctance to acceptance of application for insolvency proceedings. For example, on 12 June 2009, the Supreme People's Court issued the Opinions of the Supreme People's Court on Several Issues Concerning Correctly Trying Enterprise Bankruptcy Cases to Provide Judicial Protection for Maintaining the Order of Market Economy (the Opinions). The Opinions reaffirm the important function of the reorganization, which states that the people's courts shall make full use of the reorganization procedure to rescue the enterprises with financial difficulty, promote the sustained business operation and guarantee the effective use of the social resources.⁸¹ Nevertheless, despite the statutory threshold of rescue stipulated under the EBL,⁸² in practice, the courts are very cautious to grant such permissions. For example, in the Zhejiang Hai Na reorganization case,⁸³ the first reorganization case of listed company after the current EBL came into effect, the High Court of Zhejiang Province sent a notice to the lower court, i.e. the Intermediate Court of Hangzhou, to which the reorganization petition was filed, to conduct an evaluation prior to acceptance. After review, including the general situations of the debtor, the feasibility of the draft reorganization plan, the employee arrangement as well as the government opinions etc.,⁸⁴ the court decided to accept the reorganization application. In the case of Yiyang Tianye Real Estate Development Company (hereinafter the Tianye company), the shareholders of the Tianye company applied for reorganization but was dismissed by the court of the first instance.⁸⁵ The shareholders then appealed to the intermediate court. The intermediate court held a hearing and invited the members of the creditor committee, the representative of the creditors, the administrator and the government authorities in charge of real estate management to give their opinions on the reorganization application. The applicants contended that the court should only conduct formal review instead of substantial review on the reorganization application. The intermediate court held that examination on the reorganization application should include both formal review and substantial review. The substantial review mainly checked with the possibility whether or not the debtor could still be rescued, including the feasibility of the reorganization plan and the capability of the participants to realize the reorganization plan etc.⁸⁶

Application for reorganization of listed companies is subject to more restrictions. In 2012, the Supreme People's Court issued a notice concerning instructions on reorganization of listed companies.⁸⁷ Where an applicant file a petition for

⁸¹ Part II of the Opinions.

⁸² The EBL, art.70, 95

The EBL, art.96: where upon examination, the people's court deems that the application for compromise conforms to the provisions of this Law, it shall rule on a compromise, announce it and hold a creditors' meeting at which to discuss the draft of a compromise agreement.

⁸³ [2007] Hangzhou Civil II First Instance No. 184 (in Chinese)

⁸⁴ Yang Zhengyu, Application of Reorganization to the Listed Companies (in Chinese), in: Guide on Civil and Commercial Trial, People's Court Press, 2008, p.209

⁸⁵ [2012] Yiyang Heshan Civil Bankruptcy Civil Verdict No.3-2 (in Chinese)

⁸⁶ [2013] Yiyang Civil II Final No.168 (in Chinese)

⁸⁷ Notice of the Supreme People's Court on the Summary of Minutes of the Symposium on the Trial of Cases concerning Bankruptcy Reorganization of Listed Companies, No. 261 [2012] of the Supreme People's Court

reorganization of a listed company, in addition to the required documents set forth in Article 8 of the EBL, the applicant shall submit the report concerning the reorganization feasibility of the listed company, the briefing materials sent by the provincial people's government at the place of the listed company's domicile to the securities regulatory authority, the opinions of the securities regulatory authority, the stability maintenance plans issued by the people's government at the place of the listed company's domicile. Where a listed company applies for reorganization on its own, it also shall submit a feasible employee resettlement plan.⁸⁸ The courts should hold a hearing before the courts decide to accept the application if the listed companies raise objections against the creditors' application or any creditor, the listed company and any contributor respectively present a liquidation petition and a reorganization petition. Considering the possible influence on social stability, the people's courts shall submit relevant materials level by level to the Supreme People's Court for examination before ruling to accept the organization applications of listed companies.⁸⁹

The Supreme People's Court has taken measures and tried to resolve this problem. In 2011, a judicial interpretation has been issued,⁹⁰ which focuses on specifying the conditions of the courts to accept the application of insolvency cases in order to facilitate the courts to accept the insolvency petitions in a timely manner. It stipulated supervision of the higher courts on the courts at the lower level.⁹¹ Suppose that a lower court did not even respond to the bankruptcy petition, it is stipulated that the applicant can present the petition to a higher court and the higher court shall order the court at the lower level to examine the application according to law and timely render a ruling on whether to accept the application. If the court at the lower level still does not render the ruling on whether to accept the application, the higher court may directly render a ruling to accept it and at the same time designates the court at the lower level to adjudicate this case.⁹² In addition, the courts' reluctance to accept the bankruptcy application may also be attributed to the evaluation system of judges, which is quantity-based and dependent on how many cases the judges deal with. Due to its complexity, insolvency cases are usually very time-consuming. Hence, it is understandable that judges usually try to evade them and can spend more time in handling more

⁸⁸ Notice of the Supreme People's Court on the Summary of Minutes of the Symposium on the Trial of Cases concerning Bankruptcy Reorganization of Listed Companies, No. 261 [2012] of the Supreme People's Court, article 3

⁸⁹ Notice of the Supreme People's Court on the Summary of Minutes of the Symposium on the Trial of Cases concerning Bankruptcy Reorganization of Listed Companies, No. 261 [2012] of the Supreme People's Court, article 4.

⁹⁰ Provisions (I) of the Supreme People's Court on Several Issues concerning the Application of the Enterprise Bankruptcy Law of the People's Republic of China, Interpretation No. 22 [2011] of the Supreme People's Court

⁹¹ Song Xiaoming, Zhang Yongjian, Liu Ming (All of the authors are judges of the Supreme People's Court), Understanding and Application of Several Issues concerning the Application of the Enterprise Bankruptcy Law of the People's Republic of China (in Chinese), in: People's Judicature, 2011(21), p.028; See also Wang Xinxin, Transforming Ideas and Improving Legislation, Accepting the Bankruptcy Cases According to Law II: to understand the judicial interpretation of the EBL in depth (in Chinese), in: People's Court Daily, 15 February, 2012, p.07

⁹² Provisions (I) of the Supreme People's Court on Several Issues concerning the Application of the Enterprise Bankruptcy Law of the People's Republic of China, Interpretation No. 22 [2011] of the Supreme People's Court, article 9

ordinary civil and commercial cases, which can contribute to better evaluation results.⁹³ The further consequence is that China is lack of professional judges in adjudicating insolvency cases. Fully aware of the problem, it has been advocated by the Supreme People's Court to promote professionalism of judges, who are to be trained with relevant professional knowledge and specialized at handling bankruptcy cases.⁹⁴

VI. Conclusion

A few problems concerning China's current insolvency system have been briefly discussed in this article. Despite of more specific and systematic arrangements under the current insolvency system, the caseload of insolvency proceedings continues to decline on an annual basis in China. The participation in distribution system, which used to be complementary, is now a competing system against the insolvency system. It is a system that is contradictory to the principle of collectivity and detrimental to business rescue because the underlying rule is to encourage individual creditors to grab assets as much as possible. Considering China's current power division, involvement of government in insolvency proceedings cannot be described as good or bad but necessary. For the common purpose, the courts and the governments cooperate with each other in minimizing the social conflicts and ensuring social stability. The government is also motivated to interfere with insolvency proceedings because bankruptcy and unemployment are directly connected, which may result in bad performance on developing local economy and accordingly hinders the political promotion of officials. Nevertheless, the function of insolvency system cannot be underestimated, which to allow hopeless enterprise to exit the market in a prompt and efficient way and to help to facilitate rescue economically viable but distressed businesses. Therefore, it is expected that involvement of the government in insolvency proceedings can be maintained in a proportionate manner. The courts are reluctant to accept of application for insolvency proceedings, which is facilitated by restrictive rules for accepting cases. Although there are some supervisory rules, the quantity-based evaluation system discourages the judges from adjudicating insolvency cases.

As summarized by Bell, forum shopping is possible because first, there are potential parallel forums that are available to be selected;⁹⁵ second, the legal systems in those potentially available forums must be heterogeneous.⁹⁶ In accordance with the Black's Law Dictionary,

⁹³ Li Shuguang, Wang Zuofa, The Function of China's Court in Enterprise Bankruptcy and the Future Trend – Observations from the Background of the Four Year Implementation of China's Existing Bankruptcy Law, in: *INSOL World*, the Quarterly Journal of *INSOL International*, Fourth Quarter, 2012, p.13

⁹⁴ Notice of the Supreme People's Court on Correctly Applying the Provisions (I) on Several Issues concerning the Application of the Enterprise Bankruptcy Law of the People's Republic of China and Bringing into Full Play the Judicial Functions of People's Courts in the Trial of Enterprise Bankruptcy Cases, No. 281 [2011] of the Supreme People's Court, article 2

⁹⁵ Bell, Andrew, *Forum Shopping and Venue in Transnational Litigation*, Oxford, 2003, p.5

⁹⁶ Bell, Andrew, *Forum Shopping and Venue in Transnational Litigation*, Oxford, 2003, p.25

"Forum Shopping. Such occurs when a party attempts to have his action tried in a particular court or jurisdiction where he feels he will receive the most favorable judgment or verdict."⁹⁷

Different insolvency systems are different options. The underlying consideration is that the parties concerned can choose a favorable forum to his or her benefit, if the problems in one jurisdiction are not solved or considered unacceptable. That's why I to some extent understand the concern of the attorney in the Suntech Power case. Nevertheless, considering the problems China's insolvency system have encountered, the reforms might require more than mere revision of relevant legislations. Institutional arrangements are needed to further ensure the degree of separation between law and politics. In addition, specialized knowledge in insolvency law is desired. Currently, the tentative solutions that have been suggested by the Supreme People's Court include establishment of special tribunals for bankruptcy cases and appointment of special collegial panels to adjudicate bankruptcy cases and the judges, who are in charge of bankruptcy cases, shall be evaluated based on different criteria.⁹⁸ A few special bankruptcy tribunals have been established in certain provinces, for instance in Shenzhen and Yixing, Jiangsu Province, which have contributed to the growth of acceptance of bankruptcy cases.⁹⁹ In fact, establishment of specialized courts in adjudicating certain types of disputes is part of the reforms on judicial institutions, which have been carried out. In November and December 2014, three intellectual property courts have been set up in Beijing, Guangzhou and Shanghai respectively,¹⁰⁰ which are authorized to exclusively exercise jurisdiction over intellectual property related cases on a trans-administrative regional basis within their own municipalities or province.¹⁰¹ It can be deemed as important references for establishment of bankruptcy tribunals or courts in the future. Nevertheless, it will also be a long-term process involving considerable political struggle. May the day understand the night.

⁹⁷ Black's Law Dictionary (5th ed. 1979), at 590. The term was first used in a judicial opinion in 1951. See *Covey Gas & Oil Co. v. Checketts*, 187 F.2d 561, 563 (9th Cir. 1951).

⁹⁸ Notice of the Supreme People's Court on Correctly Applying the Provisions (I) on Several Issues concerning the Application of the Enterprise Bankruptcy Law of the People's Republic of China and Bringing into Full Play the Judicial Functions of People's Courts in the Trial of Enterprise Bankruptcy Cases, No. 281 [2011] of the Supreme People's Court, article 2, 3

⁹⁹ Wang Xinxin, Xu Yangguang, Dilemmas and Solutions to China's Bankruptcy Law: Reasons of Decrease on the Numbers of Acceptance of Bankruptcy Cases and the Relevant Treatment (in Chinese), 19 Nov. 2014, available at <http://www.chinaqingsuan.com/news/detail/7702>

¹⁰⁰ Beijing Intellectual Property Court (on November 16, 2014), see <http://bjgy.chinacourt.org/article/detail/2014/11/id/1479010.shtml>;

Guangzhou Intellectual Property Court (on December 16, 2014), see <http://www.gdcourts.gov.cn/ecdomain/framework/gdcourt/ajhfikbhgocjbboelfgjckmmdkkgkac.jsp>

Shanghai Intellectual Property Court (on December 28, 2014), see <http://www.hshfy.sh.cn/shfy/gweb/xxnr.jsp?pa=aaWQ9MzUzODE0Jnh0PTEmbG1kbT1sbTE3MQPdcssPdcssz&zd=xwzx>

¹⁰¹ Supreme People's Court Rules on Jurisdiction of Intellectual Property Courts in Beijing, Shanghai, Guangzhou, [2014] Judicial Interpretation No.12

EIR	EIR (recast)	Model Law
Main References:		

Regulation on insolvency proceedings [Council Regulation (EC) 1346/2000, hereinafter EC Regulation	Position of the Council at first reading with a view to the adoption of a Regulation of the European Parliament and of the Council on insolvency proceedings (recast) 2012/0360 (COD), 16636/14, Brussels, 26 February 2015 (OR. en), hereinafter the EU Regulation (recast)	UNCITRAL Model Law on Cross-border Insolvency (1997) with Guide to Enactment and Interpretation (2013) (hereinafter the Model Law and the Guide and Interpretation)
Overriding Principles:		
Coordinated universality (Liquidator-centered)	Enhanced coordinated universality	Coordinated universality (Court-centered)
Forms:		
Regulation: Community legal instrument [ex Article 65 TEC, Recital (2)]	Regulation: Union legal instrument [Article 81 TFEU, Recital (3)]	Model Law (soft law): legislative recommendation for States to incorporate into their own national law [Guide and Interpretation, para.19]
general application [ex Article 249 TEC]	general application [Article 288 TFEU]	an open tool to all states [Guide and Interpretation, paras. 21&22]
binding in their entirety; directly applicable in all MSs within EU, except Denmark [Recital (8) &(33)]	binding in their entirety; directly applicable in all MSs within EU, except Denmark [Recital (8)&(88) & Article 92 (3)]	voluntary & flexible: modification to the uniform text is allowed (but intended to limit deviations from the uniform text to a minimum) [Guide and Interpretation, para.20-22]
Objectives:		
Main References:		
33 Recitals and Virgós/Schmit Report 1996	Recitals	Preamble, Guide and Interpretation, para.1
	(1)proper and close cooperation between the various insolvency practitioners and the courts in all the concurrent proceedings, in particular by exchanging a sufficient amount of information; [Recital (48), (52)]	(a) Cooperation between the courts and other competent authorities of State and foreign States involved in cases of cross-border insolvency;
(1)to provide for legal certainty in cross-border insolvency;	(2)protection of legitimate expectations and the certainty of transactions in cross-border insolvency; [Recital (67)]	(b) Greater legal certainty for trade and investment;

<p>(2)to promote the efficiency of insolvency proceedings, by favoring those solutions which facilitate their administration and improve the <i>ex ante</i> planning of transactions;</p>	<p>(3)efficient administration of insolvency proceedings and effective realization of the total assets (a)a single debtor: the dominant role of the main proceedings shall be preserved in the way that insolvency practitioners in the main proceedings are granted with powers to intervene if the secondary proceedings are considered unsupportive for the efficient and effective realization of the total assets [Recital (41), (45)] (b)a group of companies: an integrated solution through the integrated group coordination proceedings on a voluntary basis, in addition to the combined efforts of all the actors involved in the multiple proceedings through compulsory cooperation and communication [Recital (51), (52), (56), (57)]</p>	<p>(c-1)fair and efficient administration of cross-border insolvencies that protects all the interested persons, including the debtor (d) Protection and maximization of the value of the debtor’s assets; and</p>
<p>(3)to remove inequalities among Community-based creditors with regard to access and participation in such proceedings</p>	<p>(4)equal treatment of creditors on a coordinated basis with a swift transmission of information [Recital (67), (68)]</p>	<p>(c-2) protection of the interests of all creditors</p>
	<p>(5)promoting the rescue of economically viable but distressed businesses and giving a second chance to entrepreneurs; [Recital (10)]</p>	<p>(e) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment</p>
<p>(4)prevention of forum shopping Recital (4)</p>	<p>(6)prevention of fraudulent or abusive forum shopping [Recital (5)&(30)&(32)]</p>	
<p>Scopes:</p>		
<p>General Scopes of Application:</p>		
<p>a debtor, including a natural person or a legal person, a trader or an individual, [Recital (9)]</p>	<p>irrespective of whether the debtor is a natural person or a legal person, a trader or an individual [Recital (9)]</p>	<p>regardless of whether they involve a natural or a legal person as the debtor [Guide and Interpretation, para.50]</p>
<p>Definitions:</p>		

<p>(1) collective proceedings [Recital (10), Article 1(1)] Annex A [Article 2(a)]</p>	<p>(1) collective proceedings [Recital (14), Article 2(1)] exhaustively listed in Annex A [Recital (9), Article 2(4)]</p>	<p>(1) collective proceedings [Article 2(a), Guide and Interpretation, paras.69-71]</p>
<p>(2)based on the debtor's insolvency and not on any other grounds [Virgós/Schmit Report, para. 49(b), Article 1(1)]</p>	<p>(2) for the purpose of rescue, adjustment of debt, reorganization or liquidation, including interim proceedings [Recital (10), (15), (17), Article 1(1)]</p>	<p>(2)for the purpose of reorganization or liquidation, including an interim proceeding [Article 2(a), Guide and Interpretation, paras.77-80]</p> <p>presumption of insolvency in case that the insolvency proceeding is initiated but the debtor is not in fact insolvent [Article 31, Guide and Interpretation paras.72, 235-236]</p>
<p>(3) entailing the partial or total divestment of a debtor, relating to the winding-up of insolvent companies or other legal persons, and the appointment of a liquidator [Virgós/Schmit Report, para. 49(c),(d); Recital (7), (10), Article 1(1), 2(b), Annex C]</p>	<p>(3) control or supervision by a court, including intervention by the court on appeal by a creditor or other interested parties. [Recital (10), Article 1(1)]</p>	<p>(3) control or supervision by a foreign court [Article 2(a)] (a) the level of control or supervision, including: a proceeding in which the debtor retains some measure of control over its assets, albeit under court supervision e.g. debtor in possession indirect control or supervision exercised by an actor, such as an insolvency representative, who is subject to control or supervision by the court [Guide and Interpretation, paras.74] (b) time for control or supervision, including control or supervision by a court at a late stage of the insolvency process e.g. expedited reorganization proceedings [Guide and Interpretation, paras.75-76; See also Legislative Guide, Part two, Ch. IV, paras. 76-94 and Recommendations 160-168]</p>
	<p>(4) based on a law relating to insolvency [Recital (17), Article 1(1)]</p>	<p>(4) pursuant to a law relating to insolvency [Article 2(a), Guide and Interpretation, para.73]</p>
	<p>(5) public collective proceedings [Recital (12), Article 1(1)]</p>	

Exclusion :		
<p>the principle of mutual trust [Recital (22)] as a corollary the waiver by the Member States of the right to apply their internal rules on recognition and enforcement in favor of a simplified mechanism for the recognition and enforcement of judgments handed down in the context of insolvency proceedings [Case C-444/07 <i>MG Probud Gdynia sp. z o.o.</i>, ECR I-00417 (<i>MG Probud</i>), para.28]</p>	<p>the principle of mutual trust [Recital (69)]</p>	<p>(1) insolvencies related to natural persons if so required in accordance with the insolvency law of the enacting State [Guide and Interpretation, para.61]</p>
(1) insurance undertakings	(1) insurance undertakings	(2) any types of entities subject to a special insolvency regime (such as banks or insurance companies) [art.1 (2), Guide and Interpretation paras.55-57]
(2) credit institutions	(2) credit institutions	
(3) investment undertakings which provide services involving the holdings of funds or securities for third parties, collective investment undertakings [Recital (9), Article 1(2)]	(3) investment firms and other firms, institutions and undertakings to the extent these are covered by Directive 2001/24/EC as amended, and	
	(4) collective investment undertakings [Recital (18), Article 1(2), 2(2)]	
	(5) proceedings which are not based on a law relating to insolvency, including (a) proceedings that are based on general company law not designed exclusively for insolvency situations e.g. UK schemes of arrangement (based on the Companies Act 2006, s 885) (b) certain adjustment of debt proceedings in which debts of a natural person of very low income and very low asset value are written off, provided that this type of proceedings never makes provisions for payment to creditors e.g. UK Debt Relief Orders based on	

	Part 7A of the Insolvency Act 1986 (c. 45) [Recital (16)]	
	(6) no 'confidential' proceedings e.g. French <i>mandat ad hoc</i> and conciliation proceedings based on Article L611-13 and L611-4 Commercial Code [Recital (13)]	
Structure:		
33 Recitals; 47 Articles	89 Recitals; 92 Articles	5 Chapters, 32 Articles
3 Annexes Annex A: Insolvency proceedings referred to in Article 2(a) Annex B: Winding up proceedings referred to in Article 2(c) Annex C: Liquidators referred to in Article 2(b)	4 Annexes Annex A: Insolvency proceedings referred to in Article 2(4) Annex B: Insolvency practitioners referred to in Article 2(5) Annex C: Repealed Regulation with list of the successive amendments thereto Annex D: Correlation Table	Guide to Enactment and Interpretation (2013); Legislative Guide on Insolvency Law in 2004; Practice Guide on Cross-border Insolvency Cooperation in 2009; Part III to the Legislative Guide (treatment of enterprise groups) in 2010; Judicial Perspective in 2011; Part IV to the Legislative Guide (Directors' obligations in the period approaching insolvency) in 2013
Interpretation:		
purposive approach: recitals (assistance in interpretation)	purposive approach: recitals (assistance in interpretation)	purposive approach: preamble (assistance in interpretation)
harmonized interpretation by CJEU [ex Article 234 TEC]	harmonized interpretation by CJEU [Art. 267 TFEU, Recital (18) & (24)]	(1) subject to different national implementation and interpretation with taking into consideration its international origin and to the need to promote uniformity in its application and the observance of good faith [Article 8, Guide and Interpretation para.106] (2) harmonized interpretation facilitated by the Case Law on UNCITRAL Texts (CLOUT) information system [Guide and Interpretation para.107]
Explanatory report: Virgós/Schmit Report 1996 [Case C-341/04 <i>Eurofood IFSC Ltd</i> [2006] ECR I-03813 (<i>Eurofood</i>), Opinion of AG		Background and explanatory information: Guide and Interpretation

<p>Jacobs, at 2;Case C-396/09 <i>Interedil Srl (in liquidation) v Fallimento Interedil Srl, Intesa Gestione Crediti SpA</i> [2011] ECR I-09915 (<i>Interedil</i>), Opinion of AG Kokott, at 63]</p>		
<p>Jurisdiction:</p>		
<p>COMI:</p>		
<p>Not defined. The center of main interests should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties. [Recital (13)]</p>	<p>Introduction of formal clarification The center of main interests shall be the place where the debtor conducts the administration of his interests on a regular basis and which is ascertainable by third parties. [Article 3(1)]</p>	<p>Not defined. “Notwithstanding the different purpose of center of main interests under the two instruments, the jurisprudence with respect to interpretation of that concept in the EC Regulation may be relevant to its interpretation in the Model Law.” [Guide and Interpretation, para.141]</p>
<p>Presumption (a company or legal person):</p>		
<p>shall be presumed to be the place of the registered office in the absence of proof to the contrary [Article 3(1)]</p>	<p>shall be presumed to be the place of the registered office in the absence of proof to the contrary; shall only apply if the registered office has not been moved within a period of 3 months prior to the request for the opening of insolvency proceedings. [Article 3(1)] The presumption should be rebuttable [Recital (30)]</p>	<p>the debtor’s registered office [Article 16(3)] but serves different purposes [Guide and Interpretation, para.141]</p>
<p>Conditions to rebut the presumption:</p>		
	<p>By codifying the case law handed down by the CJEU (see Case C-396/09 <i>Interedil Srl (in liquidation) v Fallimento Interedil Srl, Intesa Gestione Crediti SpA</i> [2011] ECR I-09915 (<i>Interedil</i>), para. 53), the main conditions are: (1) central administration located in another Member State, and (2) a comprehensive assessment of all the relevant factors, and (3) in a manner that is ascertainable by third parties [Recital (30)]</p>	<p>Principal factors, considered as a whole: (a) where the central administration of the debtor takes place, and (b) which is readily ascertainable by creditors. In addition, a non-exhaustive list of relevant factors are provided [Guide and Interpretation, paras.145-147]</p>

	<p>(4)third parties: special consideration should be given to the creditors and their perception; ascertainable: this may require, in the event of a shift of center of main interest, informing creditors of the new location from which the debtor is carrying out his activities in due course, e.g. by drawing attention to the change of address in commercial correspondence, or making the new location public through other appropriate means. [Recital (28)]</p>	
<p>Time to Determine COMI:</p>		
<p>the time of application for opening insolvency proceedings [not defined but developed in accordance with the case law, see Case C-1/04, <i>Susanne Staubitz-Schreiber</i> [2006] ECR I-00701 (<i>Staubitz-Schreiber</i>), para.29; <i>Interdil</i>, para.55]</p>	<p>three months prior to the time of the request for the opening of insolvency proceedings in order to prevent fraudulent or abusive forum shopping [Recital (31), Article 3(1), para.2]</p>	<p>the date of commencement of the foreign proceeding [Guide and Interpretation, para.141, 149, 159] e.g. inter-circuit split in U.S.A. (1) the date of the filing of the Chapter 15 petition [<i>Re Kemsley</i>, 489 B.R. 346 (Bankr. S.D.N.Y. 2013); <i>Re Millennium Global Emerging Credit</i>, 458 B.R. 63 (Bankr. S.D.N.Y. 2011); <i>Re Gerova Fin. Grp., Ltd.</i>, 482 B.R. 86 (Bankr. S.D.N.Y.2012)] (2) the date of the opening of the foreign proceeding [<i>re Ran</i>, 607 F.3d 1017 (5th Cir. 2010); <i>Re British American Isle of Venice (BVI), Ltd.</i>, 441 B.R. 713 (Bankr. S. D. Fla. 2010); <i>Re Fairfield Sentry Ltd.</i>, 440 B.R. 60, 64 (Bankr. S.D. N.Y. 2010), <i>aff'd</i>, 714 F.3d 127(2d Cir. 2013)] (3) the coordinated approach: the court should take into consideration the period between the commencement of the foreign insolvency proceeding and the filing of the Chapter 15 petition to ensure that a debtor has not manipulated its COMI in bad faith [<i>Re Fairfield Sentry Ltd.</i>, 714 F.3d 127(2d Cir. 2013), at 138; see also</p>

		Adler, Louise De Carl, Managing the Chapter 15 Cross-Border Insolvency Case (A Pocket Guide for Judges), 2 nd ed., Federal Judicial Center, 2014, p.22-23]
Establishment:		
Definition:		
any place of operations where the debtor carries out a non-transitory economic activity with human means and goods [Article 2(h)]	any place of operations where the debtor carries out or has carried out in the three months prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets [Article 2(10)]	any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services [Article 2(f)]
The mere presence of assets of the debtor cannot serve as the basis of establishment. [Virgós/Schmit Report, para.70]	The definition of establishment requires the presence of a structure consisting of a minimum level of organization and a degree of stability necessary for the purpose of pursuing an economic activity. The presence alone of assets does not, in principle, meet that definition. [Interdil, para.64]	The presence of assets is not qualified as establishment. [Guide and Interpretation, para.32]
Time to determine establishment:		
/	three months prior to the request to open main insolvency proceedings	the date of commencement of the non-main foreign proceedings [Guide and Interpretation, para.160]
Establishment-based Proceedings:		Concurrent Proceedings:
opened in the Member State where the debtor has an establishment [Recital (12)]	opened in the Member State where the debtor has an establishment [Recital (23)]	(1) opened on the basis of presence of assets of the debtor in the enacting State after recognition of a foreign main proceeding [Article 28]
the effects restricted to the assets of the debtor located in the Member State where his establishment is situated [Article 3(2)]	the effects restricted to the assets of the debtor located in the Member State where his establishment is situated [Article 3(2)]	(a) the effects restricted to the assets of the debtor that are located in the State, and [Article 28] (b) the possible extension of effects of a local proceeding to assets located abroad: (i) to the extent necessary to implement cooperation and

		<p>coordination to other assets of the debtor</p> <p>(ii) those foreign assets must be subject to administration in the enacting State under the law of the enacting State</p> <p>[Article 28, Guide and Interpretation, para.227]</p>
		<p>(2) a concurrent proceeding can also be opened in accordance with the law of the enacting State relating to insolvency and the court involved should seek cooperation and coordination pursuant to Chapter IV of the Model Law</p> <p>[Article 29]</p>
Territorial Proceedings:		
(1) prior to the opening of the main insolvency proceedings [Article 3(4)]	(1) prior to the opening of the main insolvency proceedings [Article 3(4)]	(a) prior to application for recognition of the foreign proceeding concerning the same debtor [Article 29(a)]
(2) the function of protection of local interests [Recital (17)]	(2) the function of protection of local interests [Recital (37)]	(i) any discretionary reliefs granted to the foreign proceedings should be in consistent with the concurrent proceeding in the enacting State Article 29(a)(i)
(3) shall be transferred into secondary proceedings as soon as the main insolvency proceedings are opened [Recital (17), Article 3(4)]	(3) shall be transferred into secondary proceedings as soon as the main insolvency proceedings are opened [Article 3(4)]	(ii) automatic recognition and reliefs granted to a foreign main proceeding based on Article 20 of the Model Law does not apply if the foreign proceeding is recognized as a foreign main proceeding in this enacting State where a concurrent proceeding has already been opened Article 29(a)(ii)
(4) can only be opened under limited circumstances: (a) where main proceedings cannot be opened under the law of the Member State where the debtor has the center of his main interest; [Article 3(4)(a)] (b) requested by certain specific applicants	(4) may be opened only under limited circumstances: (a) where main proceedings cannot be opened because of the conditions laid down by the law of the Member State within the territory of which the center of the debtor's main interests is situated; [Article 3(4)(a)] (b) requested by certain specific applicants	

<p>a creditor who has his domicile, habitual residence or registered office in the Member State within the territory of which the establishment is situated, or whose claim arises from the operation of that establishment [Article 3(4)(b)]</p>	<p>where the opening of territorial insolvency proceedings is requested by: (i) a creditor whose claim arises from or is in connection with the operation of an establishment situated within the territory of the Member State where the opening of territorial proceedings is requested; or [Article 3(4)(b)(i)] (ii) a public authority which, under the law of the Member State within the territory of which the establishment is situated, has the right to request the opening of insolvency proceedings. [Recital (37), Article 3(4)(b)(ii), see also Case C-112/10, <i>Zaza Retail</i> [2011] ECR I-11525(<i>Zaza Retail</i>), para.30]</p>	
<p>Secondary Proceedings:</p>		
<p>(1) following the opening of the main insolvency proceedings [Recital (18)]</p>	<p>(1) following the opening of the main insolvency proceedings [Recital (38)]</p>	<p>(b) after recognition or after the petition for recognition of the foreign proceeding [Article 29(b)]</p>
<p>(2) the function of protection of local interests and the auxiliary function [Recital (19)]</p>	<p>(2)the function of protection of local interests and the auxiliary function [Recital (40)]</p>	<p>(i) any discretionary reliefs should be reviewed by the court and should be modified or terminated if inconsistent with the concurrent proceeding in this enacting State [Article 29(b)(i)]</p>
<p>(3)requested by certain specific applicants: (a)the liquidator in the main proceedings; (b)any other person or authority empowered to request the opening of insolvency proceedings under the law of the Member State within the territory of which the opening of secondary proceedings is requested [Article 29]</p>	<p>(3)requested by certain specific applicants: (a) insolvency practitioner in the main proceedings (b) any other person or authority empowered under the national law of that Member State [Recital (38), Article 37(1)]</p>	<p>(ii) in case that the foreign proceeding is a foreign main proceeding, the stay and suspension in accordance with Article 20(1) should be modified or terminated pursuant to Article 20(2) if inconsistent with the proceeding in this enacting State [Article 29(b)(ii)]</p>
<p>(4)must be winding-up proceedings [Article 3(3)]</p>	<p>(4) secondary proceedings can be opened in the Member State of the registered office, provided that main proceedings concerning a legal person or company have been</p>	

	opened in a Member State other than that of its registered office [Recital (24), see also Case C-327/13 <i>Burgo Group SpA</i> , 4 September 2014 (<i>Burgo</i>), at 39]	
Intervention with the Secondary Insolvency Proceedings (auxiliary function):		Intervention with the local proceedings:
(1) stay of secondary proceedings: (a) at the request from the liquidator in the main proceedings, (b) suitable measure have been taken to guarantee the interests of the creditors in the secondary proceedings and of individual classes of creditors (c) up to three months and may be continued or renewed for similar periods (d) terminated by the court of its own motion or at the request of the liquidator in the main proceedings [Article 33]	(1) when a temporary stay of individual enforcement is granted in the main proceedings and for the purpose of preservation of the efficiency of such moratorium, the court can temporarily stay the opening of secondary proceedings (a) at the request of the insolvency practitioner or the debtor in possession (b) provided that suitable measures are in place to protect the interests of local creditors (c) for a period not longer than three months to allow negotiation on a rescue plan between the debtor and the creditors (d) revoked by the court of its own motion or at the request of any creditor [Recital (10), (45), Article 38(3)]	(1) no limitations on the jurisdiction of the courts in the enacting State to commence or continue local insolvency proceeding [Guide and Interpretation, para.224] (2) intervention by tailoring the relief to be granted to the foreign main proceeding and cooperating with the foreign court and foreign representative [Guide and Interpretation, para.226, 231] (3) no rigid hierarchy between the concurrent proceedings in order to facilitate cooperation of the court [Guide and Interpretation, para.231]
(2) closure of secondary proceedings: (a) by the liquidator in the main proceedings (b) through a rescue plan, a composition or a comparable measure proposed [Article 34]	(2) an undertaking in order to avoid secondary proceedings: (a) by the insolvency practitioner in main proceedings (b) distribution of the assets to local creditors as if secondary proceedings had been opened; [Recital (42), Article 36(1), Article 38(2)] (c) applicable law: the law of the Member State in which secondary proceedings could have been opened [Article 36(2)] (d) relevant time for determination: the moment when the undertaking is given [Article 36(2)] (e) in writing and in the official language or one of the official languages of the Member State	

	<p>where secondary proceedings could have been opened [Article 36(3),(4)] (f) approved by the known local creditors [Article 36(5)] (g) binding on the estate [Article 36(6)] See also <i>Re Collins & Aikman Corp Group</i>, [2006] B.C.C. 606</p>	
	<p>(3) opening a type of insolvency proceedings referred to in Annex A other than the one initially requested at the request of the insolvency practitioners in the main proceedings [Article 38(4)]</p>	
	<p>(4) The insolvency practitioner in the main proceedings may challenge the decision to open secondary proceedings before the courts of the Member State where secondary proceedings have been opened [Article 39] See also <i>Re Nortel Networks SA</i>, [2009] B.C.C. 343</p>	
<p>Recognition:</p>		
<p>Automatic recognition: recognized in all the other Member States from the time that it becomes effective in the State of the opening of proceedings [Article 16(1)]</p>	<p>Automatic recognition: recognized in all the other Member States from the time that it becomes effective in the State of the opening of proceedings [Article 19(1)]</p>	<p>Recognition upon request: A foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed. [Article 15(1)]</p>
<p>based on the principle of mutual trust: grounds for non-recognition should be reduced to the minimum necessary; the decision of the first court to open proceedings should be recognized in the other Member States without those Member States having the power to scrutinize the court's decision. [Recital (22)]</p>	<p>based on the principle of mutual trust: grounds for non-recognition should be reduced to the minimum necessary; the decision of the first court to open proceedings should be recognized in the other Member States without those Member States having the power to scrutinize the court's decision; this is also the basis on which any dispute should be resolved where</p>	<p>adaptive to different legal basis: comity v. reciprocity [Guide and Interpretation, para.214-215]</p>

	the courts of two Member States both claim competence to open the main insolvency proceedings. [Recital (65)]	
Effects:		Reliefs:
Main Proceedings:		Main Proceedings:
with no further formalities, produce the same effects in any other Member State as under this law of the State of the opening of proceedings [Article 17(1)]	with no further formalities, produce the same effects in any other Member State as under this law of the State of the opening of proceedings [Article 20(1)]	automatic reliefs granted (a) Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed; (b) Execution against the debtor's assets is stayed; and (c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended. [Article 20(1), Guide and Interpretation, para.176] as well as discretionary reliefs [Article 19, 21]
Secondary proceedings:		Non-main proceedings:
not be challenged in other Member States [Article 17(2)]	not be challenged in other Member States [Article 20(2)]	discretionary reliefs [Article 19, 21]
Public policy exception:		
manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual. [Article 26] Case C-341/04 <i>Eurofood IFSC Ltd</i> [2006] ECR I-03813 (<i>Eurofood</i>), para. 34	manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual. [Article 33]	manifestly contrary to the public policy of this State [Article 6] shall be understood in a more restrictively manner in matters of international cooperation [Guide an Interpretation, para.103]
Group of companies		Enterprise group [not stipulated in Model Law, but in Part III to the Legislative Guide (treatment of enterprise groups), (Legislative Guide Part III) to assist national countries]
/	Definitions of "group of companies" [Article 2(12)]	Definition of "Enterprise group" [Legislative Guide Part III, Glossary, para.4(a)]

Cooperation and Communication:	
proper cooperation between actors (including insolvency practitioners and courts) involved not incompatible with the rules applicable to them and does not entail any conflict of interests [Article 56(1), 57(1), 58 last paragraph]	proper cooperation between actors involved (including insolvency representatives and courts) not incompatible with the rules applicable to them and does not entail any conflict of interests [Legislative Guide Part III, Ch.3, para.7]
Contents of Cooperation and Communication:	
(1) timely communication of any relevant information concerning the group members subject to insolvency proceedings, provided appropriate arrangements are made to protect confidential information [EU Regulation (recast), Article 56(2)(a); Legislative Guide Part III, Recommendation 250(a)]	
(2) coordination of the administration and supervision of the affairs of the group members subject to insolvency proceedings [EU Regulation (recast), Article 56(2)(b); Legislative Guide Part III, Recommendation 250(d)]	
(3) coordination of the proposal and of reorganization plans [EU Regulation (recast), Article 56(2)(c); Legislative Guide Part III, Recommendation 250(e)]	
(4) allocation of powers or responsibilities between insolvency representatives [EU Regulation (recast), Article 56(2); Legislative Guide Part III, Recommendation 250(c)]	
(5) by means of agreements or protocols [EU Regulation (recast), Article 56(1); Legislative Guide Part III, Recommendation 250(b)]	
Coordination:	
group coordination proceedings [Recital (53), Ch.5 Section II]	appointment of a single or the same insolvency representative [Part III to the Legislative Guide (treatment of enterprise groups), III, para.43-47]
Rules of the proceedings:	
(1) at the request of an insolvency practitioner appointed in insolvency proceedings opened in relation to a member of the group, accompanied by required documents [Article 52]	

<p>(2) the competent court, which can assume its jurisdiction over group coordination proceedings: (a) decided by the insolvency practitioner, who filed for the opening of the proceedings, or [Article 61(1)] (b) chosen by two-thirds of all insolvency practitioners appointed in insolvency proceedings of the members of the group upon joint agreement [Article 66(1), (2)]</p>	
<p>(3) The court seized of the request will make its decision after considering appropriateness of the opening of such proceedings, no financial disadvantage on the creditor and eligibility of the proposed group coordinator [Article 63(1), 68(1)]</p>	
<p>Relationship between the participant and non-participants members:</p>	
<p>(1) Objections to the inclusion within group coordination proceedings: raised within 30 days of receipt of notice of the request for the opening of group coordination proceedings. [Article 64(1), (2)]</p>	
<p>(2) no effect on the member who raised objection [Article 64, 65]</p>	
<p>(3) subsequent opt-in [Article 69]</p>	
<p>Group Coordinator:</p>	
<p>(1) eligibility: in accordance with the law of a Member State, under which they can act as insolvency practitioners [Article 71(1)]</p>	
<p>(2) exclusion: (a) not be one of the insolvency practitioners appointed to act in respect of any of the group members; and</p>	

	<p>(b) shall have no conflict of interest in respect of the group members, their creditors and the insolvency practitioners appointed in respect of any of the group members. [Article 71(2)]</p>	
	<p>(3) rights and obligations of the coordinator [Article 69(2), 72]</p>	
	<p>Relationship between the Insolvency Practitioners and the Group Coordinator:</p>	
	<p>(1)they are required to cooperate with each other [Article 74(1)]</p>	
	<p>(2)the insolvency practitioners shall communicate any relevant information to the coordinator [Article 74(2)]</p>	
	<p>(3)an insolvency practitioner is not obliged to follow in whole or in part the coordinator's recommendations or the group coordination plan by reporting the reasons to coordinator and other persons or bodies concerned under his national law [Article 70]</p>	
	<p>(4)at the request of the insolvency practitioner, the court shall revoke the coordinator, who is considered to act to the detriment of the creditors of a participating group member or fail to comply with his obligations [Article 75]</p>	

Cooperation and Communication:		
Key References:		
European Communication and Cooperation Guidelines for Cross-Border Insolvency, prepared by INSOL Europe's Academic ("CoCo Guidelines") Wing (2007)	best practices for cooperation in cross-border insolvency cases shall be taken into consideration, (a) relevant guidelines prepared by UNCITRAL	not stipulated in Model Law, but in Practice Guide on Cross-Border Insolvency Cooperation (Practice Guide on Cooperation) to assist national countries

	<p>(b) Principles and guidelines on communication and cooperation adopted by European “CoCo Guidelines”: European Communication and Cooperation Guidelines for Cross-Border Insolvency, prepared by INSOL Europe’s Academic Wing (2007).</p> <p>(c) principles and guidelines on communication and cooperation adopted by international organizations active in the area of insolvency law ALI/III, Transnational insolvency: global principles for cooperation in international insolvency cases: report to the ALI, Philadelphia. PA : Executive Office, The American Law Institute, 2012</p> <p>(d) EU JudgeCo Principles and Guidelines, 2015 [Recital (48)]</p>	
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Actors Involved:

duty to cooperate and communicate between the liquidator in the main proceeding, and the liquidator in the secondary proceeding [Article 31]	(1) duty to cooperate and communicate between insolvency practitioners in the main proceedings and the insolvency practitioners or practitioners in secondary proceedings [Article 41]	(1) cooperation and direct communication between the [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State] and foreign courts or foreign representatives [Article 26]
	(2) cooperation and communication between courts in the main and territorial or secondary insolvency proceedings [Article 42]	
	(3) duty to cooperate and communicate between the courts and the insolvency practitioners in the main and territorial or secondary insolvency proceedings [Article 43]	(2) cooperation and direct communication between a court of this State and foreign courts or foreign representatives [Article 25]

Forms of Cooperation:

	(1) communication of information by any means considered appropriate by the court [EU Regulation (recast), Article 42(3)(b), the Model Law, Article 27(b)]
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	(2) coordination of the administration and supervision of the debtor's assets and affairs [EU Regulation (recast), Article 42(3)(c), the Model Law, Article 27(c)]	
	(3) appointment of a person or body to act at the direction of the court [EU Regulation (recast), Article 42(1), the Model Law, Article 27(a)]	
	(4) coordination in the approval of protocols, where necessary/ approval or implementation by courts of agreements concerning the coordination of proceedings [EU Regulation (recast), Article 42(3)(e), the Model Law, Article 27(d)]	
	(5) coordination of the conduct of hearings/ coordination of concurrent proceedings regarding the same debtor [EU Regulation (recast), Article 42(3)(d), the Model Law, Article 27(e)]	
	(6) appointment of a single insolvency practitioner for several insolvency proceedings concerning the same debtor [Recital (47); Article 42(3)(a)]	
	EU-wide interconnection of insolvency registers	
	a system in a decentralized way by interconnecting the individual insolvency registers on the basis of implementing act [Article 25(1)]	
	composed of central public electronic access point through the European e-Justice Portal [Article 25(1)]	
	information mandated to be disclosed [Article 24(2)]	