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'Cross-border Insolvency during Covid: Crisis and opportunity'

The Covid-19 epidemic and associated quarantine measures have caused unprecedented damage to the global economy and many industries have been forced to close. To mention just a few examples: On 2 March, Japan's Luminous Cruising Co. filed for bankruptcy. Whiting Petroleum followed suit on 1 April. On 11 April, Burger King New Zealand was placed in receivership. No exemptions were made to Virgin Australia, who declared that they are seeking bankruptcy protection on 21 April. Around the world, hotels, restaurants and the entire aviation industry have been crippled.

As a result of globalisation, cross-border insolvency cases during bankruptcies have become increasingly important. As China is the world's largest manufacturer and the second-largest economy, it is crucial that the country be able to play a good role in the field of cross-border insolvency. This participation will help determine China's future power and global position.

Cross-border Insolvency in the People's Republic of China

Currently, the legal source of generally accepted worldwide cross-border insolvency is the UNCITRAL Model Law on Cross-Border Insolvency (hereinafter, the Model Law). Its purpose is to help states align their insolvency laws with an international standard that can provide a fairer framework for cross-border in cross-border insolvency cases. As Jianli Song has argued in *The Supreme People's Court of China journal The People's Judicature*, this means seeking common ground while reserving differences. In addition to the Model Law, certain regions have reached agreements relating to cross-border insolvency. For example, the American Law Institute has published "ALI's Principle of Cooperation" to deal with cross-border insolvency cases within NAFTA (The US, Mexico and Canada). The EU, in turn, passed the "European Insolvency Regulation" in 2015 and established a data sharing mechanism. Globalisation has increased interaction between all types of economies making the development of cross-border insolvency a general trend. Yet, it is a tendency that can progress only through cooperation among all countries.

China is neither a member of the Model Law, nor a participant in any international multilateral treaties related to cross-border insolvency. However, Article 5 of the Enterprise Bankruptcy Law of the People's Republic of China (Enterprise Bankruptcy Law) provides corresponding regulations. The relevant paragraph reads:

"The procedures for bankruptcy which have been initiated according to the present Law shall have binding force over the assets of the relevant debtor beyond the territory of the People's Republic of China. Where any legally effective judgment or ruling made by a foreign court involves any debtor's assets within the territory of the People's Republic of China and if the debtor applies with or requests the people's court to confirm or enforce it, the people's court shall, according to the relevant international treaties that China has concluded or acceded to or according to the principles of reciprocity, conduct an examination thereon and, when believing that it does not violate the basic principles of the laws of the People's Republic of China, does not damage the sovereignty, safety or social public interests of the state, does not damage the legitimate rights and interests of the debtors within the territory of the People's Republic of China, grant confirmation and permission for enforcement."

What needs to be pointed out is that according to Article 5, Chinese courts would only recognise and enforce foreign cases that already have a legal effect. However, in reality, this article would largely restrict creditors' rights. Normally, the time between a court accepting a case and a debtor being adjudicated as bankrupt, is lengthy. If a Chinese court does not enforce any additional remedies, the debtor is highly likely to be transferred and their assets hidden. As Yuanyuan Huang argued in the Law Review of Wuhan University in 2018, multilateral cooperation would lose its meaning in such an event.

Currently, China's judicial authorities, academics and practitioners are conducting in-depth research and studies of cross-border insolvency. It has also been included in the legislative program. On 28 August 2018, Liu Guixiang, a member of the judicial committee of the Supreme People's Court, mentioned at the 3rd China-Singapore Legal and Judicial Roundtable that the Supreme People's Court is now actively promoting the revision of the Enterprise Bankruptcy Law. It would encourage, Wenxin Qiao reported in the People's Court Daily the following day, "standardised and refined regulations with regards to cross border insolvency jurisdiction, the status and treatment of foreign insolvency representatives and creditors, the conditions and methods of providing judicial assistance to foreign insolvency proceedings, etc." On December 27th, 2019, the Supreme People's Court released the document "Opinions on the People's Courts Further Providing Judicial Services and Guarantees for the Construction of the 'Belt and Road'". Article 31 of the document mentions a need to "[i]mprove the cross-border insolvency coordination mechanism, explore the application of the main insolvency procedures and the center of the main interest system, and protect the rights of creditors and investors in accordance with the law."

Benefits to debtors and creditors

The cross-border insolvency system protects debtors. Generally, enterprises that can apply for cross border insolvency have a mature operating system, a complete supply system and rich management experience. During the pandemic, most of them applied for bankruptcy because of the cracks in their cash flow and capital. At this moment, a cross-border insolvency system might be the last chance for a debtor. This is because bankruptcy liquidation not only means the end of the enterprise, but also, an opportunity to save the enterprise through rebirth. For instance, an enterprise could enter bankruptcy reorganising procedures to introduce investors, integrate excess inventory and eventual commence resurrection. It can also use bankruptcy conciliation procedures to reach a settlement with the creditors to stay alive. Multinational companies often have the potential to reorganise and reconcile, making the future market foreseeable.

Furthermore, cross-border insolvency systems protect creditors. Take mainland China as an example: in strict accordance with Article 5 of the Enterprise Bankruptcy Law, before extraterritorial bankruptcy procedures commence, debtors could find ample time to transfer and hide their assets. In this case it would make Article 5 useless and creditors' rights cannot be guaranteed effectively. In contrast, during the bankruptcy liquidation case of CEFC Shanghai International Group Limited on 18 December 2019 ([2020] HKCFI 167), the High Court of the Hong Kong Special Administrative Region ordered that the liquidation and protected Hong Kong assets involved be recognised and that creditors be protected pending enforcement. From this example, we can tell that only a mature cross-border insolvency system with coordination and cooperation among countries can maximize the protection of creditors' interests.

Finally, a cross-border insolvency system helps maintain and rebuild economic order. The market exit mechanism is an important indicator for evaluating the "business environment". During Covid-19 the truth is that certain multinational corporations might not be able to survive. Without a complete market rescue mechanism and unless countries hold a positive attitude towards cooperation, the hit to domestic and global economies would be harder than necessary. Even though its domestic outbreak is under control, China, as a major manufacturing country, has still seen considerable foreign trade orders

cancelled due to other states' quarantine measures. A large number of factories are shutting down and workers cannot go back to work. This is also likely to be a factor of social instability. Therefore, it is urgent to improve cross-border insolvency regulations and strengthen international cooperation.

Developing cross-border insolvency during Covid-19

Many multinational companies have applied for bankruptcy protection since the start of the pandemic. However, every coin has two sides and cross-border insolvency may usher in development opportunities. As the second largest economy in the world, China must take a major role and responsibility relative to its power. Mainland China's legislation on cross-border insolvency is not yet perfect. Despite being a relatively closed and conservative society, it has, nevertheless, sent positive signals in recent years. The field of cross-border insolvency needs legislative improvement and the sudden pandemic has made it particularly urgent.

I propose that in the field of cross-border insolvency, China can introduce a "center of the main interest" system to primarily conduct bankruptcy proceedings in geographical proximity to the debtor's regular administration of their interests. This would broaden the standards for mainland China to recognise and execute extraterritorial insolvency procedures and this will encourage mainland China to achieve a good cooperative relationship with other countries and regions. What is more, China could also learn from the EU's cross-border insolvency rules and establish an information-sharing mechanism for bankrupt companies among countries along the Belt and Road project.

Some scholars argue that due to the imbalance among regions, different substantive laws and regulations make it difficult to replicate the EU model, a point on which I agree. However, considering the unique situation the world is facing, Chinese authorities should adopt an open attitude and accelerate bilateral civil and commercial judicial agreements with countries where they have frequent business contacts. Li Shuai and Huang Ying, in issue four of *Commercial Magazine* in 2018, have also been correct to argue that, in the meantime, it is also important to use broad interpretations of "bilateral civil and commercial judicial agreement" as "international treaties" in Article 5 of the Enterprise Bankruptcy Law. This would promote cross-border insolvency cooperation and contribute to the world's economic recovery after the pandemic.

Conclusion

The pandemic might be under control for a short period of time but the bankruptcies it has caused for large numbers of multinational companies will reverberate for several years, alongside their long-term impact on the economy. China can minimise losses only by adhering to an open attitude, speeding up legislative reforms in the field of cross-border insolvency and assisting and cooperating with other countries and regions. China should turn this crisis into an opportunity.

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