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Insolvency Commission

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General introduction with respect to insolvency proceeding in China

Before answering the question listed in this Report, we would like to give you a general introduction regarding the insolvency proceeding in mainland China.

- Condition:

Where an enterprise is unable to repay its due debts, and its assets are insufficient for the settlement of all debts or where it is clearly insolvent, its debt shall be settled pursuant to the Enterprise Bankruptcy Law.

- Application:

The debtor, the creditor or the person(s) who is/are responsible for liquidation can apply for initiating insolvency proceedings.

- Acceptance:

The People's Court will take over the documents as required in accordance with law and review them. The People's Court will decide if they will accept the case.

An administrator will be appointed by the court when it decides that it will accept the application.

After a court decides to accept a bankruptcy application, it may still reject the bankruptcy application later before the final announcement of the enterprise's bankruptcy if it finds that the enterprise does not satisfy the condition that the enterprise is unable to repay its debts as they become due, and its assets are insufficient for the settlement of all debts or where it is clearly insolvent.

For a rejection, the court must provide reasons. An applicant dissatisfied with the ruling of the People's Court may appeal to the court at the immediate higher level within 10 days from the date on which such a ruling is received.

After acceptance, the court shall notify all known creditors of the proceedings and make a corresponding public announcement within 25 days, and make known the time limit and venue for registration of claims, details of the administrator, the date for the first creditors' meeting, etc.

- Suspended provisions.

After a bankruptcy application is accepted, the following rules will start to take effect:

- The enterprise is no longer allowed to make any debt settlement with any creditors separately.
- All seizures over the enterprise's assets will be cancelled.
- Enforcement procedures against the enterprise's assets will be suspended.
- All civil proceedings or arbitration proceedings relating to the enterprise will be suspended (but will be continued after the administrator has taken over the administration of the assets).

➤ Contracts entered into by the enterprise prior to the court's acceptance of the bankruptcy case but still pending full performance by the parties may be continued or rescinded, depending on the decision of the administrator. If the administrator does not notify the other contracting party within two months from the date on which the court accepts the bankruptcy application, or does not reply within 30 days from the date of receiving a notice by the other contracting party, the contract concerned will be deemed terminated. Where the administrator decides to continue performing the contract, the other contracting party is obliged to do so but it may request a security deposit from the administrator and may terminate the contract if the administrator fails to satisfy such a request.

- Assets

An enterprise's assets for bankruptcy purposes include all assets that belong to the enterprise at the time of the commencement of the bankruptcy proceedings and any asset obtained by the enterprise thereafter but before the termination of bankruptcy proceedings such as real estate, movable property and Intellectual Property.

It will include capital contribution subscribed but not yet fully paid-in by the shareholders of the enterprise, and any income and assets of the enterprise recovered from the enterprise's senior management personnel which they obtained by abusing their position.

- Result

Based on the financial situation of the enterprise, the result may be restructuring/reorganization, reconciliation or Liquidation.

- Period

It will take 1 or 2 years to complete the whole proceedings.

- Practice

In practice, we found that it is very hard to persuade the People's Court to accept the insolvency cases especially it is applied by the creditor rather than debtor. Generally speaking, most People's Courts only accept 1 or 2 new cases every year.

1. Proper place for commencement of insolvency proceedings and centre of main interests.

a. In your jurisdiction which is the proper place for commencement of insolvency proceedings? Is the applicable law determined separately than the venue?

Hylands: In China, insolvency proceedings only apply to enterprises. All bankruptcy cases shall be administered by the People's Court with jurisdiction where the debtor is domiciled. The phrase "place where the debtor is domiciled" means the place where the debtor's main office is located. If the debtor does not have an office, the people's court of the place where it is registered shall have jurisdiction. It is regulated separately in Enterprise Bankruptcy Law of the People's Republic of China rather than civil procedure law.

b. Is there in your country a notion or definition of the debtor's centre of main interests ("COMI")?

Hylands: There is no concept identical to debtor's centre of main interests ("COMI") in China. Generally speaking, the determination on the jurisdiction of insolvency proceedings will base on the business registration of the debtor, i.e. the Business License. The domicile was recorded in the Business License. The domicile on the Business License will be considered as the place where the debtor is domiciled. The basic-level People's Court where the debtor located has the jurisdiction on the insolvency case regardless of the main interests or properties.

However, in some extreme cases that if the enterprises neither carry out any business activity nor any physical office at the domicile and there is other proof indicating it has a main office in another district, the actual domicile will prevail. In fact, now PRC People's Courts are very inefficient and cautious in accepting and initiating the insolvency cases. Only in a few cases the judge will make ruling on the jurisdiction on its discretion.

c. Which are the factors relevant to the determination of centre of main interests?

Hylands: The actual business activity or physical existence may affect the judge's determination on jurisdiction.

d. Is this essential in determining the jurisdiction?

Hylands: In the legal perspective, the enterprise bankruptcy law is a nation-level law which means the regulation regarding bankruptcy is unified within mainland China. In practice, many People's Courts merely accept 1 or 2 cases every year. Based on our research in the database of the PRC People's Court, People's Courts locates in Zhejiang Province and Jiangsu Province tend to accept more cases than other People's Courts.

e. Are there international or supranational regulations regarding the proper place for commencement of insolvency proceedings and/or the determination of the centre of main interest applicable in your country?

Hylands: No .In accordance with the bankruptcy law:

1. Any bankruptcy proceeding that initiates under this Law shall be binding on all assets that are held outside the territory of the People's Republic of China by the debtor.
2. where a foreign court's judgment or ruling on a bankruptcy case that has taken effect involves assets in the territories of the People's Republic of China held by a debtor, and an application or request for judicial recognition and enforcement of the judgment is made to the People's Court, the People's Court shall, pursuant to the international treaty that the People's Republic of China has concluded or is a member of, or pursuant to the principle of reciprocity, examine the application or request;
3. where the People's Court deems that the application or request will not violate the basic principles of law of the People's Republic of China, threaten national sovereignty, security and public interest, and will not impair the lawful rights and interests of the creditors within the territory of the People's Republic of China, the People's Court shall make a ruling on recognition and enforcement.

f. Is the debtor's centre of main interests the place where an insolvency proceeding concerning the debtor is likely to commence? Why or why not?

Hylands: It varies from case to case. As we discussed before, the judge will determine the jurisdiction on the basis of the Business License unless the applicant or creditor proves otherwise. In most case, the People's Court where the debtor domiciles will require the other People's Court to assist if the debtor has asset in other districts.

g. Please discuss the issues of timing and procedure with respect to the determination of centre of main interests, including when or if a judicial determination on this issue is required or made?

Hylands: We will briefly introduce the insolvency procedure in China to you. Where a bankruptcy application is made by the creditors, the People's Court shall notify the debtor within five days from the receipt of the application. Where the debtor objects to the application, the debtor must raise the objection to the People's Court within seven days from the receipt of the notification by the People's Court. The People's Court shall rule on whether to accept the bankruptcy application within 10 days from the date of expiry of the objection period.

Other than the aforesaid circumstance in the preceding paragraph, the People's Court shall rule on whether to accept a bankruptcy application within 15 days from the date of receipt of the application.

Where time extension is required for the making of rulings in the preceding paragraphs due to special circumstances, an extension of 15 days that is subject to approval by the higher-level People's Court may be granted.

2. Movement of the place of registration (or habitual residence) of centre of main interest.

a. It is possible for the debtor to move its place of registration (or habitual residence) prior or after the commencement of insolvency proceedings? Will such a move affect the decision as to centre of main interests and the determination about the commencement of the proceedings?

Hylands: Nowadays, it becomes harder and harder to move the place of registration prior to the commencement of insolvency proceedings, and it is impossible to move the place of registration after commencing insolvency proceedings. It is more like a policy question than a legal question.

b. Is it possible to move a debtor's centre of main interests prior to commencement of insolvency proceedings?

Hylands: Not applicable.

c. Is it possible to move a debtor's centre of main interests between the time of the application for commencement and the actual commencement of those proceedings?

Hylands: Not applicable.

d. If there is evidence of such a move in close proximity to the commencement of the commencement, in determining whether to recognize those proceedings, will the court scrutinize more closely such a move?

Hylands: Not applicable.

e. Is forum shopping allowed under domestic or supranational law which applies in your jurisdiction?

Hylands: Not applicable.

f. What are factors in your country that may influence a debtor to choose one forum over another, e.g. judges, favorable laws, case law precedent, etc.?

Hylands: We cannot choose the forum.

g. Is it possible for a creditor or other party to force or cause a debtor's insolvency proceedings to be moved (rather than dismissed), as a result of a challenge to the debtor's definition of its centre of main interests?

Hylands: Not applicable.

3. Recognition of foreign proceedings, main and secondary proceedings

a. Is the recognition of foreign proceedings allowed in your country? What are the requirements? Is this recognition affected by the notion of centre of main interests?

Hylands: Yes. Where a foreign court's judgment or ruling on a bankruptcy case that has taken effect involves assets in the territories of the People's Republic of China held by a debtor, and an application or request for judicial recognition and enforcement of the judgment is made to the People's Court, the People's Court shall,

pursuant to the international treaty that the People's Republic of China has concluded or is a member of, or pursuant to the principle of reciprocity, examine the application or request; where the People's Court deems that the application or request will not violate the basic principles of law of the People's Republic of China, threaten national sovereignty, security and public interest, and will not impair the lawful rights and interests of the creditors within the territory of the People's Republic of China, the People's Court shall make a ruling on recognition and enforcement.

b. Does your relevant domestic or supranational legislation have the notions of main and secondary proceedings or otherwise distinguish between the concepts?

Hylands: Not applicable.

c. Does your legislation permits secondary proceedings to be opened to run in parallel with the main proceedings? Are the effects of secondary proceedings limited to the assets located in that State where secondary proceedings are opened?

Hylands: Not applicable.

d. Does your jurisdiction allow a challenge to proceedings being designated as secondary? If so, please explain in greater detail.

Hylands: Not applicable.

4. Abuse of process

a. In your jurisdiction, is a court able to take account of abuse of its processes as a ground to decline recognition?

Hylands: If you refer to the recognition of overseas proceedings, in China, the judge will consider the national sovereignty, security and public interest, and will not impair the lawful rights and interests of the creditors.

When it comes to the domestic insolvency cases in China, most of the insolvency proceedings are initiated by creditor. The People's Courts are very conservative where the debtor applies for insolvency proceeding.

b. What happens if the applicant falsely claims the centre of main interests to be in a particular State?

Hylands: Not applicable here.

c. Are those issues governed by international or supranational regulations or only by domestic law?

Hylands: Only by domestic law.

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