Study on Judicial Practice and Remedy System of Cross-Border Insolvency Law in China —— Based on the Observation of Insolvency Cooperation Mechanism Between the Chinese Mainland and Hong Kong

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Abstract. The cross-border insolvency system is of great importance to the current economic and political state of affairs. The Chinese mainland's cross-border insolvency cooperation system has undergone a transformation from territorial protectionism to modified universalism, and the operationalization of universalism has been further enhanced according to the needs of practice. The COMI system in cross-border insolvency should further draw on the useful experience of foreign countries, and better perform its function by increasing the criteria that can be recognized by a third group and clarifying the idea of determining the COMI under the vie corporate structure. The relief rules of cross-border insolvency should draw on the international mainstream master-subsidiary and master-slave models to avoid the waste of judicial resources in parallel proceedings, and at the same time improve the rules of provisional relief to further maximize the use of the value of insolvency estates. The recognition system of cross-border insolvency should follow the trend of softening the principle of reciprocity as well as clearly defining the public policy exceptions and clarifying the relationship between the recognition and relief systems to enhance the feasibility of the recognition system.

Keywords: cross-border insolvency, center of main interests, pilot opinion, recognition and relief regime.

1. Introduction

With China's reform and opening up to the deep development, how to make the market under the framework of the socialist market economic system with Chinese characteristics to better play a decisive role has become China's reform and opening up in the deep-water zone to continue to move forward steadily to achieve high-quality development of the important premise. In terms of the current national conditions, whether the market means to deal with the serious problem of overcapacity faced by our country has become the most important task to be solved. And in the market under the rule system, the bankruptcy system to establish and improve to deal with this problem of the choice. Bankruptcy system has the characteristics of “constitutionality” in the field of market economy, which can eliminate the backward production capacity through liquidation and reorganization and other means, realize the better allocation of resources, so as to perfect the law of survival of the fittest in the market economy. An effective bankruptcy system can undoubtedly provide a reasonable exit channel for excess capacity. The fact that the Standing Committee of the People's Congress has included the amendment of the Enterprise Bankruptcy Law in the 2024 legislative program highlights the importance of the bankruptcy system to the current political and economic situation.

As an important part of the bankruptcy system, cross-border insolvency is becoming more and more important in the context of further opening up to the outside world and economic globalization. At the same time, against the background of cross-border insolvency cases, the Supreme People's Court of China signed the Minutes of the Talks on Mutual Recognition and Assistance in Bankruptcy Proceedings between the Courts of the Chinese mainland and the Hong Kong Special Administrative Region (hereinafter referred to as the “Minutes of the Talks”) with the Hong Kong Special Administrative Region on the basis of the Enterprise Bankruptcy Law, which further reflects the practical inevitability of the improvement of cross-border insolvency and the importance of cross-border insolvency in the current political and economic situation of China. This further reflects the practical necessity of improving cross-border insolvency and the high degree of importance China attaches to it. Therefore, this article will focus on the Chinese mainland and Hong Kong bankruptcy cooperation mechanism to further analyze China's cross-border insolvency system, so as to realize the improvement of China's overall bankruptcy system.

2. The development of cross-border insolvency systems in the Chinese Mainland and Hong Kong

2.1. Before the Minutes of the Talks: from territorial protectionism to modified universalism

With the development of reform and opening up, the mobility of domestic and foreign capital as well as labor force has been enhanced, which has brought about the surge of cross-border insolvency cases while carrying out foreign trade on a large scale. And our country shows a strong characteristic of territorial protectionism when facing cross-border insolvency cases, as well as the lack of a cross-border insolvency settlement system at the legislative and judicial levels to deal with this kind of cases. Among them, the bankruptcy case of Hong Kong Millie Group and the case of Nanyang Textile Merchants better highlight the practice status of cross-border insolvency in China at the early stage of reform and opening up.

In 1980, Hong Kong Millie Group entered into a joint venture with a Shenzhen real estate company to develop the earliest commercial housing development project in Luohu District of Shenzhen. However, in 1984, due to poor operation, the Millie Group declared bankruptcy, and the relevant bankruptcy liquidator in Hong Kong applied for transferring the assets of the joint venture in Shenzhen back to Hong Kong. Eventually, with the intervention of the Shenzhen Municipal Government, the Millie Group recovered the assets of the joint venture by way of equity transfer. Similarly, the Hong Kong parent company of Nanyang Textile Company was declared bankrupt in 1983, and the Hong Kong liquidator requested to take over the assets of the company in Shenzhen. However, after the Shenzhen Municipal Government intervened in the negotiations, the assets in the territory were also recovered by way of transfer of equity. The above two cases share many similarities. In the face of the representatives of the cross-border insolvency procedures to recover the property in the territory, the Chinese mainland lacked the relevant judicial departments to respond to this, but directly administrative intervention in the form of transfer of equity to avoid the cross-border insolvency effect of the judicial issues. The subjects dealing with such cases and the measures adopted by them to protect Chinese mainland interests reflect the country's claim to territorial protectionism[1].

Against this background, the Standing Committee of the Guangdong Provincial People's Congress, on the basis of summarizing practical experience, issued the Regulations on Foreign Companies in the Guangdong Special Economic Zone and the Regulations on Bankruptcy of Foreign Companies in the Shenzhen Special Economic Zone in 1986. These two regulations show a lot of similarities and exhibit a strong characteristic of territorial protectionism. Article 44 of the Regulations on Foreign Companies in the Guangdong Special Economic Zone incorporates the initiative of equity transfer in the above two cases into the regulations, which stipulates that the disposal of the assets of the client by the client's agent shall be in the form of transfer of equity or interests, and shall not affect the normal production and operation activities of the company, which rule of law the use of transfer of equity to avoid the effects of foreign insolvency. At the same time, the two regulations emphasized the authority of the municipal government in cross-border insolvency cases. Articles 41, 42 and 43 of the Regulations of Guangdong Province Special Economic Zone on Foreign Companies stipulate the rights stipulated in the form of the agent of the guest merchant, and the government's approval is required to dispose of the assets within the special zone, as well as to authorize the entire amount of the assets of the guest merchant.

It can be seen that the cross-border insolvency system at this time was only a temporary solution to the problems arising from economic development, an expedient measure against the background of an imperfect rule of law system for rapid economic development, with a strong tinge of territorial protectionism[2].

With the deepening of reform and opening-up, China's economy has taken off at a high speed, and domestic and foreign investments have flourished, and this phenomenon of economic development has also been reflected in the practical development of cross-border insolvency. China's courts not only need to accept the application for recognition relief of insolvency proceedings filed by foreign subjects, but also began to seek recognition of the effectiveness of foreign insolvency proceedings in the territory. Meanwhile, in cross-border insolvency cases such as the case of France's Bai Gao foreign bank, China's local governments have gradually started the exploration of cross-border insolvency cases. Driven by the urgent needs of the economic development of the times and the accumulation of local judicial practice[3], Article 5 of the Enterprise Bankruptcy Law of the People's Republic of China adopted on August 27, 2006 clarified the relevant provisions on cross-border insolvency for the first time by way of the legislation of the People's Congress, which affirmed the effectiveness of the foreign insolvency procedures to a certain extent and established the relevant standards for the recognition of foreign insolvency procedures. In terms of specific content, Article 5 of the Enterprise Bankruptcy Law is divided into two paragraphs, the first of which stipulates that the bankruptcy proceedings commenced in accordance with this Law shall have effect on the property of the debtor outside the territory of the People's Republic of China, i.e., the bankruptcy proceedings in China shall have effect not only on the property of the debtor within the territory of the country, but also on the debtor's property outside the territory of the country. The recognition of extraterritoriality in this paragraph is the basis for cross-border insolvency cooperation for recognition and relief in China. Paragraph 2 stipulates the examination standards for the recognition and enforcement of foreign insolvency proceedings in China, where the people's court, in accordance with the international treaties to which the People's Republic of China is a group or in which the People's Republic of China is a group, or in accordance with the principle of reciprocity, finds that the recognition and enforcement of foreign insolvency proceedings do not contravene the basic principles of the laws of the People's Republic of China, or prejudice the sovereignty of the State, its security or the public interests of society, or impair the lawful interests and rights and interests of creditors in the territory of the People's Republic of China Ruling on Recognition and Enforcement. This paragraph stipulates that China adopts the principle of reciprocity and the public policy exception clause as the standard for the examination of extraterritoriality. As a whole, Article 5 of the Enterprise Bankruptcy Law adopts the position of modified universalism, and the recognition of extraterritoriality in the first paragraph reflects China's recognition of the unified management of the debtor's insolvency affairs, but at the same time, the second paragraph stipulates a number of review criteria reflecting China's recognition and enforcement of cross-border insolvency is still prudent, and at the same time, it provides legal basis for the protection of the interests of domestic creditors. Legal basis. The adoption of the modified universalist position enables China's cross-border insolvency hearings to reflect the unity and high efficiency of universalism, while maximizing the country's autonomy in hearing insolvency cases[4]. The legal confirmation of limited universalism in Article 5 of the Enterprise Bankruptcy Law demonstrates China's determination to integrate into the world market economy and promote economic integration, and is also an important attempt to bring China's cross-border insolvency legislation into line with international standards.

However, the provisions of Article 5 of the Enterprise Bankruptcy Law on cross-border insolvency still have certain shortcomings. First, no distinction is made between the judicial determination of cross-border insolvency cases and that of general civil and commercial insolvency cases. The cross-border insolvency procedure emphasizes collectivity, excludes individual liquidation, and applies a uniform and fair standard to all creditors to determine the rights and obligations of each of them, which is different from the procedure of general civil and commercial judgments enforcing the rights and obligations of individuals on the basis of their rights and obligations[5]. From the overall perspective of the content, the content of this article highly overlaps with the provisions of Article 299 of the Civil Procedure Law. The overlap between the provisions of Article 5 of the Enterprise Bankruptcy Law on the conditions for review of foreign bankruptcy proceedings and the provisions of the Civil Procedure Law on the review of judgments issued by foreign courts indicates that the provisions of China's mutual legal assistance in cross-border insolvency are not effectively differentiated from the provisions on mutual legal assistance in civil and commercial matters in general. Secondly, the subjects covered by the cross-border insolvency effect are limited to state-owned enterprises, while natural persons and wholly foreign-owned enterprises within and outside the jurisdiction are excluded[6]. Secondly, the conditions for recognition only rest on international treaties and the principle of reciprocity, lacking the more common and authoritative elements of due process review and criteria such as COMI, and the principle of reciprocity insisting on the principle of factual reciprocity also bring about the difficulty of recognizing the extraterritorial effects of insolvency in practice. In addition, although the Enterprise Bankruptcy Law has made progress compared with the previous absolute territorialism, there is no instance of invoking Article 5 of the Enterprise Bankruptcy Law to recognize bankruptcy cases in practice due to the limitations of the principle of reciprocity and the principle of public exception, as well as the lack of standardized and operable rules as a guide[7]. In conclusion, the introduction of the Enterprise Bankruptcy Law has achieved a historic breakthrough in China's cross-border insolvency system, but the provisions on cross-border insolvency no longer meet the needs of cross-border insolvency practice in the new era, and there is an urgent need to promote the cross-border insolvency system to respond to the new needs of the times under the economic background of economic globalization and market integration.

2.2. After the Minutes of the Talks: further refinement and implementation of revisionist universalism

The cross-border insolvency regime between the Chinese mainland and Hong Kong has long been insufficiently targeted and effective in solving the nascent problems of cross-border insolvency due to the lack of positive guidance from practical experience and the imperfection of the institutional system. It was not until 2019 that the Hong Kong court in the Shanghai Huaxin case recognized and assisted the case of bankruptcy declared by the Chinese mainland under the common law rules, recognizing for the first time the identity of the Chinese mainland's insolvency administrators, which opened a new door for cross-border insolvency cooperation between the Chinese mainland and Hong Kong. In addition, the bankruptcy and liquidation case of Nian Fu Company in Shenzhen, which took place in 2020, was also recognized and assisted by Hong Kong[8]. Under the strong impetus of practical experience, the construction of a cross-border insolvency system between the Chinese mainland and Hong Kong has become a common call from practitioners and academics. On 14 May 2021, the Supreme People's Court and the Government of the Hong Kong Special Administrative Region signed the Minutes of the Talks between the Supreme People's Court and the Government of the Hong Kong Special Administrative Region on Mutual Recognition of and Assistance in Bankruptcy Proceedings by the Courts of the Chinese mainland and of the Hong Kong Special Administrative Region (hereinafter referred to as the "Minutes of the Talks"). In order to better implement the Minutes of the Talks, the Supreme People's Court has formulated the Opinions on Carrying Out the Pilot Work of Recognizing and Assisting Insolvency Proceedings in the Hong Kong Special Administrative Region (hereinafter referred to as the "Pilot Opinions"). The Department of Justice of Hong Kong has also published the "Practical Guide on Procedures for Chinese mainland Insolvency Practitioners to Apply to the Courts of the HKSAR for Recognition and Assistance" (hereinafter referred to as the "Practical Guide").

Together with the Pilot Opinions and the Practical Guide, which serve to crystallize the relevant principles of the Minutes of the Talks, the three documents constitute an institutional system for cross-border insolvency cooperation between the Chinese mainland and Hong Kong. As a whole, the cross-border insolvency system constituted by the Minutes of the Talks and the like still inherits the principle of modified universalism, but at the same time supplements the Enterprise Bankruptcy Law with practicable by-laws. It has adopted an open and cooperative attitude towards the international community by allowing Hong Kong administrators to perform their duties in the Chinese mainland, and has introduced the concept of the center of main interests (COMI), but at the same time, it has also stipulated that the insolvency estate of the debtor in the Chinese mainland is given priority in the discharge of claims with priority in the Chinese mainland, so that the overall situation is balanced with the protection of interests of creditors in the Chinese mainland and the provision of cross-border judicial assistance[9]. The Pilot Opinions have implemented the spirit of the minutes of the talks and are a concrete institutionalized implementation of the minutes of the talks, with ten main areas of discussion. Firstly, on Hong Kong insolvency proceedings: Article 2 of the Pilot Opinions stipulates the scope of recognized and assisted insolvency proceedings in Hong Kong, including the subject matter being a company and the nature of the insolvency proceedings being collective liquidation proceedings. Meanwhile, Article 4 of the Pilot Opinions stipulates that the Opinions are applicable to Hong Kong insolvency proceedings in which the center of main interests (COMI) is located in Hong Kong, as well as the judgment criteria for determining the center of main interests (COMI). Secondly on the subject of the application: Article 3 of the Pilot Opinions stipulates that the Hong Kong administrator as the subject includes the liquidator and provisional liquidator in Hong Kong insolvency proceedings. Thirdly on the examination criteria of the place of the center of main interests: Article 4 of the Pilot Opinions stipulates that when a Hong Kong administrator applies for recognition and assistance, the center of the debtor's main interests should have existed in the Hong Kong Special Administrative Region for a continuous period of more than six months. As well as Article 5 of the Pilot Opinions stipulates that if the debtor's main property in the Chinese mainland is located in the pilot region, exists a place of business in the pilot region or has a representative office in the pilot region, the Hong Kong administrator may apply to the Intermediate People's Court of the pilot region for recognition and assistance. Fourthly on the contents and main matters of the application of the administrator: Article 6 of the Pilot Opinions stipulates the materials that should be submitted by a Hong Kong administrator applying for recognition and assistance in insolvency proceedings in Hong Kong. Article 7 of the Pilot Opinions sets out the matters to be contained in the application. Fifthly, on the initiative of the People's Court in recognizing the Hong Kong insolvency proceedings: Article 9 of the Pilot Opinions stipulates the contents of the People's Court in relation to preservation, and Article 10 stipulates the recognition of the status of the administrator after the People's Court has recognized the relevant proceedings, as well as the public notice. Sixthly, the Pilot Opinions provide for the remedies that may be taken by the courts in respect of recognized insolvency proceedings, including Articles 11 to 16, which provide for the legal effects of the People's Court's recognition of Hong Kong's insolvency proceedings, as well as a series of measures that may be taken, including the invalidation of creditor's satisfaction of individual creditors, the suspension of civil litigation or arbitration commenced but not yet terminated in relation to the debtor, and the granting of the status of an offshore receiver to a person who is not a bankrupt. A series of initiatives, such as fulfilling the disposal of distributed property, and the affirmation and authorization of the qualifications of domestic and foreign administrators in Articles 14 and 15. Seventhly, with regard to the standard of review of the recognition system, Articles 17 and 18 of the Pilot Opinions stipulate that the people's courts may change, terminate or refuse to recognize or assist an applicant for insolvency proceedings in accordance with the law in the event that the applicant has committed fraud or other circumstances. Eighth, articles 19 and 24 of the Pilot Opinions provide for the encouragement of communication and cooperation. Ninth, Article 20 of the Pilot Opinions provides for issues relating to the distribution and liquidation of the insolvency estate. Tenth, articles 21, 22 and 23 of the Pilot Opinions provide for issues relating to applications for reconsideration and reports and requests for instructions before going up or down the hierarchy, as well as the payment of corresponding litigation costs.

Compared with the Enterprise Bankruptcy Law, the Pilot Opinions have made more detailed provisions on the recognition of extraterritorial insolvency effects, the determination of COMI, the review of the recognition system, the development of the relief system, and the provisions on the duties of the administrators, but at the same time, there are also the following problems. First, the

Pilot Opinions lack criteria for determining COMI that can be confirmed by a third group, as well as the attribution of COMI under the vie corporate structure. Second, with respect to the recognition regime, the Pilot Opinions do not provide for a detailed interpretation and enforceability of the principle of reciprocity and the public policy exception provided for in the Enterprise Bankruptcy Law, and there is a lack of provisions clarifying the relationship between the recognition regime and the relief regime. Thirdly, the relief system of the Pilot Opinions lacks the distinction between primary and secondary or primary and secondary effects of the place of cross-border insolvency application under the rule of the center of main interests (COMI), which makes the relief system lack of pertinence and consume corresponding judicial resources, and there are also deficiencies in the relief system that can be carried out. These issues will be addressed separately below.

3. Theoretical analysis of the current center of main interests in China

The doctrine of center of main interests (COMI) is at the core of the cross-border insolvency recognition and relief system, and it is an important criterion for determining the attribution of jurisdiction. However, before the Pilot Opinions were issued, China's relevant provisions on the attribution of jurisdictional effects could only resort to the relevant provisions of Article 3 of the Enterprise Bankruptcy Law, i.e., insolvency cases shall be under the jurisdiction of the people's court in the place of the debtor's domicile. In this provision, there is no good distinction between general civil and commercial bankruptcy cases and bankruptcy cases involving extraterritorial effects, and at the same time, there is no detailed explanation for the determination standard of domicile, which makes the system vacuum of lack of response program when facing the situation of multiple domiciles such as the transfer of the center of main interests. On the contrary, the UNCITRAL Model Law on Cross-Border Insolvency (hereinafter referred to as the Model Law) and the EU Regulation on Insolvency Proceedings both determined the relevant rules on the center of main interests (COMI) as early as in 1997 and 2000 respectively, and made provisions and perfected the rules on the criteria for the determination of the COMI in terms of the time, the criteria for the determination of the entities, the regulation of the transfer of the center of main interests (COMI), and the insolvency of the enterprise groups, and so on. Improvement. Therefore, when cross-border insolvency disputes occur, the simple provisions of the jurisdiction of the people's court of the place of domicile of the debtor in China will put China in an unfavorable position in striving for the jurisdiction, or as in the case of Hanjin insolvency case, the Korean company will not apply for the assistance and recognition directly to China due to the lack of legal self-confidence in China's cross-border insolvency, which is detrimental to the resolution of relevant cross-border insolvency cases and to the manifestation of the image of a great country in international cooperation and exchange. This is unfavorable for China to resolve relevant cross-border insolvency cases and to demonstrate its image as a great power in international cooperation and exchange. Against this background, the provisions of the Pilot Opinions on the place of the center of main interests (COMI) undoubtedly provide a timely response to the problems that have arisen in cross-border insolvency practice in China. In view of the lack of practical experience and test standard of COMI in China, the analysis and reflection on the relevant contents of the Pilot Opinions need to adopt the perspective of comparative law, based on the Model Law and the EU Regulation on Insolvency Proceedings.

The first and foremost issue in dealing with cross-border insolvency cases is to establish the attribution of jurisdiction, which is the prerequisite for the subsequent recognition and relief system. According to the above, the center of main interests (COMI) is an important basis for confirming the jurisdiction of the court, which undoubtedly highlights the importance of the rule of the center of main interests (COMI). Therefore, the first paragraph of Article 4 of the Pilot Opinions clearly stipulates that the insolvency cases between the Chinese mainland and Hong Kong we are discussing are those in which the COMI is located in Hong Kong, i.e., insolvency cases in which the Hong Kong courts have proper jurisdiction. Secondly, on the issue of the criteria for determining the entity that is the center of main interests, Article 4(2) of the Pilot Opinions stipulates that the center of main interests generally refers to the place of incorporation of the debtor, and also stipulates that the location of the principal office, the principal place of business, and the location of the principal property may be taken into account as factors for overriding the place of incorporation. This idea of determination is a fusion of the ideas of Europe and the United States regarding the determination of the center of main interests, which not only includes the European Union Court of Justice taking the place of registration as the starting point of the determination and allowing the relevant creditors to provide proof that the place of registration can be overridden as the place of the center of main interests, but also draws on the United States Court of Justice taking the location of the head office of the debtor, the location of the administrator and other diversified, flexible entity elements to comprehensively consider the place of the center of main interests. At the same time in specific application scenarios, the EU Regulation on Insolvency Procedures for the overthrow of the center of main interests of the statutory presumption that there must be objective, for the third group to know the entity elements of the relevant provisions of the same in line with the future development trend of our country's center of main interests of the development trend of the third group known to the creditor in the transaction of the operation of the provision of certainty, at the same time in the determination of the jurisdiction of the use of third-group standards can enhance the objectivity of the standard. Thirdly, on the issue of the time determination standard of the COMI, there are mainly international models based on the commencement of insolvency proceedings and the determination model based on the time of application. The model based on the time of commencement eliminates the need to review the process from commencement to application for recognition, which to a certain extent enhances the effectiveness of the trial, but makes it more difficult to collect information on the operation of the enterprise concerned before the commencement of the proceedings. Under the model based on the time of application for recognition, the initiative of the insolvency proceedings from commencement to recognition is entirely in the hands of the insolvent enterprise, which may easily lead to the transfer of the center of main interests in bad faith to maximize the interests of the enterprise, thus affecting the relevant interests of the creditors. However, under this model, the court is not required to collect information on past operations, which largely reduces the workload of the court. It is presumed from Article 4(3) of the Pilot Opinions that the cross-border insolvency regimes of the Chinese mainland and Hong Kong have adopted the criterion of the time of filing. At the same time, in order to cope with the problem of transfer of COMI brought about by the criterion of the time of filing, the provision stipulates that the place of COMI should have been in existence for more than six months, which effectively enhances the objective criterion of the determination of the place of COMI, and reduces the risk of malicious transfer.

As can be seen from the above, in terms of the criteria of proper jurisdiction, entity determination and time determination, the Pilot Opinions have combined the international mainstream rules of COMI, and also combined the different backgrounds of the legal systems of the Chinese mainland and Hong Kong, to achieve further improvement of the cross-border insolvency system. However, apart from this, there are still no targeted regulations in the face of the current VIE model of business operation. At present, there are two ways for Chinese enterprises to get listed overseas, one of which is to directly issue foreign shares, but the domestic review is more difficult, the review criteria include total assets of not less than 400 million, after-tax profit of the previous year of not less than 60 million, the amount of capital raised of not less than 50 million U.S. dollars, and so on, so most of the enterprises wanting to get listed overseas will use the relatively indirect method of the VIE model. Typical vie framework generally contains four layers, of which the first layer is the enterprise's shareholders in the British Virgin Islands and other places to create a bvi company, the bvi company's responsibility is to hold 100% of the shares of the overseas listed subject that is the second layer of the Cayman company, his advantage is that in the transfer of shares in the tax burden is almost nil, and at the same time, no foreign exchange control, confidentiality is good, do not have to submit the annual return and accounts, and so on. However, the disadvantages of a bvi company are the legal risks involved and the fact that the world's major stock exchanges do not accept it for listing. The second level is the establishment of a Cayman company by the bvi company and its founders, which is the main body of the offshore listing, with the advantages of registration, relatively relaxed audit process, as well as not subject to foreign exchange control, and stock exchanges allow its listing. But the audit conditions are more stringent compared to the first tier. The third tier is to set up a company in Hong Kong with a Cayman company as the shareholder. According to the Enterprise Income Tax Law, overseas dividend income without an organization in China needs to pay 10% withholding income tax in China, but for the Hong Kong company's dividend income from China that complies with the regulations can be subject to withholding income tax at a rate of 5%. Therefore, choosing a Hong Kong company as the third tier under the vie framework can effectively enjoy the relevant tax incentives, while facilitating the operation of the enterprise and the approval of related matters. The fourth layer is to set up a wholly foreign-owned enterprise in Chinese mainland with a Hong Kong company as the shareholder and control the domestic operating entity through an agreement, while the domestic operating entity realizes the transfer of profits of the operating entity through technical consulting fees, intellectual property rights licensing fees, etc. The vie framework involves a large number of subjects and is distributed both domestically and internationally, so once the relevant enterprise is facing insolvency, it will be difficult to identify the place of the center of main interests. It is difficult to recognize the center of main interests (COMI). However, foreign countries have relatively more experience with the vie model due to their long history of pioneering. In the Sphinx Fund insolvency case, the United States court found that although the place of incorporation was in the Cayman Islands, the principal business operations and assets were located on the United States, so that the mainland should be found to be the location of COMI, and made it clear that the place of incorporation would be found to be the location of COMI under the vie model in the absence of creditor-initiated objections. Similarly, in the Eurofoods bankruptcy case, the court held that although the wholly-owned parent company was located in Italy, the COMI should still be recognized as the place of daily operations and known to creditors in Ireland. From the above two cases, it can be concluded that when facing the issue of determining the COMI of the vie model, for the purpose of enhancing the efficiency of the trial, the criteria for determining the place of COMI in the absence of creditor objections should be determined first, i.e., the formal criteria, including whether it is the place of incorporation and whether it can be ascertained by a third group, and so on. At the same time, it should not be confined to specific provisions, but should be analyzed in the context of the case to determine the place of the closest connection with the operation of the enterprise concerned, the location of the main business activities, the location of the main property, and the location of the main office as the specific circumstances.

To sum up, the center of main interests does believe that the implementation of the recognition system provides a feasible criterion, and is also a key consideration in the development of the subsequent relief system. The relevant provisions in the Pilot Opinions not only follow up the advanced pace of the international cross-border insolvency system, but also respond to the Chinese characteristics of the specific circumstances of the case in China, which is an important manifestation of the development of China's cross-border insolvency system and the mentality of international openness and cooperation. In addition to this, the establishment of the determination criteria under the vie model, as well as the criteria for the determination of the time of entity determination still need to keep pace with the development of the specific status quo.

4. Analysis and selection of models for cross-border insolvency relief

4.1. Summary of features of the dominant international relief model

The implementation of the relief system is the original purpose of the cross-border insolvency assistance proposed by extraterritorial insolvency subjects, and it is an important institutional source for the court to adopt measures of the relief system. The choice of institutional model, on the other hand, affects whether the relevant measures can best meet the needs of cross-border insolvency between the Chinese mainland and Hong Kong on the basis of the antecedent provisions such as recognition and the place of the center of main interests (COMI). At present, there are two mainstream models of relief systems in the international arena, one of which is the master-subsidiary model set forth in the Model Law on Cross-Border Insolvency, and the other is the master-slave model set forth in the EU Cross-Border Insolvency Regulation.

The principal-assistant model under the Model Law is characterized by two typical features: first, it is lagging in nature, in that the principal-assistant model operates after the commencement of the foreign insolvency proceeding and the filing of the application by the foreign representative, and it is a lagging, passive mode of relief. This makes the mode of relief dependent on the timing of the foreign representative's application, which will undoubtedly cause significant disruption to the disposition of the assets involved in the case, as well as to the related liquidation. The second is to make a clear distinction between the judgment criteria of the main and auxiliary systems, as well as the content and effect of the corresponding relief. The judgment standard of the main and auxiliary mode is mainly based on the rule of the center of main interests (COMI), i.e. the insolvency proceedings conducted in the COMI are the main proceedings, while the other places of business are the auxiliary proceedings, and in terms of the relief effect, once it is established as the main proceeding, the country where the case is closed will initiate the automatic stay of proceedings as well as a full range of remedies to maximize protection of the interests of creditors, and the auxiliary proceeding The ancillary proceedings will only provide appropriate relief on the basis of the relevant facts of the case. At the same time, in terms of the specifics of the proceedings, the main proceeding has to go through complex and specific steps, including the application for commencement and the court's declaration of insolvency, while the ancillary proceeding dispenses with the complexity of the preceding steps and ensures that the proceeding is carried out in a timely manner by means of the presumption of the absence of evidence to the contrary. The advantage of the main and ancillary model is that it maximizes cooperation with countries in granting relief, with the main proceeding serving as the central proceeding and the ancillary insolvency proceeding assisting the main proceeding to the maximum extent possible under local insolvency law. There are, however, problems of varying degrees of application of the Model Law in various countries and practical limitations resulting from divergent theories on the determination of the center of main interests (COMI).

The master-slave model provided for in the EU Cross-Border Insolvency Regulation is based on a high degree of integration within the EU members and has significant EU characteristics. The understanding of the master-slave model should focus on the unity of independence and collaboration under this model. For the main proceedings, the EU has adopted the system of automatic recognition, i.e., EU member states automatically recognize the legal effect of the commencement of insolvency proceedings in the place where the center of main interests is located, which fully reflects the conditions of political and economic integration of the EU. Subordinate proceedings are commenced at the place of business other than the debtor's center of main interests and are based on the law of the country where the place of business is located. Subordinate proceedings have a distinctive territorial character, with full insolvency proceedings protecting local creditors and the interests of the host country as a whole. The purpose of the distinction between main and subordinate insolvency proceedings is not to differentiate the effects of insolvency in different regions by means of full and summary proceedings, but rather to serve different purposes under parallel proceedings, with the main proceeding focusing on recognition and relief of external effects and the subordinate proceeding focusing on the protection of local creditors' interests. Objectively speaking, the relative independence of the master-slave mode in their respective applications is ideal for resolving the complexity of cross-border insolvency cases, and the subordinate proceeding coordinates and cooperates with the main proceeding by protecting the interests of local creditors, and ultimately achieves the purpose of integrating the management of the debtor's property located both inside and outside the country and maximizing the value of the property. Therefore, the master-slave model is a relief model that takes into account both the extraterritorial effects and the interests of local creditors under a highly synergistic framework.

4.2. Analysis and Improvement of China's Existing Relief System

China's current relief system is mainly stipulated in article 5 of the Enterprise Bankruptcy Law and the Pilot Opinions. Article 5 of the Enterprise Bankruptcy Law provides that our relief system is based on auxiliary proceedings[10], which enable China to focus on protecting the legitimate interests of its creditors in international collaborative cross-border insolvency proceedings, and which are characterized by the distribution of property in favour of our country in cross-border collaborative insolvency proceedings to deal with the debtor's assets located in our country. The application of ancillary proceedings is conducive to the liquidation and reorganization plans of each country under the framework of parallel proceedings, but it also tends to lead countries into territorial protection, which is not conducive to the realization of the protection of the insolvency estate and the protection of creditors both within and outside the region. The remedies in the Pilot Opinions mainly include automatic and discretionary remedies[11]. Automatic relief is provided for in the Pilot Opinions, whereby the People's Court, after recognizing the Hong Kong insolvency proceedings, automatically determines that the debtor's satisfaction of individual creditors is invalid, and that any civil litigation or arbitration that has commenced but not yet concluded in relation to the debtor should be stayed, and that litigation or arbitration will continue after the Hong Kong administrator has taken possession of the debtor's property. It is automatically determined that the measures of preservation in respect of the debtor's property should be lifted and the enforcement proceedings should be stayed. The provisions for the Hong Kong administrator mainly include the duties in Article 14. Discretionary remedies include Articles 14 and 15 of the Pilot Opinions on the duties of Hong Kong and Chinese mainland administrators, and Article 16, which provides that the People's Court may apply for a ruling to assist in the realization of the value of the property of the bankruptcy estate, the distribution of the property, and the arrangement of debt restructuring after the recognition of the bankruptcy proceedings. Compared to the Enterprise Bankruptcy Law, the relevant provisions of the Pilot Opinions have shifted the focus from the protection of local creditors to the study of maximizing the use of insolvency value and providing the most effective remedies for international cross-border insolvency. However, at the same time, there are also some problems in the provisions of the relief system in the Pilot Opinions, such as the lack of distinction between primary and secondary insolvency proceedings between the Chinese mainland and Hong Kong, and thus the lack of provisions on the relief system for different degrees of primary and secondary relief, so that the protectionism of the place of parallel proceedings is not effectively regulated. Besides, the current relief system in China mainly focuses on the relief measures taken after the recognition of the insolvency proceedings by the court of the receiving country, and lacks the provisional relief measures for the insolvency after the debtor's application and before the recognition, so that the reasonable interests of the creditors in this stage are not protected, and the value of the insolvency estate can not be maximally utilized. Compared with the primary and secondary modes of the EU Cross-Border Insolvency Regulation, the primary and secondary modes of the Model Law on Cross-Border Insolvency are better adapted to China's conditions and more capable of solving the problems existing in China's relief system. The relief measures of the Model Law on Cross-Border Insolvency can be divided into interim relief (Article 19), relief measures automatically commenced upon recognition of a foreign main proceeding and discretionary relief to be recognized upon recognition of a foreign main, non-main proceeding as stipulated in Article 20, especially with regard to the provision of stop execution of the debtor's assets, entrustment of the foreign representative with the management or sale of assets and other interim relief measures which are of great reference significance to China. Meanwhile, the EU Cross-Border Insolvency Regulation is based on the high degree of integration of the member states, but there are obvious differences between the Chinese mainland and Hong Kong in terms of legal systems and insolvency regimes, and both of them lack experience in dealing with cross-border insolvency, so the adoption of the EU's master-slave model is not suitable for China's conditions at present. The Model Law on Cross-Border Insolvency has a stronger universality and recognition in international insolvency treatment, and at the same time, China's current Hong Kong Cooperation Framework and the relevant contents of the Pilot Opinions have strong reference to the contents of the Model Law, so on the basis of the existing cross-border insolvency system in China and Hong Kong on the basis of the Model Law on Cross-Border Insolvency in the relief system for the purpose of reference, can further converge with the international cross-border insolvency, and can further integrate with the international cross-border insolvency. It can further converge with the international cross-border insolvency, and at the same time lay a solid foundation for the future establishment of a cross-border insolvency and recognition system in line with international standards[12], and better contribute China's strength to the international common solution and handling of cross-border insolvency issues.

5. Criteria and improvements to the current system of recognition

5.1. Analysis of the elements of the current recognition review

The principle of reciprocity and the relevant provisions of the public policy exception constitute important criteria for the cross-border insolvency review system between the Chinese mainland and Hong Kong, but how to rationally apply these two criteria remains an important issue that needs to be resolved urgently. In respect of the principle of reciprocity, Article 5 of the Enterprise Bankruptcy Law stipulates that the people's courts shall conduct reviews in accordance with international treaties concluded by the People's Republic of China or to which the People's Republic of China is a group, or in accordance with the principle of reciprocity. However, prior to the issuance of the Pilot Opinions, there was a lack of bilateral treaties in force in respect of the cross-border insolvency regimes between the Chinese mainland and Hong Kong, which made it possible in practice to review only on the basis of the principle of reciprocity. However, China has long been practicing a de facto reciprocity system, i.e., when faced with a request for recognition from another country, the focus is on examining whether the applicant country already has a precedent of recognizing and enforcing ours. However, the principle of de facto reciprocity fails to address the question of whether reciprocity should come first when the two countries lack a basis for reciprocity, leading to a reciprocity loop and seriously affecting the normalization of judicial cooperation. In the face of this status quo, China issued the Several Opinions on the Provision of Judicial Services and Guarantees by the People's Courts for the Construction of the Belt and Road as well as the Nanning Statement in 2015 and 2017, respectively, which made it clear that China would consider granting judicial assistance first, actively contributing to the establishment of a reciprocal relationship, as well as adopting a presumption of reciprocity in line with the trend of the reciprocity principle's softening. Article 18 of the Pilot Opinions specifies five criteria for the People's Court not to recognize insolvency proceedings, including failure to satisfy the place and time requirements of the main interest, violation of article 2 of the Enterprise Bankruptcy Law, unfairness to creditors on the Chinese mainland, and fraud, as well as setting out the underpinning provisions of article 5[13]. It can be seen that, on the basis of the foundation laid down by the Enterprise Bankruptcy Law, the standard of review of the recognition system in the Pilot Opinions has been further materialized into five specific aspects and the court has been given room for free trial. However, with regard to the principle of reciprocity, which is still doubtful in the Enterprise Bankruptcy Law, the Pilot Opinions have not made it clear as to how to understand the principle of reciprocity and the legal response to the principle of presumed reciprocity as it has been applied in practice. The Pilot Opinions do not clarify how the principle of reciprocity should be understood and the legal response to the presumption of reciprocity applied in practice. As for the public policy exception, Article 5 of the Enterprise Bankruptcy Law stipulates that on the basis of the principle of reciprocity, the principle of reciprocity shall not violate the fundamental principles of the laws of China, and shall not jeopardize the sovereignty, security and public interests of the State, or the legitimate interests of creditors in the territory of the People's Republic of China. It can be seen that the provisions of the public policy exception clause reserve a great deal of adjudicative space for the protection of creditors in the country, and the definition of the scope of the relevant interests is still unclear, which is not conducive to the normal development of judicial collaboration in practice. In the Pilot Opinions, article 18 of the public policy exceptions to the provisions of the basic principles of law and public order and morality, but the same is still not in practice for the public policy elements of the substantive limitations. Because if not on public policy exceptions, substantive limitations, then will largely lead to public policy exceptions to the expansion of the application of the provisions. Therefore, the provisions of the system of recognition regarding the principle of reciprocity and the public policy exceptions are not clearly defined, and there is no legal response to the trends that exist in practice.

5.2. Recommendations for improving the elements of the review of the system of recognition

Since China's cross-border insolvency mechanism still has problems such as late start and insufficient practical experience, it is necessary to draw on international mainstream ideas such as the Model Law and combine them with the situation when facing the above problems to deal with them appropriately. From the perspective of legal application background, the legal system between Chinese mainland and Hong Kong is relatively different, so it does not have the integration background to draw on the EU's response ideas. Apart from that, the existing center of main interests system, relief system and many other aspects in China have effectively drawn on the Model Law, so drawing on the relevant practices of the Model Law in the recognition system is conducive to the internal order of the system.

Firstly, with regard to the principle of reciprocity, there should be a legal response to the softening trend of the principle of reciprocity, such as the abolition of the requirement of reciprocity, the conditional application of the principle of reciprocity, and the liberalization of the interpretation of the rules of reciprocity. Typical countries that have abolished the principle of reciprocity include Switzerland, etc. Although this practice can directly circumvent the problem of recognition brought about by the excessively strict interpretation of the principle of reciprocity, it also leads to the lack of analysis of the basis of judicial cooperation, which in turn brings about certain legal risks. The countries that conditionally apply the principle of reciprocity, including Turkey and the Czech Republic, can be divided into three categories according to the way in which the conditions are attached: the first category is to recognize the citizens of the country as the defendant, the second category is only applicable to the enforcement of the foreign court's decision, and the third category is to initiate the reciprocity review procedure only if there is sufficient evidence to prove that reciprocity relationship is not established. The effect of attaching conditions is clearly targeted, but it also possesses limitations. He has limited the scenarios in which the principle of reciprocity as a standard of review can be initiated, but again, he has not effectively defined the application of the principle of reciprocity itself, so that when faced with statutory situations such as those in which a citizen of the country is the defendant, there will still be a lack of clarity in the standard of the principle of reciprocity. Lastly, regarding the loose interpretation of the reciprocity rule, this approach has been adopted by Japan and is also the typical recognition of the current practice in China, which is more specific to the consideration of the basis of reciprocity between the two parties does not focus on the existence of the fact of cooperation, but rather, as long as there is no reciprocity as the reason for refusing and recognizing the implementation of the precedent can be regarded as the existence of a good foundation[14].

The public policy exception clause is to serve as a safety line for the administration of justice in a country, an important line of defense to protect the fundamental interests and order of a country. Therefore, I think that first of all, the public exception clause cannot be abolished in one go. Although Hong Kong and the Chinese mainland belong to the same country, due to reasons of historical background and differences in the existing legal system, there are differences in many aspects, for example, acts such as horse racing are not recognized in the Chinese mainland, but they are legal acts in Hong Kong. Therefore, Article 18 of the Pilot Opinions, which stipulates that the relevant provisions are contrary to public order and morality, still has the practical necessity of application. However, in retaining the application of the public exception clause should pay attention to limit the expansion of the application of this provision of the trend. On this issue, we can learn from the EU Insolvency Regulation to sign a “bilateral agreement”, through the agreement to agree on the application of the law of the two sides and the specific issues related to public order and morality of the detailed provisions, so that the cross-border cases have a detailed statute to refer to, in order to prevent the expansion of the use of the announcement of the policy exceptions.

In addition to the refinement of the public policy exception and the principle of reciprocity, I believe that the feasibility of the recognition regime can be enhanced by clarifying the relationship between the recognition and remedies regimes and applying the model of separation of recognition and remedies in accordance with the needs of practice. The Model Law's model for the connection between recognition and relief is automatic relief, i.e., once recognition is granted, individual actions involving the rights, obligations or legal liabilities of the debtor's assets are frozen or stayed, and relief measures such as legal proceedings or enforcement proceedings are carried out automatically. However, due to the late initiation of cross-border insolvency in China and the relative lack of judicial experience, it is impossible to properly control and cope with the remedies unfolding after the recognition, which makes the judge unconsciously raise the standard of examination of the recognition system for fear of uncontrollable risks, which on the one hand will lead to difficulties in carrying out the cross-border insolvency assistance proceedings properly and at the same time will increase the burden of judicial examination. In order to control this phenomenon, Japan has made clear in the Law on Recognition of Assistance in Foreign Insolvency Proceedings the separation of the recognition and relief systems, i.e., the recognition is only the qualification for obtaining the relief applied for, while the validity of the relief depends on the application of the subsequent administrator and the actual needs. The establishment of the separation model will undoubtedly reduce the judge for the recognition of the pressure of the system review, and effectively reduce the legal risks brought about by the uncontrollable relief system[15]. This is of great reference significance to the status quo of our country, on the one hand, our country has similar legal background with Japan, both belonging to the civil law system, at the same time, our country and Japan in the establishment of cross-border insolvency system, also faced with the problem of late start, and lack of experience.

6. Concluding Remarks

The trend of economic globalization will only continue to advance with the development of the times, and the degree of closeness between the world market and China's market will only be further deepened. Under such a background, how to quickly comply with the positive trend of the world, eliminate the backward production capacity that does not adapt to the development of the times, and realize the effective distribution of resources has become an important issue. Therefore, the importance of building a cross-border insolvency system is increasing day by day. As for the research on the judicial practice and relief system of cross-border insolvency law in China, China is still in the stage of exploration, and there is still much room for research on how to establish a system that conforms to the conditions, advocates international exchanges, and takes into account the protection of the interests of creditors of the country.

The introduction of the Minutes of the Talks, the Pilot Opinions and other documents is an effective inheritance and innovation of the previous system represented by the Enterprise Bankruptcy Law, and if we want to further develop it, we need to learn from the mainstream experience of international cross-border insolvency and make targeted improvements according to the conditions. First of all, we need to continue to adhere to the revision of universalism, so as to achieve an effective balance between territorial protection and maximizing the use of the value of the bankruptcy estate. Secondly, as for the COMI, we should further improve the criteria for third-group knowledge to enhance objectivity, and improve the provisions on the attribution of COMI under the vie corporate structure model. Finally, for the recognition and relief system, we should firstly clarify the relationship between the two in practical application, and on this basis, absorb the effective provisions of the primary and secondary models to enhance the effectiveness of the relief system, and at the same time, enhance the feasibility of the recognition system by adapting to the softening of the principle of reciprocity and clearly defining the exceptions to the public policy provisions, so as to realize the effective connection and synergistic development of the recognition and relief systems.

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