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China Legal Obstacles and Legislative Suggestions on Bankruptcy Disposal of Financial Institutions

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ABSTRACT
This article investigates the trans-national efficacy of financial institution resolution measures with regard to existing as well as soon to be amended Chinese banking institutions bankruptcy law, the Bank Resolution Regulation (BRR). The Enterprise Bankruptcy Law (EBL) of China governs the overall structure. The final verdict regarding repercussions of financial institution resolution procedures rests with China's peers. Nevertheless, the contractual technique is a suggested approach for enhancing legal clarity. Even so, China must first recognize inbound applicability from foreign resolution actions. Global treaty, mutuality, as well as public policy exemption are three fundamental requirements for recognition and admissibility. Such criteria require evaluation in light of the evolving global system for financial institution resolution as well as the most recent developments in the justice system of China.

Keywords: *Enterprise Bank Law (EBL), Financial institutions insolvency, Cross-border bankruptcy.*

1. INTRODUCTION

At present, the legal system of financial institution bankruptcy is mainly composed of enterprise bankruptcy law, banking supervision and administration law, commercial bank law, securities law, insurance law and deposit insurance regulations.The Chinese Enterprise Bankruptcy Law (CEBL) governs the overall structure.

Due to its stakeholder nature, basic service and Risk Spillover, financial institutions have particularity in their bankruptcy, but these characteristics of different types of financial institutions are different. Specific to how different types of financial institutions exit the market, bankruptcy liquidation or reorganization rescue, more detailed provisions should be made in the corresponding financial law. On the disposal of crisis financial institutions, the enterprise bankruptcy law and financial laws and regulations must be coordinated, and the judicial procedures of the court and the regulatory procedures of the regulatory authorities should cooperate with each other. The final verdict on the repercussions of resolving Chinese banks actions rests with China's peers. Nevertheless, it is suggested that the contracting technique might be used to improve legal clarity. Even so, the approaching efficacy of foreign settlement methods must first be acknowledged in China.

In a bid to correct the ineffectiveness of conventional enterprise insolvency systems witnessed in the 2007/08 global financial crisis (GFC), G20 leaders rallied around developing resolution models and systems to ensure orderly redressal of financial institutions, effectively mitigating the disruptions amongst financial groups' failings whilst lowering future ethical hazards [1]. This background empowers resolution authorities (RAs) or administrative authorities (AAs) to act administratively by taking resolution measures (RMs) for meticulous redressals of distressed financial institutions (FIs). Consequently, the new developments involved three primary model changes to bank resolution away from bank insolvency were advanced, including shifting to (a) public from individual interest, (b) government from judicial-based management, and (c) harmonization and unification from national regulation [2]. Likewise, Guo [3], argued that the interest of the public took center stage of the RAs' resolution measures in RAs by preventing systematic hazards while keeping financial stability. Along with conventional judicial insolvency tools like liquidation or reorganization, AAs are now conferred with resolution as another insolvency tool to assist with addressing distressed banks [4]. This article investigates the transnational efficacy of bank insolvency measures in terms of existing and forthcoming revisions on Chinese bank bankruptcy policy, namely the Bank Resolution Regulation (BRR).

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2. GLOBAL LEVEL STANDARDS

Globally, endeavors have gone towards harmonization of national resolution regulations as well as realization of an efficacious international resolution system. In 1997, the United Nations Commission on international trade law adopted the UNCITRAL Model Law on cross border insolvency (hereinafter referred to as the "model law") based on the theory of amended universalism. At present, the international text has been adopted by more and more countries. In the Asia Pacific Free Trade Area, in addition to Peru and Brunei, Malaysia and Vietnam of ASEAN, seven other countries among the signatories of cptpp have adopted the model law. Among the 15 signatories of RCEP, Australia, New Zealand, Japan, South Korea, Singapore, the Philippines and Myanmar have adopted the model law, showing a tendency of assimilation in the domestic legislation of cross-border bankruptcy. Among the countries that have not adopted the model law, China's Enterprise Bankruptcy Law implemented in June 2007 establishes the position of limited universalism and the basic rules of cross-border bankruptcy judicial assistance. The enterprise bankruptcy reorganization law of Laos, which came into force in June 2020, adds provisions on international cooperation in cross-border bankruptcy.

This began with the Financial Stability Board's (FSB) formulation of a comprehensive proposal in 2011, effectively making the Key Attributes for an efficacious resolution system among FIs [5], before a 2014 upgrade [6]. The fresh resolution system requires creditors plus shareholders should be first in line to bear the losses rather than directing funds from taxpayers to bail out these institutions [7]. Relatedly, the International Monetary Fund (IMF) outlined three kinds of resolutions powers, including (a) assuming control by replacing the management, reduce bonuses, plus appointing an administration for management of the institution; (b) resolution mechanisms like transferring liabilities and assets to a bridge banking institution, a portfolio management firm, or another entity in existence; and, (c) complementary measures supporting payment suspensions to non-secured creditors along with stay actions for creditors .

From the foregoing, as per FSB's 2017 resolution report, the majority of domestic jurisdictions of Global Systemically Important Banks or G-SIBs, had in place bank resolution systems mostly in line with the Key Attributes, such as the Single Resolution Mechanism Regulation (SRMR) inclusive of Europe's Bank Recovery and Resolution Directive (BRRD) [8]. China subscribing to FSB along with being a domestic jurisdiction to 4 G-SIBs, must also reconsider its bank resolution regulation to supplement the existing bank insolvency system.

Among the principal concerns that need addressing under the novel bank resolution model is the cross-border aspect with regard to the forthcoming Chinese Bank Resolution Regulation. It is an open secret that there is increased involvement by financial institutions from China in global trade, with 2015 data showing the 22 FIs from China had established 1,298 branches throughout 59 jurisdictions, along with 213 affiliates, first-level outlets, plus representation offices. As far as foreign investors go, from the time China joined the World Trade Organization coupled with the latest conceptualization of the Belt and Road Initiative (BRI), the market has fast-tracked implementing an open financial market to attract foreign investors. Cross-border FIs operations along with failures are projected to surge, generating discussions on insolvency plus subsequent resolution in China, which would eventually be useful to both China and its global allies[9].

3. COMPARATIVE ANALYSIS

From the passage of China's Enterprise Bankruptcy Law (EBL) in 2006, the country welcomed a fresh restructuring and liquidation era among financially distressed and troubled firms. The EBL broadly complies with recognised worldwide norms plus provisions contained in current insolvency rules of other countries. The EBL governs three major proceedings: reorganisation, composition, and liquidation. Nevertheless, when it comes to cross-border bankruptcy, just Article 5 gives any advice without including the UNICTRAL Model Law regarding Cross-Border Bankruptcy proceedings. Banking institutions which are expressly listed in a different section of the EBL will receive preferential treatment. Firstly, bodies in charge of financial regulation and supervision may petition the courts to begin reorganization and liquidation processes. This differs from standard corporate bankruptcy processes, in which only debtors or creditors can submit such a petition.

Next, these bodies are given extra regulatory authority, such as administration as well as trusteeship. Special provisions for taking management are provided by the Commercial Bank Law (CBL), as well as the Regulatory of and Supervisory provisions under the Bank Industry Law (RSBIL). The former states that the State Council's banking regulatory authority or the CBIRC, can take charge of a banking institution if it has had or is likely to experience a credit crisis, therefore adversely damaging the depositors' concerns, a shortcoming shared in the provisions of RSBIL. The IMF classifies management takeover among the resolution tools. The novel Bank Resolution Law, which is now being drafted, is intended to be consistent with the Key Attributes whilst still allowing Chinese authorities to exercise further resolution capabilities, such as resolution instruments plus relevant supportive interventions. The

2015 Deposit Insurance Regulation (DIR) further embodies a different major piece of bank bankruptcy law in China. According to Haentjens and Wessels, this rule intends to create a deposit insurance framework, safeguarding depositors' interests, reducing investment risks, while preserving financial stability. Insured banking institutions are required to join the plan guaranteeing depositors at least RMB 500,000 in the event of a bank bankruptcy. The DIR takes a jurisdictional approach, covering exclusively Chinese domestic banks while excluding international subsidiaries of Chinese banking institutions as well as Chinese branches of foreign banking institutions. The DIR regulates exclusively internal matters and makes no mention of cross-border concerns.

In summary, the special bank resolution regime might continue applying in relation to the Chinese EBL, along with Article 5's cross-border restrictions, which have been a hot subject for Chinese bankruptcy attorneys, in both normal corporate as well as special bank bankruptcy. The prior study, nevertheless, overlooks subsequent developments in bank resolution rules. There is some uncertainty concerning those special resolution measures that needs resolving. As a result, this article seeks to fill the void by focusing on cross-border challenges in the future Chinese Bank Resolution Regulation.

4. RECOMMENDATIONS

Until an international treaty or a comparable statutory system is already existing, the outbound impacts of Chinese bank resolution policies would be very speculative. A contract method, mandating Chinese banking firms to include a contractual acknowledgment provision in financial instruments establishing obligations for those banks, might help accomplish the aim of cross-border efficacy of resolution measures. Regulators should demand or offer incentives for enterprises to use contractual techniques, as stipulated by the FSB. Even though numerous institutions have voiced reservations concerning the applicability of cross-border resolution mechanisms, inclusive of inadequate statutory backing, coupled with likely incoherence with social policy, contractual methods might offer a potential alternative step for the efficacy in cross-border resolution procedures. According to Guo, contractual techniques cannot replace the void when no legislative recognition system is in existence, although they can serve to enhance statutory certainty along with predictability under a legislative provision to a small degree.

Financial stability is often regarded as among the most important public issues. Further, it is widely agreed that the use of financial institution resolution is necessary to ensure financial stability. As a result, whenever a foreign resolution step jeopardizes domestic financial stability, it contravenes the primary objective of the bank resolution system. Financial stability must remain top of the public policy priorities in such situations, and it might be used to fail to recognize and execute foreign resolution actions.

Creditors' rights are a well-known issue in bankruptcy law. Particular emphasis is made in the cross-border situation to the equitable treatment of international and local debtors. The pari passu concept governs the disposal process, ensuring that the borrower's assets are allocated pro rata among creditors in comparable scenarios. Exclusions are permitted in specific instances, such as taxes as well as employee pay, plus depositors' savings in financial institution insolvency procedures. Nonetheless, nationality is not a legal privilege, and international creditors must be treated equally with internal debtors. When disposing the borrower's assets, comparably positioned domestic and overseas creditors must be in identical situation. The same protection does not only apply to the asset distribution as well as disposal processes, but to ancillary holders' rights, including the ability to initiate and participate in the entire insolvency or restructuring actions[10].

5. CONCLUSION

As one of the key global market players, China is dealing with a high volume of cross-border deals, some of which could include business as well as bank bankruptcy difficulties. Concerning cross-border difficulties, emphasis should be made to the impending Chinese Bank Resolution Regulation. It is necessary for China to improve the domestic legislation and justice of cross-border bankruptcy and provide Chinese experience and solutions for the formation of regional multilateral mechanisms. At the legislative level, we should focus on improving the legal system of cross-border bankruptcy from the following three aspects: first, establish the system of direct jurisdiction and indirect jurisdiction of cross-border bankruptcy. In the process of docking with international rules, we should pay attention to the clarity and predictability of the definition of relevant legal concepts. We can consider accepting the standards of the debtor's center of main interests and place of business, and clearly define them. Second, improve the judicial assistance system for cross-border bankruptcy, and clarify the object of recognition and assistance, review standards, procedural rules and relief measures. Third, establish a legal system to regulate parallel bankruptcy, identify the effectiveness of multiple bankruptcy procedures, and provide legislative support for the exchange and cooperation between the bankruptcy administrator and the court of bankruptcy procedures in different countries. As far as the legislative framework's provisions, Article 5 of the EBL is projected to retain its status quo as the controlling statute towards cross-border financial institution insolvency as well as resolution within the coming years. Nevertheless, this article simply

specifies the procedures for recognition and enforcement, as well as other cross-border problems, including jurisdiction plus relevant legislations are left unaddressed. Absent major modifications to Article 5, subsequent cross-border bank bankruptcy and financial institution resolution will be fraught with ambiguity. Special elements of bank resolution ought to and could be considered under the existing framework. This study believes that prior legal cases as well as regulatory procedures of financial regulators might provide a beneficial construction of Article 5 through its applicability toward cross-border bank bankruptcy and financial institution resolution.

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