

Administrator in New Bankruptcy Law of China

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Introduction

The new Bankruptcy Law of China is coming out. Something catching people's eyes in this law is that, among others, the Chapter on Administrator.

In the existing Enterprise Bankruptcy Law (For Trial Implementation) of 1986, the function of administration in the bankruptcy proceeding is assumed by "liquidation team". The design of such an institution bears three features. First, the team is established after the bankruptcy adjudication. Therefore, during the period from acceptance of a case to bankruptcy adjudication which usually amounts to quite a long time, assets and affairs of an insolvent firm continue to be controlled by the management without any outside supervision, and thus the risk of assets running off exists obviously. Second, the members of the team are mainly from local government agencies, lacking neutrality, professional skill and transparency. Third, there lacks mechanisms of supervision, dismissal and investigation aiming at the team's conducts.

In 1994 when the new bankruptcy law started to be drafted, the drafters realized the above-mentioned shortcomings. In the first draft we designed a "temporary receiver" in order to fill the vacancy of administration before bankruptcy adjudication. Then, the draft established rules for take-over by administrator as early as acceptance of a case, and defined administrator as intermediary agencies, e.g. lawyers and accountants, that is supposed to be independent from the government. Afterwards the draft combines administrator, liquidator and reorganizer into a single setup named "administrator".

1. Appointment of Administrator

As for the character of administrator there are various doctrines, considering administrator as "representative of creditors", "representative of debtor", "representative of the estate of assets", "trustee" or "legal organ". The first two doctrines, "representative of creditors" and "representative of debtor", are deemed to be inconsistent with the principle of neutrality. The second two, "representative of the estate of assets" and "trustee", are separately based on the concept of estate of assets as a legal entity and the concept of trust which are not adopted in Chinese bankruptcy law. Therefore, in the process of drafting the new law, the leading doctrine is "legal organ", taking administrator as an organ that is established by law and performs the functions provided by law in order

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to realize the objectives of bankruptcy proceedings. During the discussion, some scholars alleged the doctrine of “representative of creditors”, suggesting that administrator should be appointed by creditors’ meeting. However, the majority agreed such an analysis that even though protection of creditors’ interests should be one of the major objectives of bankruptcy proceedings, administrator must keep independent and neutral, and might litigate against some creditors to protect the creditors in a whole as well as the debtor, workers or other parties in interest.

Consequently, the draft provides that administrator shall be appointed by the people’s court and responsible to the court. Further, for the sake of monitoring by creditors’ collective over administrator, the draft entitles creditors’ meeting to petition the court to dismiss an unqualified administrator and have him replaced.

2. Qualification of Administrator

According to the draft, administrator can be assumed by an intermediary agency such as law firm, accounting firm or liquidating firm, or personnel who has relevant professional knowledge and special qualification of practice. Moreover, anyone who has ever been punished criminally or revoked professional license, or has interest in the case, or unsuitable to take this position as deemed by the court, shall not assume the office of administrator.

Actually the function of administrator is carried out by real persons. These persons should therefore be qualified practitioners. Based on the term “special qualification of practice” used in the draft, it seems a logic conclusion that an institution of special license for insolvency administrator will be put into practice, and only those who have passed the unified examination and got the license could be appointed as administrator in a bankruptcy case.

Taking into account the complexity in practice, the draft grants judges the discretion in affirming qualification of administrator. For instance, they may refuse to appoint, or dismiss, a person who is proven incompetent to deal with a large company bankruptcy, or without commercial experience for business reorganization, or with grave moral blemish even not within the scope of the unqualified situations as provided in the law, for the sake of maintaining justness and effectiveness in a bankruptcy case.

3. Functions of Administrator

There are eleven general functions of administrator provided in the draft law:

- 1) Taking over the control of all the property, books, documents, files, seals and stamps and so forth of the debtor;
- 2) Investigating the situation of assets and making out a report thereof;
- 3) Determination of internal management affairs of the debtor;
- 4) Determination of day-to-day expenditure and other necessary spending of the debtor;
- 5) Employ management, professionals and other personnel as needed;

- 6) Determining whether the debtor continues to operate before the first creditors' meeting;
- 7) Management and disposal of the assets of the debtor;
- 8) Accepting payment or delivery of property to the debtor by a third party;
- 9) Taking part on behalf of the debtor in litigation or arbitration;
- 10) Request for summoning creditors' meetings;
- 11) Other functions which the people's court deems necessary for the administrator to carry out.

Besides, there are a number of special functions provided in other chapters of the draft law. For instance, right to avoid transactions occurring prior to insolvency proceedings and recover the property transferred thereby when managing the assets; duty to registering and recording the filed claims and keeping the documents; right to raise objection during investigation of claims; duty to give notice for summoning creditors' meeting; duty to report important dealings to the creditors' committee; right to monitoring the self-management of the debtor, or appointing management while take-over, right to determine the performance of executory contracts, right to submit reorganization plan, and to apply for extension of time to formulate the plan, right to negotiate and apply for confirmation when voting of the plan, duty to hand over affairs and right to monitor for execution of the plan, during reorganization proceeding; right to call back the secured property, right to determine the performance of executory contracts, right to carry out the scheme of assets disposal and the scheme of distribution, during the liquidation proceeding.

The draft stipulates that administrator may employ necessary staffs. It is also stipulated that the expenditures and remuneration for administrator's line of duty, and the cost for employment of staffs, shall take priority as administration expenses, being paid by the debtor's assets at any time.

4. Responsibility of Administrator

The draft stipulates that administrator shall carry out functions with diligence, due care and loyalty. Further, whenever an administrator asks for or accepts a bribe, or misconducts in office, and if the act constitutes a crime, criminal responsibility shall be investigated in accordance with the law. If the illegal act causes big losses to the creditors, the debtor or a third party, liability for damages shall be imposed.

The draft establishes creditors' committee as a standing agency of creditors' meeting, with a major function of monitoring administrator's management. Therefore the draft lists a series of major assets disposal and other considerable transactions that administrator must timely report to the creditors' committee. This would conduce to strengthening administrator's responsibility.

During the drafting process people expressed their concern to some extent with the moral hazard of administrator. Obviously, it is crucial to found good fame of bankruptcy administrator in the society from the very beginning. It is safe to say that the reliance of

the society on administrator is very important to the future implementation of the new bankruptcy law. On the other hand, we should understand the high-risk characteristic of bankruptcy administration, and shall not ignore the particularity of such a business when fixing the standard of duty of care on an administrator. If the responsibility imposed on administrator is too hard, so that people flinch from this profession, it would contravene the purpose of the system of legal responsibility in the bankruptcy law.

5. Remuneration of Administrator

According to the draft, administrator's remuneration shall be determined by the people's court, and the standard of the remuneration will be prescribed by the Supreme People's Court. Meanwhile, it stipulates that any creditor who has objection against the remuneration of administrator may claim it before the court.

Since administrator's remuneration is paid in priority by the debtor's assets, the amount of remuneration is important to the creditors' interests in distribution. However, to a large extent the maximization of creditors' interests rely on the maximization of the value of debtor's assets. It is easy to learn that a fair and favorable remuneration is propitious to attracting excellent practitioners to take part in bankruptcy administration and provide excellent service.

6. Professionalizing Bankruptcy Administration

It can be expected that along with the implementation of the new bankruptcy law, bankruptcy administration will emerge as a new profession in China. In many modern countries bankruptcy practitioners have their guilds. In the global community there exists a well-known international association of insolvency practitioners code-named "INSOL". After the promulgation of the new bankruptcy law, we will bear a hot and heavy mission to train a large number of practitioners in bankruptcy administration in a short term and even keep the training going. On the basis we should lose no time to organize local and national bankruptcy practitioner associations, so as to strengthen the self-discipline of the industry, and develop the business cooperation and international exchange. In this regard the government may play an active role to promote the development.

It is without saying that the new law settles a foundation for the system of bankruptcy administration. At the same time, the life of the system comes from not only its logos, but also its practice with supports from other relevant systems. The loyalty, diligence and wisdom of thousands of judges and practitioners for the cause of bankruptcy administration should be the real source of power for long-term flourish of this system.