The Regulation of Personal Insolvency in China: Historical Perspectives, Comparative Insights and Future Directions

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Content

Declaration

This thesis has not been submitted in support of an application for another degree at this or any other university. It is the result of my work and includes nothing that is the outcome of work done in collaboration except where specifically indicated. Many of the ideas in this thesis were the product of discussion with my supervisor Professor David Milman and Dr Lu Xu.

Abstract

This thesis explores the evolution of personal insolvency regulation in China, examining its historical context, comparative insights from established systems, and potential future directions. The research addresses a significant gap in China's legal framework: the absence of a nationwide personal insolvency regime. By investigating the well-established systems in the United Kingdom and the United States, alongside the recent implementation in Shenzhen, this study aims to draw valuable lessons for China's potential nationwide adoption.

The research methodology combines doctrinal and comparative approaches. It analyses primary legal texts, including the UK's Insolvency Act 1986, the US Bankruptcy Code, and Shenzhen's Personal Insolvency Regulation. The historical development of personal insolvency laws in these jurisdictions is examined, taking into account cultural influences and legal reforms. Case law review provides crucial insights into practical application and judicial interpretation.

Comparative analysis reveals key similarities and differences between the personal insolvency procedures in the UK, US, and Shenzhen, with particular attention to the position of debtors and creditors across these jurisdictions. The research identifies critical issues such as legislative style, pre-bankruptcy debt counselling, discharge mechanisms, and out-of-court procedures.

The thesis argues that China's rapid economic growth and evolving market dynamics necessitate the introduction of a personal insolvency regime. It grapples with the challenges of legal transplantation, seeking to balance international best practices with China's unique cultural and economic context. The

Shenzhen regulation serves as a valuable case study, offering insights into the potential for nationwide implementation.

By synthesising findings from doctrinal and comparative studies, this research contributes to the understanding of personal insolvency law in China and provides insights into its historical context, comparative lessons, and future possibilities. It offers recommendations for establishing a comprehensive Chinese personal insolvency regime, considering both legal and socio-economic factors. The study aims to inform policymakers, legal scholars, and practitioners about the complexities and potential benefits of introducing personal insolvency regulation in China.

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Today’s sun is brighter than yesterday’s.

Chapter 1 Introduction

1.1 Introduction

1.1.1 General Overview of Area and Background

The 2006 Enterprise Bankruptcy Law of the People's Republic of China (2006 Bankruptcy Law) took effect on 1st June 2007. The law can only be applied to legal persons rather than individuals. 2006 Bankruptcy Law is known as 'half bankruptcy law', which means it is not a complete bankruptcy law because of the absence of a personal insolvency regime. However, this does not mean personal insolvency is unnecessary in China. 2006 Bankruptcy Law has been implemented for a decade. In these ten years, China's economy has grown rapidly, and both the market and individuals have shown their great need for a personal insolvency regime. For example, people are encouraged to start a new business by removing the minimum capital requirement for registering a new company and offering some easy ways to obtain a loan. Meanwhile, it is easy for companies to get loans through informal financing. However, in many cases, the debts are secured by shareholders' joint guarantee; the property of enterprises commonly overlaps with shareholders' personal property.

In this circumstance, because of the absence of a personal insolvency regime, businessmen cannot save their own personal property when the company is insolvent. It is expected that businessmen leave their homes or commit suicide to escape the debt, especially in the Zhejiang province of China. Moreover, creditors of informal financing might use violence to get their money back, such as torturing debtors' bodies, murder, and kidnapping. Similarly, credit cards and high overdrafts allow people to purchase more expensive than they can afford, but they may also face credit card debt trouble. If such trouble cannot be solved without the protection of a personal insolvency regime, people and their families may lose their only one house. As China is not a command economy country anymore, there are many reasons

for causing debt troubles and making people insolvent in the free market. Therefore, all businessmen, consumers, creditors and debtors need the protection of a personal insolvency regime in the free market.

In terms of overcoming the problems caused by the gap in the personal insolvency regime, several regimes have been set in China. Firstly, the regime of compulsory civil execution provides that the courts shall consider the necessities of the debtor's life when the courts are executing. Secondly, other specific measures of civil execution are committed to settling the debt dispute, such as limiting the person subjected to execution to leave the country and supervising the execution. Thirdly, the Supreme Court of China published a document stating that the court can limit debtors' high-end consumption, and the debtors will be punished if they break the rules. Further, China's government prefers to take temporary measures when a debt crisis happens to a group of people. For example, after the Magnitude 7.9 earthquake that powerfully struck Sichuan province, many people lost their property, especially their houses, and became insolvent. The problem was finally solved by temporarily writing off bad debts taken by the China Banking Regulatory Commission. Actually, to some degree, the regimes and measures mentioned above can deal with the problem of the absence of a personal insolvency regime. Still, it cannot entirely replace the personal insolvency regime. Consequently, the existing regimes and measures not only show the need for a personal insolvency regime in China but also can be a sign of changing the 'half bankruptcy law' situation. Further, there are few countries that do not have legislation for personal insolvency.

As China keep being open to the world and becomes more and more active in the international market, Chinese bankruptcy law should, at the same time, be in line with the world. In a word, now 'the conditions are not ready' can not be the excuse for the absence of a personal insolvency regime, and it is time for China to introduce the regime of personal insolvency. In 2020, Shenzhen introduced the Shenzhen Personal Insolvency Regulation, which is now well-implemented.

1.1.2 Literature Review and Key Research Questions

A personal insolvency regime is important to both parties of debts and society. Firstly, Gareth Miller (2004) argued that a personal insolvency regime is not only a means of ensuring fairness between all the creditors but also a way to relieve and protect individuals from creditors' further demands outside the bankruptcy process. Therefore, indebted people can rehabilitate themselves only when they get out of the debt trouble without any more debt demands. However, because of the influence of traditional culture, most Chinese think it is shameful to become bankrupt, and having a fresh start is more complicated than climbing Mount Qomolangma (Qomolangma is the Tibetan name for Mount Everest, the highest mountain on Earth). If the insolvent person in China has a chance to go bankrupt through the legal way, moving on with his life again may be more accessible. Especially nowadays, the credit market is developing rapidly in China.

Chinese researcher Xian-chu Zhang (2003) claimed that China is becoming a new consumer society globally. Also, Thomas H. Jackson (2003) analyses bankruptcy law from the behavioural perspective: consumers' rationality, willpower, and self-interest are bound, the penalty for an indebted person should not be so severe, and they need a fresh start. As more and more Chinese people buy houses and private cars through loans with bounded rationality, bounded willpower, and bounded self-interest, the possibility of bankruptcy may increase if they cannot pay the debt. Consequently, the absence of a personal insolvency regime should no longer exist.

Further, the fresh start of insolvent person and their family is related to the interest of society. Elizabeth Warren and Jay Lawrence Westbrook's (2001) view in their studies that the class middle class in America is important but fragile; the stability of society cannot be ensured without the personal insolvency regime. As for the People's Republic of China, people are the foundation of Chinese society. Similarly, if a personal insolvency regime cannot protect indebted people in China, it might have some adverse effects

on society. Karen Gross (1999) defined bankruptcy as a three-legged stool; the third leg is the community's interests. On the one hand, the interest of the community and society should be considered for bankruptcy, which means one of the aims of personal insolvency law is to balance the interests of debtors, creditors, and society.

On the other hand, the existence of a personal insolvency regime is also in the interest of society. Kenneth Cork (1981) suggested that the primary objective of insolvency law is to support the maintenance of commercial morality. Although English law and Chinese law are different, knowledge of the law is expected. Therefore, introducing a personal insolvency regime in China can be a way to maintain morality instead of breaking society's morality, as some lawmakers and authors are concerned about.

As for creditors, a personal insolvency regime can help them to get a fair repayment in the case of bankruptcy. David Milman (2005) views that the primary rationale of Bankruptcy law is securing and realising the estate. That means creditors can get money back through security and realisation in bankruptcy without being mistreated. Chinese researchers Wanyi Zhao and Da Gao (2014) indicated that compulsory civil execution and high-end consumption limitation can not completely replace the personal insolvency regime. Because the creditor who first files to the court has no duty to give notice to other creditors, the other creditor will miss the execution of the debtor's property and lose the chance to get the appropriate share. It is unfair to both creditors and debtors. An honest debtor will wish to repay the debt fairly to his creditors through a fair legal process.

Further, Jing Liu (2011) argued that unlucky people have no expectable protection from personal insolvency, especially when natural disasters happen because the Chinese government prefers to make temporary policies to deal with debt troubles after natural disasters. Actually, as for creditors, what frustrates them is that the temporary measures taken by the government may not consider their interests

because such temporary measures always favour debtors. SiRMB Cao (1996, as cited in Development of Consumer Credit in China, Xianchu Zhang, 2003), a leading bankruptcy expert in China, views the absence of a personal insolvency regime as violating the fundamental principle of market equality.

However, ten years passed after the Chinese Enterprise Bankruptcy Law 2006 took effect, and some authors kept their enthusiasm about supporting the introduction of the personal insolvency regime in China, the Chinese 'half bankruptcy law' haven been completed. The study of Chinese personal insolvency will never stop, and the development of the Chinese economy will keep moving. Indebted people, creditors of debts and Chinese society in China need the regime of personal insolvency. There had been much tragedy of debt in China, and it should not continue to suffer people who struggle in debt trouble and his family. The previous studies of personal insolvency in China have limitations, including the lack of research on the bankruptcy culture and history in China, two parties of the debts, the interest of society and so on. In this study, with more details, the critical research questions are: How will personal bankruptcy law develop in China? What is the significance of the UK and US leading personal bankruptcy systems? And what can China learn from the history of the UK and US personal bankruptcy systems?

This thesis adopts a doctrinal and comparative research methodology. It aims to explore the future development of personal insolvency in China from historical perspectives, comparative insights, and future directions. It will analyse personal insolvency laws in the United Kingdom, the United States, and the Shenzhen Special Economic Zone. Moreover, there will be a historical examination of the legal development in the UK, the US and China. Doctrinal and comparative research methodology enables a comprehensive assessment of the subject matter of personal insolvency and provides both theoretical base and practical insights.

1.1.3 Thesis Theme

This thesis is structured around a set of recurring substantive themes that guide the comparative analysis of personal insolvency systems in China, the United Kingdom and the United States. These themes serve as analytical lenses through which to explore both the legal frameworks and the broader social, cultural and political contexts in which they operate. Key themes include: (1) the scope and function of discharge mechanisms (2) the balance between debtor rehabilitation and punitive restrictions; (3) the treatment of the debtor's properties, especially debtor's home in personal insolvency proceedings; (4) access to procedures and socio-economic eligibility thresholds; (5) the structure and variety of current debt resolution procedures; (6) the influence of national bankruptcy culture and changing social attitudes towards debt. These themes provide a coherent framework for assessing each jurisdiction's response to personal insolvency and allow for a more integrated comparative analysis in Chapters 3 to 6.

1.3 Methodology

1.3.1 Doctrinal Study

Doctrinal legal research is the main method used by various legal researchers. It involves rigorous analysis and creative synthesis of multiple theories.[1] The doctrinal study in this thesis will focus on the discussion of legislation, legal principles, and other legal frameworks regulating the personal insolvency regime in the UK, the US, and Shenzhen. It mainly includes the legal text analysis, the history of legal development, and a case law review. Firstly, there will be an examination of primary legal texts. It includes code, regulations, etc. The Insolvency Act 1986, the United States Bankruptcy Code and the Shenzhen Personal Insolvency Regulation will be analysed mainly. The key provisions of personal insolvency law and the historical context of the law will be discussed. Secondly, the thesis will research the historical development of these three jurisdictions. It includes how the personal insolvency law in

[1] P Ishwara Bhat, 'Doctrinal Legal Research as a Means of Synthesizing Facts, Thoughts, and Legal Principles' in P Ishwara Bhat (ed), *Idea and Methods of Legal Research* (Oxford University Press 2020) 143 https://doi.org/10.1093/oso/9780199493098.003.0005 accessed 10 March 2022

different jurisdictions developed, cultural influence, and the reforms made in the historical legal development.

A study of historical context can provide a view of the pathway of different legal developments in the UK, the US and China. That is the insights into the ideas behind the exiting legal and practices. Thirdly, the case law review will made in the thesis. By highlighting the court interpretation and judgment made by the court and reviewing the process of personal insolvency procedures, the case law study shows the landscape of personal insolvency practices in the UK, the US and China.

1.3.2 Comparative Study

C. Scott Littleton defines comparative mythology as "the systematic comparison of myths and mythic themes drawn from a wide variety of cultures."[2] In this thesis, besides Shenzhen City, China, the UK and the US were selected. The UK's and US's personal insolvency laws are well-established, and Shenzhen introduced a brand new personal insolvency regulation in 2020, the first of its kind in China. A comparison of personal insolvency regimes in the UK, US, and Shenzhen will be conducted. It will mainly include the discussion of similarities or differences between the personal insolvency procedures in the UK, US and Shenzhen. Also, the position of debtor and creditor in these different jurisdictions will be compared. Further, it involves a comparison of the historical development in different jurisdictions. Finally, it will identify the practices and lessons from the comparative study to look at what China can learn from the UK and the US.

1.3.3 Data Collection and Analysis

The research will use primary legal sources, including regulations, statutes, and judicial decisions from China, Shenzhen, the UK, and the US. It will also use academic literature, policy reports, and books to understand personal insolvency regimes better. Finally, the data will be collected and analysed

[2] C Scott Littleton, 'The New Comparative Mythology' (1970) 29(1) *Western Folklore* 47 https://doi.org/10.2307/1498684

qualitatively. Analysing the data will enable it to identify the trends and patterns of personal insolvency regimes and understand the relationship between legal frameworks and society.

1.3.4 Synthesis of Findings

This will be the final stage of synthesising the findings of both the doctrinal and comparative studies. It includes suggestions and future directions for establishing Chinese personal insolvency regimes.

Using doctrinal and comparative methodology, the thesis aims to contribute to understanding personal insolvency law in China, Shenzhen, the UK, and the US and provide valuable insights into the Chinese legal historical context, comparative lessons, and future possibilities of establishing the first Chinese personal insolvency law.

1.4 Legal Transplantation

1.4.1 A Simple Introduction to Legal Transplantation

Borrowing and transplanting the law or legal institutions from foreign countries is usually a way that is used by a country to improve its own legal system or achieve legal reform. However, it must be accepted that not all legal transplantation would be successful in a certain and different cultural environment. In other words, the legal transplantation would not take place in a cultural vacuum.[3] Pierre Legrand argues against legal transplanting by asking, “How could law travel if it was not segregated from society?” and emphasising that law is a culturally situated phenomenon.[4]

However, many examples could prove the success of transplanting foreign law to another country. The point that should be considered is how to modify foreign law and adjust it to a certain cultural context. Here, it refers to “indigenisation”, similar to “localisation”. Things imported from other countries need a

[3] Jaakko Husa, ‘Developing Legal System, Legal Transplants, and Path Dependence: Reflections on the Rule of Law' (2018) 6(2) *Chinese Journal of Comparative Law* 129

[4] Pierre Legrand, 'The Impossibility of "Legal Transplants"' (1997) 4(2) *Maastricht Journal of European and Comparative Law* 111

process of localization so that they will be able to be suitable. Such a process may include complex ways "in which local forms of knowledge and organization are constantly being reworked in interaction with changing external conditions".[5]

In this context, the culture, such as legal culture and tradition, is not the only point to consider when thinking about legal transplantation. Thus, the connection between legal transplantation and indigenization is that successful legal transplantation depends on successful indigenization. Also, there is an interesting and convincing idea that legal transplantation is a broadly lawmaking activity. Actually, legal transplanting would always take place in circumstances when legislation is absent in a legal system. Legal transplantation will be the main way to introduce personal insolvency law in China. With the change in the policy of Chinese personal insolvency, it is worth discussing how China can successfully transplant the personal insolvency regime from other jurisdictions. Making the foreign law fit the local culture and economy is one of the most significant challenges. However, it has to be noted that the Chinese culture, with thousands of years, is not fixed. It develops with the nation's growth and is good at learning the essence of other cultures. The great changes over the past 80 years in New China are the evidence. Here, I will give the example of the 1986 Enterprises Bankruptcy law (Trial) of the People's Republic of China and discuss the lessons.

1.4.2 Learning from the 1986 Enterprises Bankruptcy Law (Trial) of the People's Republic of China

After the Third Plenary Session in 1978, the NPC Standing Committee started to clean up 81% of the legislation made before 1978, which included more than 100 invalid pieces of legislation. In this way, fewer legal materials could be used in China at that time. The development of the economy and society called for a change of such a situation and ending the lack of sufficient legislation to regulate the society.

[5] Henrietta L Moore, *The Future of Anthropological Knowledge* (Routledge 1996)

In such circumstances, legal transplantation was the best way for China to be fresh and build her own legal system quickly. Since then, China lawmakers have transplanted regimes and regulations from other countries. For instance, when amending criminal law in 1997, it referred to several related foreign law by changing the name of counter-revolutionary crime to the crime of endangering national security. Also, it borrowed a new crime of holding a huge amount of property with unidentified sources from the Ethics Reform Act of 1989 in the USA.

It is known that China has its own long history and legal tradition of criminal law, which means that during the transplanting of criminal law, the lawmaker could grasp the scale, for example, to what degree the provisions could be amended and added. Similarly, until today, China is still a country that maintains the death penalty in the criminal law, as it had been an old tradition of the death penalty the period of ancient China, and the lawmakers understand that most of the Chinese people would not accept the cancellation of dead penalty though nowadays many people are talking about human right. That is why Chinese criminal law is always moving in the right direction and developing rapidly. However, not all the transplanting activities in China went well. The 1986 Enterprises Bankruptcy Law (Trial) of the People's Republic of China could be an example of failure, as well as legal irritants. Coincidentally, the first Chinese bankruptcy law made in the late Qing Dynasty also failed in the inappropriate legal transplantation from Japan and the unsuitable feudal society.[6]

As the development of the reform of its economic system in 1984, the Chinese government and scholars started to pay attention to the enterprise bankruptcy law. That provided an opportunity for enterprise bankruptcy law to be made in China. The Technical Research Center of the State Council drafted a plan for enterprise bankruptcy legislation in September 1984, and then a researcher at the

[6] 张晋藩 (Zhang Jinfan), '综论中国法制的近代化' (A Comprehensive Study on the Modernization of Chinese Legal System) (2004) *政法论坛* (Tribune of Political Science and Law)

Technical Research Center, SiRMB Cao, published his article about legal measures for enhancing vitality in enterprises and attached a draft of enterprise bankruptcy law. This draft largely introduced the enterprise's bankruptcy law to the public and promoted real legislation. In 1986, the first enterprise bankruptcy law of New China was made in a short time. Obviously, this new law did come with a high exception. However, the result was disappointing. According to Article 2 of the Enterprises Bankruptcy Law 1984, the law only applies to the enterprises owned by all people.[7] The reality is that, in the 1980s, nearly all the enterprises were owned by all people, in other words, owned by the Chinese government. Such enterprises had common character, most of them are large enterprises with a large number of workers who were no longer young and had no special skills. However, the inevitable question is, without a good social security system, once a large enterprise goes bankrupt, how do these workers make a living after losing their jobs? To avoid the problem that will influence the stability of society, Article 3 of the Enterprises Bankruptcy.

Law 1984 provided that Public utilities and enterprises that have a major bearing on the national economy and people's livelihood should not declare bankruptcy, and such enterprises shall be subsidized by relevant government departments or other measures to pay off debts.[8] Here it did simply modify the transplanted provisions, but could never change the situation actually. Under the law, a dying enterprise could get help from the government again and again, and continue to make nothing to the national economy. Chinese scholar Su Li argued that the Enterprises Bankruptcy law 1984 did not reduce but increase the transaction cost.[9] In fact, what needed to be changed and improved is how the government and the local take measures to deal with the issue of unemployment, for example, to build a good social security system.

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[7] Article 2, *Enterprises Bankruptcy Law (Trial)* 1986 (People's Republic of China)

[8] Article 3, *Enterprises Bankruptcy Law (Trial)* 1986 (People's Republic of China)

[9] 朱苏力 (Zhu Suli), *法治及其本土资源* (The Rule of Law and Its Indigenous Resources) (China University of Politics and Law Press 1997)

Moreover, some enterprises tried to make use of the enterprise bankruptcy law to get rid of their debts. These enterprises first secretly transferred the young workers and facilities to a new enterprise, then declared bankruptcy of the old one without making any repayment.[10] It is interesting to find that today, Chinese lawmakers are still concerned about such an issue when considering whether it is appropriate to make a personal insolvency law in China. Fortunately, the government realized the problem and limit the enterprises' bankruptcy by encouraging mergers and acquisitions to save an insolvent enterprise. However, it was not easy for an enterprise to get investment. Moreover, after mergers and acquisitions, the management would be changed, the old manager would be replaced, the enterprise would lose its own right to run the business. At the same, the old staffs would be dismissed. Though the government set several limitations, some enterprises still tried to seek private gain through the back door.[11]

Obviously, the trial implementation is massive due to the inappropriate legal transplantations without considering more about the reality and supporting facilities, especially at the beginning of the reform of the economic system. The 1986 Enterprises Bankruptcy Law (Trial) of the People's Republic of China was finally replaced by the new Enterprises Bankruptcy Law of the People's Republic of China in 2006. Here, it has to be admitted that the lawmakers of the Enterprises Bankruptcy Law 1986 are brave, though the transplanting was unsuccessful. Today, when talking about the legislation of personal insolvency, it is likely to be hopeful but also hopeless. The Chinese economy and society are developing differently and rapidly, as well as the Chinese legislative technique. Also, the public

[10] 任强 (Ren Qiang), '*法律思想的形成*' (The Formation of Legal Thought) (2006) 1 *政法论坛* (Tribune of Political Science and Law)
[11] Ibid

acceptance of new things has increased. The situation is much better than that in the 1980s, but why are lawmakers no longer brave? The need for Chinese personal insolvency law seems to be clearer.

Chapter 2 Personal Insolvency Context

2.1 The Worldwide Growth of House Debt

2.1.1 Household Debt and Living Costs Rises in China

The trend of rising household debt and living costs in China has been significant in recent years. Specific data indicate that households are facing increasing financial pressure in economic activities. Since 2008, China's household debt levels have rapidly climbed, with total resident loan growth reaching 40% between 2009 and 2010. According to the latest data, by March 2024, China's household debt-to-GDP ratio has risen to 62.6%, surpassing the 60% risk threshold set by the Bank for International Settlements.[12] By January 2024, household debt in China had surpassed $11 trillion, marking a 50% increase over five years. There were 8.3 million documented defaulters, accounting for 1% of the country's labour force. This significant rise in debt, coupled with the growing number of defaulters, highlights the increasing financial pressures on Chinese households.[13]

Housing loans have been the primary driver of household debt growth in China. As the real estate market has boomed in recent years, more and more families have purchased homes through mortgages. Data shows that from 2015 to 2022, the balance of medium- and long-term loans increased from 18.12 trillion

[12] Trading Economics, 'Households Debt to GDP by Country' https://tradingeconomics.com/country-list/households-debt-to-gdp accessed 19 August 2023, also see Marco Lombardi, Madhusudan Mohanty and Ilhyock Shim, *The Real Effects of Household Debt in the Short and Long Run*, BIS Working Papers No 607 (Monetary and Economic Department 2017)

[13] NetEase, '是谁偷走我们的钱？中国家庭债务超 11 万亿美元，较五年前增加 50%' (26 February 2021) https://www.163.com/dy/article/J0O6H7N10553L4MG.html accessed 10 August 2022

RMB to 56.53 trillion RMB, a growth of 211.99%.[14] In 2022, medium- and long-term loans accounted for 75.45% of total household loans, reflecting that most household debt is related to home purchases.[15] This trend has led the Chinese real estate market to rely on household credit expansion, and the repayment pressure from high debt levels poses a long-term burden for many families.

Against this backdrop, the continuous rise in housing prices has significantly increased the cost of home purchases for families, driving up household leverage ratios. For example, in large cities, many families allocate a substantial portion of their income to down payments and monthly mortgage payments. If housing prices were to fall or the economic environment worsens, this high-leverage risk could lead to widespread defaults and financial instability.

In addition to housing loans, the expansion of consumer credit has significantly contributed to the growth of household debt. In 2024, the total consumer credit in China reached RMB 559.606 billion, reflecting that an increasing number of families are relying on loans to sustain their daily expenses.[16] Particularly, there has been a noticeable rise in credit demand for healthcare, education, and transportation. The rising living costs have also directly impacted household financial conditions. In 2023, the per capita consumption expenditure of residents nationwide reached RMB 26,796, a year-on-year increase of 9.2%. Specifically, essential expenditures on food, housing, education, and healthcare accounted for a significant portion of total household spending. In 2023, the national per capita spending on food, alcohol, and tobacco reached RMB 7,983, making up 29.8% of total consumption. Per capita housing expenses were RMB 6,095, accounting for 22.7%. Per capita transportation and communication expenses reached

[14] 祝玉浩 (Zhu Yuhao), '家庭负债与家庭消费的辩证关系研究' (A Study on the Dialectical Relationship Between Household Debt and Household Consumption) (2023) (34) *Zhongguo Jiti Jingji*.

[15] Ibid

[16] Trading Economics, 'Households Debt to GDP by Country' https://tradingeconomics.com/country-list/households-debt-to-gdp accessed 19 August 2023

RMB 3,652, with a sharp increase of 14.3%, while per capita healthcare spending was RMB 2,460, reflecting a 16.0% growth.[17]

The rise in living costs, especially in urban areas, has further increased the economic burden on households. Although the increase in loans has supported consumption in the short term, the financial pressure from high debt is undermining families' confidence in the future economy. In June 2024, China's consumer confidence index was only 86, well below the optimistic threshold of 100.[18] In the early 2000s, China's consumer confidence index consistently remained above 90, reflecting a generally optimistic outlook among residents regarding their consumption and economic prospects during that period. This suggests that an increasing number of households are feeling uncertain and anxious about their future income and the economic environment. The dual pressure of high debt and rising living costs is weakening consumers' willingness to spend. As a result, they are more inclined to cut unnecessary expenses, allocating their income towards savings or repaying loans.

Moreover, data from the China Household Wealth Index Survey Report indicates that in 2021, there was a significant divergence in wealth, income, and job stability across different income groups.[19] High- and middle-income families saw continued increases in wealth and income, with households earning between 100,000 to 300,000 RMB performing particularly well. Their job stability also remained relatively strong.[20] However, low-income households experienced slower growth in wealth and income, and although there was some improvement, they remained below the baseline, and job stability had not fully

[17] Ibid
[18] Ibid
[19] 中国家庭金融调查与研究中心, '疫情后时代中国家庭的财富变动趋势: 中国家庭财富指数调研报告(2021Q2)' (*The Post-Pandemic Trend of Chinese Household Wealth: China Household Wealth Index Research Report (2021Q2)*) https://chfs.swufe.edu.cn/info/1321/2671.htm accessed 10 August 2024
[20] Ibid

recovered.[21] This suggests that despite the gradual economic recovery, low-income families continue to face significant financial and employment pressure. The rich are getting richer, while the poor are getting poorer.[22]

What is worth mentioning is that, from a macroeconomic perspective, as the ratio of household debt to GDP rises, the financial risks facing China are also increasing. The Bank for International Settlements has pointed out that when household debt exceeds 60% of GDP, long-term consumption may be suppressed, thereby impacting economic growth. China's household debt has already surpassed this warning threshold, with fluctuations in the housing market particularly likely to trigger the "grey rhino" risk. If real estate prices experience significant volatility, many households may struggle to repay their loans on time, potentially setting off a chain reaction that could destabilise the financial system.

In terms of China's entrepreneurial environment, data from the State Administration for Market Regulation shows that over 9 million new enterprises were established in 2021, reflecting a 4% year-on-year growth. From 2013 to 2021, new market entities increased by 155.2%, with the number of new enterprises growing by 261.6%, bringing the total number of market entities nationwide to 154 million, including over 100 million self-employed individuals. Most entrepreneurs have limited startup capital, with 69.2% having less than 100,000 RMB. Most funding gaps are below 200,000 RMB, and 56.4% of entrepreneurs face funding gaps under 50,000 RMB.[23] Moreover, the sources of startup capital are relatively limited, with 75% coming from personal or family savings, 14.4% from loans borrowed from friends and relatives, and only 10.6% raised through venture capital firms or other financing channels.[24]

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[21] 中国家庭金融调查与研究中心, '2024 年中国家庭财富指数调研报告' (2024 China Household Wealth Index Research Report) https://chfs.swufe.edu.cn/info/1321/3701.htm accessed 10 August 2024

[22] Institute of Economic Affairs, 'The Rich Get Richer and the Poor Get... Richer' (IEA, 2021) https://iea.org.uk/blog/the-rich-get-richer-and-the-poor-get-richer accessed 10 August 2024

[23] 中国青年创业就业基金会 (*China Youth Entrepreneurship and Employment Foundation*), '2022 *中国青年创业发展报告*' (*2022 China Youth Entrepreneurship Development Report*) http://www.yee.org.cn/qywtzgg/202302/P020230216391280142325.pdf accessed 10 July 2023

[24] Ibid

Regarding financing methods, bank loans and equity partnerships are the most common, accounting for 47.2% and 37.6%, respectively. Pawnshop collateral and loan guarantees are less frequently used, reflecting the limited assets of entrepreneurs, who tend to rely more on partners to share risks.[25] The large size of the entrepreneurial group combined with the limited funding sources, means that business failures could potentially drag many entrepreneurs and their families into debt traps. The reliance on personal savings, family loans, and narrow financing channels leaves many vulnerable to financial instability if their ventures are not succeed.

In conclusion, the quick rise in household debt and living costs in China over the past decade presents significant challenges for the nation's economic stability and household financial security. Also, housing loans rise rapidly. It is driven by the booming real estate market, has made mortgages the primary component of household debt. Many families are allowed to purchase homes. However, it has also created a long-term repayment burden that threatens financial stability. The consequence will be more serious in the case of the housing prices decline or economic environment gets worse. Additionally, the rise in consumer credit for daily expenses and the costs for essential services, such as healthcare, education, and transportation, has aggravated financial pressures on households. That will lead to growing concerns about debt sustainability.

The widening gap between high-income and low-income households underlines the growing economic inequalities. The wealthier families continue to increase their assets while lower-income groups keep struggling with debt and job instability. Such a divergence and the declining consumer confidence reflect an increasingly anxious public. Because the public is confused about future income prospects and economic conditions. From a macroeconomic perspective, China's household debt levels surpass the

[25] Ibid

BIS's risk threshold, raising concerns about long-term consumption suppression and potential risks to financial stability, particularly if the real estate market experiences significant volatility. Entrepreneurs' reliance on personal savings and family loans for business ventures adds another layer of financial vulnerability, as many face limited financing options and a high risk of failure, potentially dragging families into debt traps.

Overall, while expanding household credit has fueled short-term consumption, the long-term implications of high debt levels and rising costs pose significant risks to economic growth and household financial security.

2.1.2 Household Debt in U.S.

Household debt in the United States has continued to grow over the past few years, especially during the post-pandemic economic recovery. According to data from the Federal Reserve Bank of New York, as of the second quarter of 2023, the total household debt in the United States had reached a record high of 16.51 trillion U.S. dollars.[26] The increase in household debt is mainly concentrated in the three major areas of mortgages, credit card debt, and student loans. Mortgage debt accounts for the largest proportion, reaching 11.67 trillion U.S. dollars.[27] This debt growth results from a combination of economic factors, including rapidly rising housing prices, rising income inequality and changes in the overall economic environment.

2.1.2.1 Rising Mortgage debt

The sharp rise in mortgage debt is closely linked to the rapid rise in US housing prices. During the pandemic, the Federal Reserve implemented an extremely low interest rate policy, which significantly reduced the cost of home purchases, prompting many families to seize the opportunity to buy a home.

[26] Federal Reserve Bank of New York, *Quarterly Report on Household Debt and Credit, Q2 2023* (2023) https://www.newyorkfed.org/microeconomics/hhdc accessed 1 August 2023

[27] Ibid

Meanwhile, the imbalance between supply and demand in the housing market has led to continued price increases. According to Zillow, the median home price in the United States rose by nearly 30% from 2020 to 2022.[28] Although demand for home purchases fell as interest rates began to rise in late 2022, those who have already purchased homes are carrying heavy mortgage debt. For many homebuyers, while rising home prices mean their property values have increased, they have also increased their monthly payments and long-term debt burdens.

2.1.2.2 Income iIequality and Debt Expansion

Rising income inequality has indirectly contributed to the growth of household debt. A study by Coibion et al. found that between 2001 and 2012, low-income households in areas with high-income inequality in the United States had greater difficulty obtaining bank loans.[29] This trend forced these households to meet their financial needs through credit products with higher interest rates.[30] Banks in these areas have become more conservative in lending to low-income households, further widening the gap between the rich and the poor.[31] Without access to formal credit, low-income households are forced to rely on high-interest instruments such as credit cards to maintain their daily lives, exacerbating their debt burden.

It is worth noting that the increase in income and wealth inequality not only impacted the growth of household debt but also laid the groundwork for the 2008 financial crisis. Many studies have shown that the widening gap between the rich and the poor has led to low-income households having to take on more debt, while the rich have further increased the wealth gap through the appreciation of financial assets. This imbalance ultimately made the US financial system more fragile.

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[28] Zillow, 'Housing Market Showed Signs of Life in January, as Buyers Began to Compete Over Still-Scarce Listings' (January 2023 Market Report) https://www.zillow.com/research/january-2023-market-report-32172/ accessed 12 August 2023

[29] Olivier Coibion, Yuriy Gorodnichenko, Marianna Kudlyak, and John Mondragon, 'Does Greater Inequality Lead to More Household Borrowing? New Evidence from Household Data' (2017) Federal Reserve Bank of Minneapolis Working Paper 17-04

[30] Ibid

[31] Ibid

2.1.2.3 The Relation between Housing Price Change and Household Debt

The impact of housing price fluctuations on household debt should not be overlooked. During the global financial crisis, housing prices in the US fell sharply, which helped somewhat to reduce household debt as a percentage of GDP. In the years following the financial crisis, the decline in housing prices led to a reduction in the overall leverage of American households.[32] While the ratio of household debt to income in the US has remained relatively stable despite the decline in house prices, this does not mean that the household debt problem has been resolved.

2.1.2.4 Credit Card Debt and Inflationary Pressures

In addition to mortgage debt, US households have also seen a significant increase in credit card debt. As inflation rises and the cost of living continues to increase, more and more households are forced to rely on credit cards to pay for daily expenses. The credit card debt reached a record high of US$1.03 trillion by the second quarter of 2023.[33] In an environment of high inflation, the rising cost of basic living expenses such as food, fuel and housing has forced consumers to use credit cards to cope with emergency expenses. As credit card interest rates are usually high, many families face increasing interest expenses, which also increases their financial pressure.

2.1.2.5 Student Loan Problems Remain Severe

Student loans are another major component of American household debt, and despite certain relief policies implemented by the government, the total amount of student loans remains high. As of 2023, the total amount of student loans in the United States is still as high as 1.6 trillion U.S. dollars.34 Although some of the Biden administration's relief policies have eased the financial pressure on some families in

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[32] International Monetary Fund, *Global Financial Stability Report October 2017: Is Growth at Risk?* (IMF 2017) https://www.imf.org/en/Publications/GFSR/Issues/2017/09/27/global-financial-stability-report-october-2017 accessed 12 May 2020

[33] 'Business Economies Across the World Have Racked Up Liabilities – Now, the Bills Are Starting to Arrive' (The Hankyoreh, 7 September 2021) https://english.hani.co.kr/arti/english_edition/e_business/1104278 accessed 12 January 2021

[34] Council on Foreign Relations, 'Is Rising Student Debt Harming the U.S. Economy?' (CFR, 10 August 2023) https://www.cfr.org/backgrounder/us-student-loan-debt-trends-economic-impact accessed 12 August 2023

the short term, many student loan borrowers will face greater financial pressure as the grace period for loan repayment ends, especially in the current uncertain economic outlook and increase.

2.1.3 UK Household Debt

From the late 1990s to the 2008 financial crisis, household debt in the UK experienced significant growth, reflecting the profound impact of macroeconomic conditions and policy changes on household finances. During this period, household debt as a percentage of income rose sharply from 85% in 1996 to 156% at the time of the 2008 financial crisis.[35] Rising house prices and increased demand for mortgages were the main drivers of this growth. However, during the economic downturn in 2008/09, banks reduced lending, and consumers became more cautious, gradually causing the household debt-to-income ratio to decline to 128% by the end of 2015.[36] After the financial crisis, despite declining debt levels, the household debt-to-income ratio has risen again since 2016, reaching a peak of 136% in 2017.[37]

With the outbreak of the coronavirus pandemic, the structure of household debt has changed significantly. During the pandemic, unsecured debt decreased due to reduced consumer spending and lockdown measures.[38] However, mortgage demand increased rapidly, driven by stamp duty relief measures. Between March 2020 and May 2021, household unsecured debt fell sharply month-on-month, while mortgage debt increased sharply over the same period and reached its highest year-on-year growth rate in June 2021.[39] From the second quarter of 2022, as interest rates rise, the debt-to-income ratio begins

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[35] House of Commons Library, 'Household Debt: Key Economic Indicators' (Research Briefing, 30 September 2024) https://commonslibrary.parliament.uk/research-briefings/sn02885/ accessed Council on Foreign Relations, 'Is Rising Student Debt Harming the U.S. Economy?' (CFR, 10 August 2023) https://www.cfr.org/backgrounder/us-student-loan-debt-trends-economic-impact accessed 12 August 2023

[35] House of Commons Library, 'Household Debt: Key Economic Indicators' (Research Briefing, 30 September 2024) https://commonslibrary.parliament.uk/research-briefings/sn02885/ accessed 30 September 2024

[36] ibid

[37] ibid

[38] Bank of England, 'Mortgage Lenders and Administrators Statistics - 2021 Q4' (2021) https://www.bankofengland.co.uk/statistics/mortgage-lenders-and-administrators/2021/2021-q4 accessed 10 June 2022

[39] House of Commons Library, 'Household Debt: Key Economic Indicators' (Research Briefing, 30 September 2024) https://commonslibrary.parliament.uk/research-briefings/sn02885/ accessed 30 September 2024

to decline gradually, falling to 124% by the fourth quarter of 2023.40 The UK's debt problem is not limited to mortgages. In July 2024, the total consumer credit in the UK reached £121.5 billion, reflecting the increasing financial pressure on households due to rising living costs.41 According to the Joseph Rowntree Foundation, 20% of low-income households borrowed or used their credit cards to pay for rent, energy and council tax in the past two years in May 2023.42 In addition, the FCA report pointed out that the number of UK adults with low financial resilience has increased significantly, from 10.7 million to 14.2 million during the pandemic, further exacerbating the debt burden on households.[43] Insufficient savings is a critical component of the UK household debt problem. Research by the Resolution Foundation shows that 41% of households did not have enough savings to cover a month's living expenses in 2020, making these households more likely to fall into debt distress in the face of unexpected financial events.[44] For low-income households, the dual pressure of debt burdens and rising living costs means that they are more reliant on unsecured loans and credit card debt, and the economic vulnerability of this group also makes them more likely to fall into a long-term debt cycle.

Insufficient savings is a key component of the UK household debt problem. Research by the Resolution Foundation shows that 41% of households did not have enough savings to cover a month's living expenses in 2020, making these households more likely to fall into debt distress in the face of unexpected financial

[40] Office for National Statistics, *UK Spending on Credit and Debit Cards* (2024) https://www.ons.gov.uk/economy/economicoutputandproductivity/output/datasets/ukspendingoncreditanddebitcards accessed 13 March 2024

[41] Ibid

[42] Joseph Rowntree Foundation, 'Cost of Living Tracker' (2023) < https://www.jrf.org.uk/cost-of-living/unable-to-escape-persistent-hardship-jrfs-cost-of-living-tracker-summer-2023 > accessed 2 September 2023

[43] Financial Conduct Authority, 'Financial Lives 2020 Survey: The Impact of Coronavirus' (FCA, 2020) https://www.fca.org.uk/publications/financial-lives/financial-lives-2020-survey-impact-coronavirus accessed 2 September 2023

[44] Resolution Foundation, 'UK Household Wealth Report' (2022) <https://www.resolutionfoundation.org/publications/wealth-check/#:~:text=British%20household%20wealth%20has%20been,wealth%20is%20unearned%20passive%20gains. L> accessed 2 September 2023

events.[45] For low-income households, the dual pressure of debt burdens and rising living costs means that they are more reliant on unsecured loans and credit card debt, and the economic vulnerability of this group also makes them more likely to fall into a long-term debt cycle.

The economic impact of household debt is complex and multifaceted. In the short term, moderate household debt can help support consumer spending and promote economic growth. However, excessive debt accumulation can lead to long-term financial instability and economic growth slowdown. Household debt problems can exacerbate the severity of economic crises, especially when the macroeconomy faces shocks.

First, the growth of household debt can drive economic growth by increasing personal consumption power. Loans enable households to continue to consume despite limited income, especially in the areas of major consumer goods such as housing, cars, and education. This not only maintains the family's quality of life but also stimulates production, employment and tax revenue. However, once household debt increases beyond a reasonable level, it can lead to a heavy debt repayment burden, which causes households to reduce future consumption expenditures. This situation will suppress economic growth in the long term, especially when households spend most of their income on debt repayment, their consumption power decreases significantly, which in turn drags down the overall economy.

High levels of household debt can also increase the vulnerability of the financial system. Large-scale debt defaults can pose significant risks to banks and other financial institutions, affecting their lending capacity and ultimately leading to a credit crunch.[46] A credit crunch not only affects the financing channels of households and businesses but also inhibits investment and consumption, weakening

[45] Ibid

[46] Röhn O and others, 'Economic Resilience: A New Set of Vulnerability Indicators for OECD Countries' (2015) OECD Economics Department Working Papers No 1249, OECD Publishing, Paris

economic vitality. For example, the 2008 global financial crisis was partly rooted in the excessive expansion of household debt in the United States, which ultimately led to the collapse of the financial system and a deep global recession.

Against this background, the importance of personal bankruptcy systems becomes particularly apparent. Personal bankruptcy systems not only provide a legal way for households that have become over-indebted and unable to repay their debts to restructure their finances but also mitigate the negative impact of debt crises on the economy at a broader level. Bankruptcy systems are essential for maintaining economic stability by helping individuals and households to clear their debts and reschedule their repayments so that they can resume consumption and economic participation as soon as possible.

First, personal bankruptcy systems provide households with a means of financial relief. When households are overburdened with debt, personal bankruptcy systems allow debtors to resolve their debt problems by liquidating assets or rescheduling payments. This mechanism not only relieves debtors of long-term pressure but also allows them to regain financial freedom after a certain period of time, thereby restoring their ability to consume.[47] This has a positive effect on the economy because as more households are relieved of their heavy debt burdens, they can re-engage in consumption and investment, injecting vitality into economic recovery.

Second, personal bankruptcy systems help stabilise the financial system by reducing non-performing loans. Banks and other financial institutions face increased risk when household debt reaches unsustainable levels. If large amounts of household debt cannot be repaid, the balance sheets of financial institutions will be impacted, leading to increased risk in the banking system. An effective personal

[47] André C, 'Household Debt in OECD Countries: Stylised Facts and Policy Issues' (2016) OECD Economics Department Working Papers No 1277, OECD Publishing, Paris

bankruptcy system can help financial institutions quickly dispose of these non-performing assets, thereby avoiding the collapse of the financial system and ensuring the normal functioning of the credit market.

In addition, personal bankruptcy systems play an essential role in promoting social justice. They provide a fair solution for families who have fallen into difficulties due to economic crises or personal financial problems and prevent them from being economically marginalized for a long time due to debt problems. Personal bankruptcy systems provide an important economic safety net for families, especially in times of increased economic uncertainty, such as global economic downturns and unstable job markets.[48]

Finally, personal bankruptcy systems help prevent the outbreak of systemic financial crises. When household debt is too high, and there is no bankruptcy system to alleviate it, the economy may fall into a vicious cycle. Households' inability to repay debt leads to a credit crunch, which in turn triggers business closures, rising unemployment and, ultimately, economic contraction. The existence of a bankruptcy system provides a buffer against this chain reaction and helps prevent debt problems from spreading throughout the economy.

Although household debt can boost economic growth in the short term, its long-term accumulation may pose systemic risks and even trigger an economic crisis. In this context, a personal bankruptcy system is essential. It not only provides financial relief for over-indebted households but also maintains long-term economic stability by mitigating the impact of debt on the financial system and the economy. Therefore, a sound and practical personal bankruptcy system should be an essential policy tool for addressing household debt problems.

[48] Röhn O and others, 'Economic Resilience: A New Set of Vulnerability Indicators for OECD Countries' (2015) OECD Economics Department Working Papers No 1249, OECD Publishing, Paris

In conclusion, household debt growth is global, and household debt growth in China is relatively more significant. The 2023 McKinsey China Consumer Report shows that China's middle class is proliferating, with double-digit growth in middle- and high-income households, becoming the main driving force behind consumption growth. Moreover, the overall sentiment of Chinese consumers is more optimistic than that of consumers in developed countries.[49] This means that China's consumer concept is changing as a country with a high savings rate. However, this does not affect the fact that low-income people are always pessimistic consumers in China. From the perspective of personal bankruptcy, the personal bankruptcy law is a system that provides a bottom line for individuals' socio-economic activities, that is, the last resort for excessive debt. The above discusses the impact of household debt on macroeconomic development. The importance of the personal bankruptcy system lies in the fact that a well-functioning debt relief procedure can contribute to the stability of economic development.

Rising household debt levels in China significantly impact individual financial stability and overall economic resilience, primarily due to increasing housing costs and consumer credit requirements. As a result of the increasing debts, living costs have increased, particularly in less expensive places like travel and education. Because home debt-to-PIB levels exceed risk levels, frequent defaults, especially in the event of economic recessions or real estate market fluctuations, pose a significant risk to China's economy Relatively speaking, China's position resembles those in several areas like the United States and the United Kingdom, where a combination of student loans, credit card debt, and obligations often causes surging household debt. However, China's particular political and economic environment, which is characterized by strong urbanization, a rising middle class, and economic disparities between revenue parties, brings up household debt problems in particular. Low-income people in China are especially

[49] 麦肯锡, '2023 年麦肯锡中国消费者报告' (2022) https://www.mckinsey.com.cn/wp-content/uploads/2022/12/20221208_China-consumer-report-CN.pdf accessed 30 September 2024

vulnerable because they struggle with job uncertainty and payment responsibilities while wealthier people continue to accumulate homes, which is worsened by rising economic injustice.

The assessment emphasizes the critical importance of developing a solid personal bankruptcy strategy in China to minimize the risks of excessive household debt. By reducing non-performing loans and preventing frequent financial problems, a well-functioning personal insolvency regime would satisfy over-obligated people and help stabilize the economy. The software may restore consumer trust and encourage long-term economic growth by letting debtors regain control of their income and re-enter the company.

In more common sense, household debt encourages economic growth and quick-term rise, but increased loan concentration stifles development and undermines financial stability. Full legal protections and debt relief mechanisms will be necessary to lessen the risks posed by extraordinary household debt amounts and maintain concerned economic development as China's insolvency regime continues to evolve.

In a comparative context involving China, the United Kingdom (UK), and the United States (US), unitary or separationism is frequently discussed. Because they represent fundamentally different ways of structuring debt rules, these two methods considerably affect constitutional persistence, operational reliability, and socio-cultural characteristics. Because it is feasible for China to adopt a global private insolvency regime, it is crucial to understand the possible paths to change through the numerical evaluation of these two political patterns.

2.2 Attitude toward Personal Insolvency law in China changed

2.2.1 Current Situation of Personal insolvency Law in China: Has been Absent for more than 70 years

2.2.1.1 Have been in High Profile for Three Times since 2002: Call on Personal Insolvency Law

By 2019, the legislation of bankruptcy law in China has been absent for 70 years.[50] However, for several times, the personal insolvency law's legislation has become a hot social topic and was called on by the deputies of the National People's Congress (NPC deputy), scholars and people.[51] According to the statistics provided by the leading Chinese academic website National Knowledge Infrastructure (CNKI), academic attention and media attention on personal insolvency have experienced increases and decreases three times since 2002. Firstly, in the period between 2002 and 2004, then reduced in 2005 and 2006.[52] Before 2006, the discussion and drafting of the new Chinese insolvency law triggered a debate about whether the personal insolvency law should be included in the new Chinese insolvency law. However, the new Corporate Insolvency Law of the People's Republic of China 2006 was passed and published, which means the government's decision excluded the personal insolvency law. Obviously, after that, the personal insolvency started to keep a low profile.

Secondly, in 2008, academic attention and media attention respectively increased by 118% and 169%.[53] On 12th May 2008, Wenchuan 8.0 earthquake not only took millions of people's lives but

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[50] On 22nd February 1949, it was ordered to repeal all legislation made by the Nanjing national government in the liberated areas by the Communist Party of China. Following this, mainland China did not have an insolvency law until 1986, when the *Corporate Insolvency Law 1986* was enacted. However, Personal Insolvency law was excluded when drafting the new *Chinese Insolvency Law 2006*

[51] In recent years, the introduction of a Personal Insolvency law has been proposed by NPC deputies at every annual National People's Congress. For example, in 2016, Wu Xiaolin, an NPC deputy and former deputy president of the People's Bank of China, proposed Personal Insolvency legislation. Similarly, in 2017, Li Yang, Chairman of the National Institution for Finance & Development (NIFD), called for Personal Insolvency legislation at the 2017 National People's Congress.

[52] 'Figures on Personal Bankruptcy' http://nvsm.cnki.net/KNS/brief/Default_Result.aspx?code=CIDX&kw=个人破产&korder=&sel=1 accessed 30 September 2020

[53] Figures available at: http://nvsm.cnki.net/KNS/brief/Default_Result.aspx?code=CIDX&kw=个人破产&korder=&sel=1 From 2007 to 2009, the US subprime mortgage crisis (financial crisis), caused a rapid increasing of consumer bankruptcies. The total bankruptcy filling (includes business filling and non-business filling) in 2007 U.S. bankruptcies soared 38 percent in 2007, further in 2008, the number of consumer filling(includes Chapter 7 and Chapter 13 fill) totally rose to 1 million(653,319 Chapter 7 filling and 350,015 filling). It seems that the Personal Insolvency law became more popular in the period between 2007 and 2008

also destroyed most of the people's homes and properties, which caused a great property loss and serious debt problem.[54] After such a destructive earthquake, earthquake victims could lose everything and face insolvency, as the apartment or house they live in could always be the only property they own. If they had used to save most of their cash at home, the cash would have been destroyed by the earthquake as well. Moreover, as the credit market developed rapidly, most of the urban housing was brought through mortgage finance. In other words, after the earthquake, there would be nothing for people to pay the debt to their creditor, the bank. Even if a person had more than one apartment in the disaster area, he or she could lose all of them for once. Therefore, because of the absence of Chinese personal insolvency law, the question of how to deal with the issue of bad debt problems caused by natural disasters and the need for personal insolvency in China were discussed warmly.

However, though the society paid high attention to the legislation of personal insolvency law, it did not strengthen the Chinese government's determination to make a personal insolvency law. In other words, when facing the absence of law, the Chinese government prefers to use government documents to solve emergencies. In order to deal with the bad debt that appeared in the Wenchuan 8.0 earthquake, the government took measures that required the bank to cancel the victims' bad debt in certain circumstances.[55] That could be the legal preference of the Chinese government. Thirdly, after 2008, the figures decreased again, and they remained stable, which did not increase until the years 2015 and 2016.[56] In 2016, an intentional injury case that involved usury and debt collection by violence shocked the whole of Chinese society.

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[54] The Figures Show That the Loss of Housing Account for 27.4% of the Total Loss Building' (Sina Finance, 12 May 2009) http://finance.sina.com.cn/roll/20090512/09032835113.shtml accessed 30 March 2020

[55] The CBRC calls for conscientiously writing off bad debts of banks in Wenchuan earthquake. available at: http://www.gov.cn/gzdt/2008-05/23/content_990264.htm

[56] Figures available at: http://nvsm.cnki.net/KNS/brief/Default_Result.aspx?code=CIDX&kw=个人破产&korder=&sel=1

As the usury was not returned on time, Yuhuan and his mother, Su, were illegally detained as well as being tutored by more than 10 debt collectors. When Yu saw his mother was sexually assaulted, he attacked four of the debt collectors by using a knife.[57] After the first instance on 27th Feb 2017, Yu was sentenced to life imprisonment.[58] After that, Yu appealed to the court. Dramatically, the appeal court changed the judgment from life imprisonment to 5-year imprisonment as it found that it was reasonable for Yu to defend his mother and himself and identified Yu's excessive defense.[59] In this case, it involves the debt problems. First of all, to continue running the company, Yu's mother, Su, borrows money from lenders at high interest. Here, it shows a common problem that a small company founder always has unlimited liability to the company because the properties of the company and the founder himself or herself are unclear. Also, the debts of companies and individuals are unclear. In this way, if a small company faces insolvency, the founder would also face bankruptcy trouble.

However, under Chinese law, individuals have no bankruptcy qualification. Secondly, in this case, the debt was Su's debt. If she could not return a large debt, the law provided her nothing to get over the trouble. By looking at these two points, Chinese insolvency law scholars called on the legislation of personal insolvency law again. As discussed above, it could be seen that the personal insolvency law was sometimes high-profile when specific events and cases happened. Moreover, the need for personal insolvency law in China is shown. If the personal insolvency regime is available in China, it could be believed that some debt emergencies would be solved without a provisional government order. Further, people would not be worried about their debt problem when a terrible disaster comes. Criminal cases such as Yuhuan's case could be prevented. However, though people in society and scholars have paid

[57] For the English version of news, see http://www.globaltimes.cn/content/1039559.shtml
[58] For the judgment of the first instance, see http://www.110.com/ziliao/article-665802.html
[59] For the judgment of the appeal court, see http://www.110.com/ziliao/article-6658031html

attention to the personal insolvency regime several times in the past ten years, the official attitude is still uncertain.[60]

2.2.1.2 A Particular Attitude toward the Establishment of Personal Insolvency Regime in China

The Chinese government's attitude toward personal insolvency law was not clear until July 2019. In July 2019, the National Development and Reform Commission(NDRC) published an official document, 'The Reform of Speeding up the Improvement of the System Intervening the exit of the Market Body (the Reform Plan)', which confirmed that it is time to establish the regime of personal insolvency law to meet the market's needs.[61] 'The withdrawal system of market participants is an important part of the modern economic system. The reform aims to 'further smooth the exit channels of market participants, reduce the exit costs of market participants, stimulate the competitiveness of market participants, improve the market mechanism of survival of the fittest, and promote high-quality economic development'.[62] After the Supply-side structural reform started in 2015, it generally paid increasing attention to corporate insolvency and introduced the prepackaged reorganization regime in China.

On the one hand, zombie companies with debts should declare bankruptcy through liquidation. They were dying but still kept alive by relying on the support of the government without making any profit. They were wasting land, capital, labour force, and other element resources. It was not good for the health of the market and the development of new technologies and industries. On the other hand, companies that still have possibilities to refresh themselves need a more effective reorganization

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[60] Chen Xiahong, 'The Inadequacies of Insolvency Regime Behind the Yuhuan Case (Caixin, 25 March 2017) http://opinion.caixin.com/2017-03-25/101070443.html accessed 30 August 2022

[61] In China, there are some substitution regimes of Personal Insolvency law, which aim to make up for the absence of a Chinese Personal Insolvency regime. will discuss below.

[62] The Reform of Speeding up the Improvement of the System Intervening the Exit of the Market Body' (Chinese version) http://www.ndrc.gov.cn/zcfb/zcfbtz/201907/t20190716_941615.html accessed 30 September 2022

system. The further implementation of supply-side structural reform shows the need for a personal insolvency regime to allow individuals to exit the market; for example, in the case of the assets of a one-person company, the owner could not be distinguished clearly. However, the supply-side structural reform is not the only reason for the change of government's attitude. The Chinese economy is developing rapidly, and the booming but unpredictable market requires a good system that allows all market participants to have a way to enter and exit the market effectively. In other words, Chinese 'half bankruptcy law' needs to be completed by introducing the personal insolvency law, which gives an opportunity for individuals to have a fresh start in the case of misfortune in their business.

Therefore, in order to establish a complete Chinese insolvency law system, "to promote a personal insolvency regime step by step' becomes an essential part of the Reform Plan. The Reform Plan shows three steps to introduce a personal insolvency law in China. Firstly, to focus on dealing with the issue of joint responsibility of the natural persons in the case of corporate insolvency. Generally, a defect in the shareholder's capital contribution would result from the joint responsibility of natural personnel when a company becomes bankrupt. In this case, it would lead to the personal insolvency of the shareholder.

2.2.3 Shenzhen's Suggestion Draft of Personal Insolvency Regulation in 2016

In 2016, Shenzhen City Intermediate People's Court finished the report on personal insolvency regime research. It proposed Shenzhen's Suggestion Draft of Personal Insolvency Regulation (Shenzhen's Suggestion Draft) to the Standing Committee of Shenzhen Municipal People's Congress.[63] This highly appreciated suggestion draft is the first time Chinese scholars and insolvency practitioners have finished a complete draft of bankruptcy law by learning from other countries and considering the current situation

[63] It is pointed in the Reform Plan, the reform should be guided by Xi Jinping's socialist ideology with Chinese characteristics in the new era, and fully implement the spirit of the Nineteenth National Congress and the Second and Third Plenary Sessions of the Nineteenth Central Committee of the CPC, meanwhile, should comprehensively promote the overall layout of the "Five in One" and the strategic layout of the "Four in All" has been coordinated.

in China. Before Shenzhen's Suggestion Draft, the study of personal insolvency law remained an academic research paper. Therefore, it could be said that Shenzhen's draft is a big progress in the Chinese personal insolvency study and a sign of Shenzhen city's ambition to be a bankruptcy law pioneer in China.[64]

As one of the specious economic zones of China, under the Legislation Law of the People's Republic of China, Shenzhen can make its regulations and implement them in the specious economic zone after being authorized by the National People's Congress.[65] Moreover, Shenzhen is one of the biggest cities with a great perception of the economic problems and the need for reform, so it is appropriate for Shenzhen to implement its bankruptcy regime in advance.[66] Shenzhen's Draft, while considering Shenzhen's current situation, also refers to the bankruptcy regime of some regions and countries that have experienced and developed personal insolvency law legislation, such as Taiwan Province, Hong Kong Special Administrative Region, Japan, Germany, and the US. To see the whole draft, it could not say which bankruptcy regime is mainly learned by the draft. After absorbing the cream worldwide, the draft is more likely to combine several countries' insolvency regimes, which try to be a perfect bankruptcy regime.

However, it could be seen that the drafters' ingenuity and consideration of the draft. First of all, the proposes of legislation is written in Article 1, which points out the interest of the creditor, debtor and the socialistic market economic system. To ensure fair repayment among the creditors, to help the

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[64] Chi Hongwei, 'Businessmen and Personal Insolvency Regime' http://rmfyb.chinacourt.org/paper/html/2016-11/16/content_118538 htm?div=-1 accessed 30 September 2021

[65] Shenzhen Intermediate People's Court is the first court that build a professional team to manage and hear corporate insolvency cases. That allows the Shenzhen intermediate people's court to become the most experienced and professional court to deal with corporate insolvency cases around the country. Further, the Shenzhen intermediate people's court is also creative, for example, it first introduced pre-packaged insolvency to save insolvent companies. Therefore, as the trial of Personal Insolvency, it could be believed that Shenzhen would do a good job.

[66] Article 74, *Legislation Law of the People's Republic of China*

debtor to have a fresh start and to preserve the order of the socialistic market economic system is the proposes of Shenzhen's Suggestion Draft.[67] Secondly, Article 3 provides a scope of who is qualified to declare bankruptcy. 'The debtor who has registered permanent residence in Shenzhen, or has paid the social insurance in Shenzhen for 1 year, or has an individual business registered in Shenzhen, or has an actual business doing in Shenzhen' could apply the Shenzhen's bankruptcy regime.[68] The draft excluded all the debtors that were not related to Shenzhen city. That means it would firstly ensure the number of personal insolvency cases would not stress the local courts at the beginning of implement of personal insolvency regulation.[69] Also, it would not influence other cities and provinces' economies, as others would still apply the substitution regimes of personal insolvency law to solve the debt problems.[70] Thirdly, the draft can connect the existing laws. Article 5 71 provides that the Corporate Insolvency Law of the People's Republic of China and the Civil Procedure Law of the People's Republic of China should be applied to where the draft does not provide. Further, Article 41 provides that once the court decides to commence the procedure of personal liquidation or reorganization, creditors can only exercise their rights in the personal liquidation or reorganization procedure, whether or not the debt is in the execution procedure.[72] In this way, the existing substitution

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[67] Lu Lin, *The Draft of Shenzhen Special Economic Zone's Personal Insolvency Regulation (Reasons Attached)* (2016)

[68]Article 1, Shenzhen Municipal Justice Bureau, *Suggestion Draft of the Personal Insolvency Regulation* (深圳市司法局《个人破产条例（建议稿）》) (2020). In other countries, the proposals for Personal Insolvency legislation also focus on these points; see David Milman, *Personal Insolvency Law, Regulation and Policy* (Markets and the Law, Ashgate Publishing 2005). The difference is that China is a socialist country, and its economic system is the socialist market economy, which has its own complexities. Simply put, it is unique for a socialist country to have a market economy.

[69]Article 3, Shenzhen Municipal Justice Bureau, *Suggestion Draft of the Personal Insolvency Regulation* (深圳市司法局《个人破产条例（建议稿）》) (2020).

[70]Article 4, Shenzhen Municipal Justice Bureau, *Suggestion Draft of the Personal Insolvency Regulation* (深圳市司法局《个人破产条例（建议稿）》) (2020).
It provides that only the Shenzhen Intermediate People's Court has jurisdiction over Personal Insolvency cases.

[71] Article 5, Shenzhen Municipal Justice Bureau, *Suggestion Draft of the Personal Insolvency Regulation* (深圳市司法局《个人破产条例（建议稿）》) (2020)

[72] Here the situation that there is a dispute about the debt between creditor and debtor would not be discuss, If the two parties have disputes about the amount of debt, they should sue. As for the insolvent

regimes of personal insolvency law, such as the execution procedure, would no longer be able to take place in the bankruptcy regime. However, Shenzhen's draft is like a beautiful dream that practitioners and scholars make because Shenzhen is still awaiting the authorization of the People's National Congress. The next section will discuss the existing substitution regimes of personal insolvency in China.

2.2.4 The Existing Substitution Regime of Personal Insolvency Law in China

Though the personal insolvency law is absent in China, it does not mean the bankruptcy regime is unnecessary in China. The substitution regimes of personal insolvency actually indicate the need for a personal insolvency regime in China. As discussed above, Chinese lawmakers' attitude towards personal insolvency legislation is uncertain. Therefore, in order to deal with the individual bankruptcy problem, the best choice for them is to implement several substitution regimes, which could also keep the existing insolvency law system that only includes the corporate insolvency regime. For the substitution regimes, it could be divided into 2 parts.

The first part is the execution procedure, which has been mentioned above. A creditor is allowed to petition to execute the debtor's property as long as the creditor has a valid document, such as the payment order made by the court and the proof of debt made by notary offices. As for the payment order, the debtor is allowed to object within 15 days after the payment order is made.[73] If the debtor only claims that he or she lacks the ability of solvency or requests to defer the repayment date, the objection should be invalid. After 15 days, the payment order should have the executive effect, which means the creditor can petition the execution procedure.[74] Here has to discuss the debtor's objection further. It could be seen that a lack of solvency could not make an objection work. In other words, the

corporate debtor, according to the Chinese corporate insolvency law, it could petition for liquidation or reorganization.

[73] Article 244, *Civil Procedure Law of the People's Republic of China*

[74] Ibid

only thing that an individual insolvent debtor can do is wait for the forcible execution made by the court.[75] Therefore, it could be said that in most cases, an insolvent debtor could be passive. Back to the execution procedure, similarly, only the creditor is allowed to petition for executing debtor's properties. The debtor certainly would not ask the court to execute his or her properties voluntarily. Before the execution procedure ends, the debtor could make an objection; if the objection is approved, the execution would be changed or stopped. However, making an objection is useless for an insolvent individual debtor. Once the execution procedure commerces, the debtor should make the repayment in time; if he or she does not return the debt in time, the court has the right to seize, freeze, or auction the debtor's properties. However, the court should persevere in determining the life necessities for the debtor and her or her family's basic life.[76] Actually, after the execution, an insolvent debtor has actually become bankrupt. In the case that the debtor has no property to be executed, or the properties are not enough for the repayment, according to the court's decision, he or she might have other obligations.[77] Once the creditor finds that the debtor has properties that could be executed, the creditor could petition for the execution again.[78]

Further, Chinese lawmakers also consider the case of one debtor having more than one creditor. Here will mention the second part of China's substitution regimes of personal insolvency law. The regime named 'participating in the distribution' allowed other creditors to participate in the execution of debt during the execution procedure.[79] According to the interpretation of the Supreme People's Court, to join in the execution procedure, other creditors should also get the required document that could prove the debt. However, the fact is that it takes much to get the required document. It is possible that the properties

[75] Article 253, *Civil Procedure Law of the People's Republic of China*
[76] Ibid
[77] Article 508, *Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China*
[78] Article 510, *Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China*
[79] Idid

have been executed before other creditors get the proof of debts. Moreover, there would not be any public announcement that could notice other creditors. It could cause two problems. One is that other creditors might release the execution after the execution procedure is ended. The other is that, during the execution procedure, other creditors might participate in the procedure at different times. In this way, the repayment plan would be changed repeatedly because the plan should be changed once there is a new creditor. Further, the debtor should continue the repayment after the execution. Also, once the creditors find that the debtor has other properties that could be executed, the creditors could petition for the execution. In light of the aims of bankruptcy law, an insolvent debtor would not be able to have a fresh start under this substitution regime.

In fact, Chinese courts now are facing difficulties when processing the execution procedure, which could be simply divided into 2 points. One is that when the debtors hide themselves, it is difficult for the courts to find them out. Also, if dishonest debtors hide their properties, it is difficult for the courts to check the properties. Many dishonest debtors refuse to return the debt through the courts have already made the order. In order to ensure repayment and punish the dishonesty, the Chinese government takes measures, such as publishing the name of those dishonest debtors, not offering a bank loan, limiting the dishonest debtor's high consumption, limiting the dishonest debtor to taking a plane, etc.[80] By 1 August, 12906894 people were prevented from taking a plane, and 4820278 people were prevented from taking a train.[81] However, the most important problem of these measures is that it is easy to treat dishonest debtors and insolvent debtors in the same way, as it only sees the surface that both the insolvent debtors and the

[80] Chinese Government, 'Notice on Issuing the Memorandum of Understanding on "Building Integrity, Punishing the Dishonesty', Supreme People's Court, 'Decision on Revising "Certain http://www.xypt.gov.cn/66/3448.htmlProvisions of the Supreme People's Court on Restricting the High Consumption of Executed Persons"' http://www.court.gov.cn/fabu-xiangqing-15046.html accessed 15 September 2023

[81] Figures from http://jszx.court.gov.cn

dishonest debtors have not paid the debt. That would make an insolvent debtor live like a dishonest man without a fresh start. An insolvent but honest debtor does not deserve it.

In conclusion, though these regimes could be regarded as the substitution regime of personal insolvency law, they still lack the essential elements of a personal insolvency regime. The most obvious point is that the substitution regimes are not friendly to the debtors. Moreover, other essential elements, such as the insolvency practitioner and the creditor meeting, are not applicable under the regime of participating in the distribution. Some Chinese scholars appreciated the regime and comment that the regime of participating in the distribution is a great invention to deal with the individual bankruptcy issue without making a personal insolvency law.[82] However, the substitution regimes discussed above could not have all the functions that a bankruptcy regime should have. For example, as the creditors could not inter into the execution procedure at the same time, and some creditors might not have enough time to participate in the procedure, a fair and equal contribution of the debts could not be ensured. That is contrary to the proposal of bankruptcy law. In a word, by looking at Shenzhen's Draft and the substitution regimes it obviously shows the uncertain attitude of Chinese lawmakers toward the debtor-friendly personal insolvency legislation. Under the cultural influence in Chinese long history, it is a kind of tradition to treat debtors harshly. Therefore, besides the concerns of the current Chinese situation, the Chinese government's uncertain attitude might still be influenced by history and culture. The next section will discuss the cultural tradition of debt and the historical development of bankruptcy law before New China.

2.3 Culture in China

2.3.1 A Legal Tradition and the Influence of Confucianism on Underdeveloped Ancient China's Civil Law Legislation

[82] Now, there are many scholars who argue that such substitution regimes cannot completely take place in the Personal Insolvency law in China

China has its long history of legislation and age-old legal tradition of stressing the criminal law and neglecting the civil law (重刑轻民 zhong xing qing min), the integration of various (诸法合体 Zhu Fa He Ti). By comparing with the Ancient Chinese public law,[83] it could be argued that ancient China's civil law had been underdeveloped for a long time, not to mention the bankruptcy legislation.[84] Xu Lizhi, a scholar of the Chinese Academy of Social Science, views that ancient China did not have any legislation of commercial law until the early 20th century.[85] As society and the policy of encouraging agriculture and restraining commerce changed in the early 20th century, commercial legislation was finally placed on the agenda with the political reform of the late Qing dynasty and quickly formed a system.[86]

The state ideology, Confucianism, is highly related to such a legal tradition. Since the Han Dynasty, Emperor Wu has carried out policies that reject hundreds of schools of thought except Confucianism, which Dong Zhongshu's Theory recommends. As a result, Confucianism started to be accepted as the dominating state ideology and orthodoxy for the imperial government's centralization of power.[87] Confucianism culture is regarded as a diffused religion that performs a universal function in every part of social life and matures a person's inner character.[88] The time-honoured Confucianism culture has influenced the whole Chinese nation in all aspects, either political economy or social humanity.[89]

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[83] Here the public law are administrative law and panel law.

[84] Before the establishment of new China (People's Republic of China), China has a long history of 5000 years, which includes Primitive society, slave society (21 B.C.— 476 B.C.), feudal society (476 B.C.— A.D.1840), semi-colonial and semi-feudal society (A.D.1840 — A.D.1949, includes the period of Republic of China). Here the ancient China mainly refers to the period between the slave society and semi-colonial society and semi-colonial society before the establishment of Republic of China, which is from 476 B.C.— A.D. 1912.

[85] 许世英, *清末商事立法研究* (硕士论文, 山东大学) https://doi.org/10.7666/d.Y1564940.

[86] 季立刚, *民国商事立法研究* (复旦大学出版社 2006).)

[87] Jinfan Zhang, *The Tradition and Modern Transition of Chinese Law* (Springer 2014)

[88] 'Confucianism' (Asia Society) https://asiasociety.org/education/confucianism accessed 30 April 2022

[89] 戴圣 (Han Dynasty), *礼记·大传* (The Book of Rites: The Great Tradition)

Confucianism has four central points that include ‘rites’ (Li 礼), ‘virtue’ (De 德), ‘benevolent administration’ (Ren Zheng 仁政), and ‘loving people’ (Ai Ren 爱仁). These points precisely suit the Chinese feudal hierarchical system and centralized monarchy, especially the point of ‘rites’. ‘Rites’ emphasizes that there is a hierarchy between nobility and the common people, and it is different to be old or young, be rich or poor (礼，贵贱有等、长幼有差、贫富轻重皆有称也).[90] That means in ancient China; people couldn't enjoy the same status. Moreover, many of the common people were only the attachments of nobility and landlords rather than individuals. For example, the slave girls and maidservants who had a legal status of ‘Nu Bi’ (奴婢) only could live at the bottom of society that was no better than that of domestic animals.[91] Moreover, such kind of inequality can be seen in many issues and it absolutely had a deep effect. For instance, Zhang Jinfan, a Chinese law researcher, describes a fact in his book, saying that before the Ming and Qing Dynastys, a debtor, as well as his wife and daughters, might be forced to be enslaved by the creditor if the debt could not be paid. In fact, according to the research of the Ming and Qing Dynasties, there were some similar solutions when the debtor could not pay back the debt.

Due to the teaching of Confucianism had been deepened, people had no awareness of the equality of private right, either people in the high position or common people. Similarly, Confucianism’s rightness concept(Yi li Guan 义利观) had a further effect on the lack of equality awareness. The rightness concept that emphasizes the importance of justice and public interest had largely limited people’s pursuit of their personal interests and riches. Several words are written in ‘Confucian Analects’, for example: ‘The Master said, "The mind of the superior man is conversant with righteousness; the mind

[90] Ibid
[91] Jinfan Zhang, *The Tradition and Modern Transition of Chinese Law* (Springer 2014)

of the mean man is conversant with gain.' (子曰：君子喻於義，小人喻於利) [92] According to the Master's words, trying to ignore the people's personal interest and educating people to be righteous if they want to be the superior man is Confucianism's attitude. However, though it attaches importance to public interests, Confucianism's teaching itself only opposes excessive personal desire that is greedy. Absolutely, It has to admit that being greedy does not always bear any good fruit. In the Song Dynasty, neo-Confucianism representative Zhu Xi placed a further emphasis on 'keep the heavenly principle (Tian Li) then take away human desire'（存天理 灭人欲）, also explained the limitation of appropriate human desire. For instance, people's normal diet is the heavenly principle, while revelling in dainties is the human desire that is not in the limitation. Similarly, marriage is a heavenly principle, but marrying several wives is not. It can be seen that the principle of emphasising public interest and national interests by restricting individual rights and private interests has been adhered to in China's long history. Even today, the awareness of public interest still influences Chinese people in their daily lives and businesses.[93]

However, as a part of the official ideology, the thought inevitably became a strong tool used by the rulers to strengthen the emperor's power and consolidate the rule. It also leads to the result that the teaching of Confucianism might lose its original meaning.[94] Through the thought of valuing justice and public interest above personal interest, all common people in the country should serve the emperor without considering any personal interest also, should be satisfied with their poverty.[95] Under the

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[92] Le Jin, *Confucian Analects*, James Legge's translation, Chapter 16, Book IV http://www.cnculture.net/ebook/jing/sishu/lunyu_en/04.html accessed 30 April 2022

[93] Patricia Werhane and Alan E. Singer, *Business Ethics in Theory and Practice: Contributions from Asia and New Zealand* (Illustrated edn, Springer 1999)

[94] Since emperor Wu of Han Dynasty adopted Dong Zhongshu's 'ousted 100, Only Confucianism' (罢黜百家 独尊儒术), confucianism began to have an unshakable position in Chinese long history.

[95] It is written in 'Confucian Analects': 'With coarse rice to eat, with water to drink, and my bended arm for a pillow;-- I have still joy in the midst of these things. Riches and honors acquired by unrighteousness, are to me as a floating cloud.' 子曰: '饭蔬食饮水,曲肱而枕之,乐亦在其中矣.不义而富且贵,于我如浮云.' It encourage people to be be contented in poverty and devoted to things spiritual, also never struggle with the material desire, which will exhaust people. See Chapter 15 in Book VII: Shu R, 'Confucian Analects'

Chinese autocratic monarchy system, according to the ‘rites’ mentioned above, every emperor in each dynasty was the owner of the country and the son of heaven(Tian Zi 天子).

In other words, the emperor's interest is regarded as the interest of the whole country and society. In this way, all common people gradually forgot their personal needs and material wealth at that time and sacrificed themselves without for the country without consideration. It means that, in ancient China, only the sovereign needed to ensure the country's stability and no citizen desired the extra interest and considered their own wealth. As a result, it could lead to public law’s advancement and civil law’s underdevelopment in ancient China. Accordingly, the tough public law, especially the panel code, could strengthen the Confucian idea of attaching the importance of public interest. The panel code not only punished crimes but also dealt with the disputes of property, succession, and issues that are termed ‘family law’ in Western law.[96] It has to be mentioned that ‘rites’ have adjusted many of the social relations since Dynasty West Zhou.

As for civil relations, ‘rites’ could be the main measure that solved the civil disputes and family relation. For example, the marriage regime in ancient China that emphasized the order of parents and seven rules of divorcing one’s wife was exactly based on ‘rites’.[97] Also, as for the debt relation, it gradually formed a tradition of ‘son paid for the debt for his father’. Sons should pay the unpaid debt to their father if their father passes away and cannot pay all the debts to creditors. It seems that the debt will not end unless the next generation pays, and this tradition and idea still exist in China in this modern time. Moreover, since Han Dynasty, ‘rites’ were introduced into the law and finally built a

[96] Geoffrey MacCormack, *The Spirit of Traditional Chinese Law* (University of Georgia Press 1996)
[96] Ronald C. Keith, *China’s Struggle for the Rule of Law* (Macmillan 1994).
[97] Jinfan, *The Tradition and Modern Transition of Chinese Law* (Springer 2014)

legal system of 'Confucianism outside, Legalism inside'(Wai Ru Nei Fa 外儒内法), which used Confucianism as outward decoration to show ruler's benevolent administration and in fact used Legalism to regulate people and the whole country. Confucianism outside and Legalism inside the legal system won people's hearts and stabilized society, which is suitable for the Chinese feudal system. Also, it is regarded as a sign of the mature ruling skill of ancient Chinese feudal society.

In a word, by making good use of the great influence of Confucianism, the emperors and the government in ancient China, were rarely concerned the people's private rights. That led to the lack of awareness of equality and the underdevelopment of ancient Chinese civil legislation, which could be a further confirmation of the negative position of common people and their individual rights and interests.[98] The culture of Confucianism had largely decided the keynote of the legislation of ancient China and continues to have positive or negative effects in the future, as Friedrich Hirth says: 'for even at the present day. After the lapse of more than two thousand years, the moral, social and political life of about one-third of mankind continues to be under the full influence of his (Confucius's) mind'.[99] Therefore, it is necessary to look at Confucianism's influence on current legal issues and Chinese legislation activities when doing a research on Chinese law. In short, the Confucian idea that emphasizes public interest firstly and minimized people's material desire and individual right in the spiritual aspect had a negative impact on the development of ancient Chinese civil law, which means it basically lacked the condition of social material life. In the meantime, the developed public law in ancient China strengthened this characteristic further and exactly made ancient Chinese civil law to be

[98] Geoffrey MacCormack, *The Spirit of Traditional Chinese Law* (University of Georgia Press 1996)

[99] Friedrich Hirth, as cited in Huan-Cheng Chen, *The Economic Principles of Confucius and His School* (Longmans, Green & Co 1911) 250 https://ia802609.us.archive.org/14/items/economicprincipl00huan/economicprincipl00huan.pdf accessed 30 June 2021

in a bad position. The next section will discuss the related legislation of debt in ancient China, which could show the traditional attitude toward the debt and debtor.

2.3.2 The Related Legislation of Debt in Ancient China

However, under the mutual influence of legislation, culture, and policy, ancient Chinese under-developed civil law still had its clear legal attitude toward the debt relation, which could be shown in the legislation of each dynasty and folk tradition. Firstly, the legal attitude toward the debt relation exactly followed the legal traditions of stressing the criminal law and neglecting the civil law (重刑轻民 zhong xing qing min), the integration of various (诸法合体 Zhu Fa He Ti). It mainly solved the debt problem in two ways: one is by using criminal penalties to ensure repayment, and the other one is by making the debtor's family hold joint responsibility.[100] In other words, a debt would never be relieved by law. Such a legal attitude could be traced back to the Western Zhou Dynasty (1046 B.C. - 771 B.C.), it said that 'someone whom the death creditor entrusts, could sue the debtor if the debtor refuses to repay the debt. The officer, after confirming the entrustment with people who are closed to the trustee, should accept the lawsuit. (凡属责者， 以其地傅而听其辞)'.[101] It means that the debt would be continued to be owed after the creditor's death and the debtor should not be free from his debt. As for the situation of the debtor is dead or missing, the debt would not disappear until the repayment is done. In the Han Dynasty, a regulation of death or missing debtors' repayment is in the book, which said that the debtor's family should pay the debt for the debtor in the situation when his or her whereabouts are unknown or he or she is dead (团石十石，约至九月耀必以；既有之物，故知责家中见者).[102]

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[100] CAI Xiao-Rong, 'From the Principle of No Obligation Exemption for Bankruptcy to Debt Exemption for Bankruptcy: Historical Development of Chinese Debt Repayment Obligation for Bankruptcy' (2013) (6) *The Jurist* 93.

[101] 周礼·秋官·朝士(Zhou Li, Autumn Official, Court Officer)

[102] 居延汉简(Juyan Han Slips)

Since the Qin Dynasty, the debt could be paid by labour. It is written in the law: 'Someone who owes money to the government, should be asked on the date of judgment; the debtor should pay the debt by labour from the date of judgement, if he or she is unable to repay the debt. Every one-day labour is equal to the repayment of 8 qian(¥0.8). If the debtor is provided meals by the government, every one-day labour is equal to the repayment of 6 qian (¥0.6) (有罪以赀赎及有责(债)于公，以其令日问之；其弗能人及赏(偿)，以令日居之，日居八钱；公食者，日居六钱)'.[103] Also, it is possible for someone to cover for the debtor as long as he or she is as healthy as the debtor, however, craftsmen and businessmen could only repay the debt by labour on their own (居赀赎债欲代者，者弱相当，许之；作务及贾而负责者，不得代).[104] Here it is also an evidence of the different treatment of businessmen and the low social position of businessmen in ancient times. In the Tang Dynasty, the law regulated that the debt could be paid by the debtor, which should be done by the debtor and his or her male family members if the debtor could not pay all of his or her debt by all of his or her properties(若家产净绝无力偿债，则可役身折酬，由债务人及户内男口以劳役抵债).[105]

In this way, the debt would always become a family's debt rather than a personal debt. That seems unarguable as ancient Chinese society consisted of each family, which was linked by blood relation. Hence, there is a Chinese proverb about debt that says that a son should pay his father's debt as a matter of course (父债子还，天经地义). The records of the case of paying debts for the father could be found. In the late Qing Dynasty, the court of Chongqing rejected the plaintiff's request of asking the dead debtor's father to pay the debt and made a decision that the debtor's son should make

[103] 秦律·司空律 (Qin Law, Law of the Ministry of Works)
[104] Ibid
[105] 唐律 (Tang Code)

the repayment for his dead father.[106] Until now, the idea of blood relation is still influencing many Chinese people. It is interesting to mention that now Chinese females think that marrying a man is actually marrying a family. An English missionary, Macgowen, who had lived in China for more than 50 years since 1860, described the Chinese family in his book, 'The Chinese are a thoroughly domesticated people and have a great affection for their home. It would seem, indeed, as though their love for that had left no room for patriotism in their hearts,[107] And 'His whole devotion and affection are centred in his home.[108] It is a fact that Chinese people have duties to their families throughout their lives and regard their families as themselves. Even in today's Chinese society, young people realize their family pressures but hardly find a perfect way to improve them.

In order to ensure the repayment of debts, the government started to punish debtors with criminal penalties during the Tang Dynasty. The law of the Tang Dynasty said that if the debtor owed the creditor more than 1 疋, and the debtor failed to pay the debt for 20 days, he should be punished by flogging for 20 times, 20 times more would be done if debtor failed to repay again for 20 days; if the debtor owed the creditor 30 疋, he or she should be punished by flogging for 40 times; for the debt of 100 疋, the flogging should be 60 times (诸负债违契不偿, 一疋以上, 违二十日笞二十，二十日加一等, 罪止杖六十, 三十疋，加二等; 百疋，又加三等。各令备偿)'.[109] Tang's law of debt relation was followed and copied by other dynasties, including the Ming and Qing Dynasties.

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[106] 汪庆祺编 (Wang Qingqi, ed), *各级审判厅判牍* (Li Qicheng, rev, Beijing University Press 2007) 108, as cited in 蔡晓荣 (Cai Xiaorong), '从负债应偿到破产免责：破产债务清偿责任衍进的中国法律史叙事' (From Debt Repayment to Bankruptcy Exemption: The Evolution of Debt Settlement in Chinese Legal History)

[107] John Macgowan, *Men and Manners of Modern China* https://ia801407.us.archive.org/23/items/menmannersofmode00macgrich/menmannersofmode00macgrich.pdf accessed 20 September 2021

[108] Ibid

[109] 《唐律》 (Tang Code)

In conclusion, the legal attitude of Chinese ancient law toward debt relations is obvious. The law treated debtors harshly and was quite friendly to creditors, similar to the attitude of English law. However, the law started to make some changes in late Qing Dynasty, which could regard the 1906 Chinese first bankruptcy law as a milestone.

Chapter 3 Historical Position in China and English Law

3.1 The Development of Insolvency Law in Modern China: Chinese Insolvency Law of 1906

As for The Chinese Insolvency Law of 1906, most of the works of literature that could be consulted are old, which reflects the mild influence of the Chinese Insolvency Law of 1906 on Chinese legal development in recent years. However, as the first Insolvency law in Chinese legal history, the Chinese Insolvency Law of 1906's short existence has its own research value. Through the procession from formulation to abolishment, it could show the regular route of Chinese insolvency law's development in the modern age, i.e., doing the legal transplantation with the country's conditions and being successful after experiencing ups and downs. Moreover, it is reasonable for the Chinese Insolvency Law of 1906 to appear under the political and economic background at that time, which helped lawmakers and the government to see the need for insolvency law. As this dissertation aims to research the need for personal insolvency law in China today, the first Chinese Insolvency law is referential.

3.1.1 What Contributed to the Chinese Insolvency Law of 1906?

Debt was never dealt with by law in China before the Chinese Insolvency Law of 1906. Therefore, some pushing hands should significantly contribute to the first Chinese Insolvency Law. By concluding the literature written by other writers, the pushing hands would be three.

First of all, the Qing government was imposed a heavy indemnity of 200,000,000 'Kuping tael' (库平两, was a unit of silver currency used in imperial China, particularly during the Qing Dynasty) because of the Treaty of Shimonoseki after the Sino-Japanese War, which largely declined the Chinese finance and accelerated China's feudal economy's disintegration.[110] Moreover, after the Siege of the International Legations it further increased the Chinese financial burden. Also, the treaties that China signed after wars generally deprived China of its territorial sovereignty; other countries had exterritorial jurisdiction in China according to the treaties. Therefore, the Chinese governments, both the Qing government and Nanjing national government, tried to abolish other countries' territorial sovereignty mainly by making modern law, which could make it possible for other countries to use Chinese law in China rather than their own law.[111] It could be one of the reasons for the legislation of the first Chinese Insolvency Law.

Secondly, the entrance of foreign business struck Chinese traditional manufactories and local commerce, as well as stimulating the Patriotic Movement of "Revitalizing the industry" (振兴实业) and "setting up a factory for self-saving" (设厂自救). In this way, Chinese modern manufactories and companies developed, which helped capitalism to grow stronger in the modern age. However, because the business could not be predicted perfectly, it might succeed or fail in any way. An important memorial to the Throne has to be mentioned, which could be regarded as the proposal of the Chinese Insolvency Law of 1906, saying that "Though the Commercial Code's Company Law section protects to an extent those ongoing businesses that are flourishing, still, whether because commerce is not yet healthy or because the market is deficient, there cannot but occur bankruptcies." It clearly saw the need for Insolvency law on the base of Chinese Commercial law. If they fail, businessmen will be insolvent with a large amount of debt. In addition, some businessmen prefer to get profits faster through speculation, though they all know that the

[110] Article 4, *The Treaty of Shimonoseki* (1895) https://china.usc.edu/treaty-shimonoseki-1895 accessed 30 September 2021

[110] Peace Protocol of 1901, China agreed to pay an indemnity of 450,000,000 Haikw

faster they harvest, the more risk they face. It might be a kind of human nature, but today, people, not only businessmen, still try to get money fast by speculating, such as speculative investment.

However, the most direct reason for the legislation of the Chinese Insolvency Law of 1906 is the fraud called 'Dao Zhang (倒帐)'. For example, a crook used a company that never existed to borrow money from a banking house and then run away with the money on bankruptcy grounds.[112] As written in the memorial: 'There are those individuals who, out of motives of treachery, will go so far as to indulge in corruption a hundred times over and bring down calamity without end'. The issue of 'Dao Zhang' could also make other good businessmen who were truly facing bankruptcy in an embarrassing position. The Qing government tried to deal with the problem of 'Dang Zhang' by Capital Finance. House regulations that used criminal punishment to deter bankruptcy fraud. From 3 November to 2 December 1899, the problem of 'Dang Zhang' fraud was deliberated and reported by the Board of Punishments. Liu Kunai, the previous Governor-General of Liang-Chiang, requested to punish criminal insolvency according to the special provisions in the Capital Finance House Regulation, which provided that insolvency crime should be punished by wearing the change, bambooing and military exile all the way to life imprisonment. However, the regulation would be Injustice to the innocent who were honestly bankrupt. Therefore, as the words in the memorial: "it was absolutely necessary to be this stringent and let the horde of unscrupulous businessmen know the fear of the law. Nonetheless, fraudulent bankruptcies proceed from evil intent, while bankruptcies due to financial losses are beyond the control of the bankrupt.

So, though both types are termed 'bankruptcies', in fact, they are different. There is no question that fraudulent bankruptcies are execrable; however, financially fortuitous failures must be excused. If you

[112] From the year of 1902, the presidents of the Law Revision Committee started to reform the law of late Qing Dynasty as ordered.

punish severely simply in order to instil fear, then you will guard against the flow of corruption, but you will lack all feelings of protection and help. The thorough investigation seems to suggest that it is only as to protecting commerce that compassion has still not been exhausted." it directly let the official see that the problem could not be solved only by Capital Finance Houses Regulations, the need for the specific insolvency law is emergency.[113]

3.1.2 Provisions in the Chinese Insolvency Law of 1906

From the year of 1902, the presidents of the Law Revision Committee started to reform the law of late Qing Dynasty as ordered, which included the Chinese Insolvency Law of 1906.[114] Looking through the full text of the law, it could be found that the law is short and simple, with only 9 chapters and 69 provisions. However, it is commended by the Japanese bankruptcy law leading researcher that by learning and concluding from the law of other countries, the Chinese Insolvency Law of 1906 has most of the necessary details and has its own changes according to Chinese current situation.[115] Also, he commented that as this young Chinese insolvency law is like an emergency measure, it is absolute and reasonable to be inferior to the other countries' law, such as the English law.[116] In a word, the first Chinese Insolvency Law has her good and bad, which could be seen from the provisions.

3.1.3 The Positive Features of the Chinese Insolvency Law of 1906

It could be said that the Chinese Insolvency Law of 1906 combined foreign law and the Chinese situation at that time. As mention above, Chinese law has no experience in dealing with debts by civil law and the ways that people solve the debt problems privately could only be the customs. Moreover, different places in China have their own customs, which can never be unified. Therefore, it is the first

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[113] Banking house means the old-style Chinese private bank. The example is simplified from the story written in Chapter 7 of the book Odd Things Witnessed Over Twenty Years

[114] the Capital Finance Houses Regulations

[115] Since 20 Century, China began to translate foreign laws into Chinese language from other countries, which includes insolvency law. The translations of foreign law was served for the legal reform in future.

[116] 加藤正次, '读大清新破产法' (Kato Masaji, "Reading the New Qing Bankruptcy Law") 王凤翘 (trans), (1907) 5 *法政学交通社杂志* (Journal of Legal and Political Studies).

time China has used unified civil law items to deal with debts in the whole country. It could be seen that the law shows a complete legal insolvency procedure. Firstly, chapter 1 provides the provisions for filing a petition for Bankruptcy. Secondly, chapters 2, 3 and 4 regulate the election of trustees, creditors meetings and winding-up accounts. Finally, the disposal of the estate, an extension of the time of repayment of debts and the reports requesting closing the case are provided in Chapters 5, 7 and 8. These 54 provisions basically contain the essential elements of an insolvency procedure. Absolutely, without any experience and development of insolvency law, this Chinese version of the insolvency procedure has to be made by transplanting from other foreign laws.

However, through the Chapter 6 of intentional fraudulent bankruptcy, the Chinese situation is shown. As discussed above, the direct promotion of the Chinese Insolvency Law of 1906 is the problem of 'Dao Zhang'. Here, Chapter 6 provides the provisions to deal with this issue, which provides an explanation of 'Dao Zhang' as well as a list of the acts that should be regarded as fraudulent bankruptcy and the procedure for punishing fraudulent bankruptcy. Moreover, the law legally confirms the important role of the Chamber of Commerce in an insolvency procedure. The Chamber of Commerce grew in the development of Chinese commerce; before the issuing of the Chinese Insolvency Law of 1906, the Chamber of Commerce played the role of middlemen in business disputes. Accordingly, the lawmakers persevered in the important role of the Chamber of Commerce in the law, to give the right for the Chamber of Commerce to elect the trustee in insolvency cases, accept and prove creditors' claims, organize the creditor meeting and so on.[117] Further, the law first changes her attitude towards debtors. Like nearly all countries, Chinese law showed a creditor-friendly attitude before, which used cruel punishment on the debtors, whether they were good or bad. Now the Chinese first Insolvency Law of 1906 shows sympathy to debtors by allowing both businessmen and non-businessmen to file a petition

[117] Ibid

of insolvency voluntarily.[118] Moreover, article 66 provides that "If the circumstances under which the merchant went bankrupt be found extenuating, and the liquidated estate is sufficient to pay a dividend of not less than fifty", the bankrupt should be exempted from the rest of debts and the Chamber of Commerce would request the local authorities to close the case.[119]

3.1.4 The Negative Features of the Chinese Insolvency Law of 1906

Unfortunately and ironically, this Chinese first Insolvent law only existed less than 1 month because of its fair and equal division. Article 40 provides that " in the event merchant's bankruptcy involves government or public funds, the local authorities, besides allowing the government to receive a dividend *pari passu* with the other creditors, shall investigate the matter…". However, the government was not satisfied with the law because the government's claim could only be divided equally according to the law.[120] Here has to refer to the memorial that could be regarded as the sign of the Chinese Insolvency Law of 1906's repealing: "This Ministry realize that the practice under Article 40 of the Insolvency Law — that in the event a business house closes down, government or public funds should share in the division uniformly with other creditors, each receiving a *pro-rata* share — is basically the way such matters are handled under the general principle of international practice. So, for fairness' sake, on the basis of the reasoning presented in the reply sent us by the Committee on Finance, we hereby authorize the deferral of putting inter effect the article in dispute."

It could be seen that though the Qing government just pretended too hard, it's hard to reform the law on the surface. In fact, the government was not sincere, and in the case of interest dispute, they could use their power to repeal any laws. It is still ruled by men, after all. Chinese modern history

[118] *Insolvency Law of the Great Qing* 1906 (大清破产律), ch 8
[119] *Insolvency Law of the Great Qing* 1906 (大清破产律), ch 9, arts 19-41.
[120] *Insolvency Law of the Great Qing* 1906 (大清破产律), ch 6

researcher Zhu Ying argues that the history of China did not move on until the time of system reform.[121] Though the Chinese Insolvency Law of 1906 only existed for less than 1 month, the new and fresh idea expressed by the law would quietly spread in China. After the Chinese Insolvency Law of 1906, the Nanjing national government experienced failures in the draft of the Republic of China Insolvency Law (1915), the draft of the Republic of China Insolvency Law (1934), Provisional Regulations on the Liquidation of Merchants' debt (1934) and finally kept the insolvency law of the Republic of China (1935) until now.[122] In brief, no matter how good or bad, the Chinese Insolvency Law of 1906 became the landmark of the Chinese Insolvency law development, which gave a start to the modern Chinese insolvency law process and provided experiences for further progress. Also, one day, when the lawmaking of insolvency law is on the schedule in mainland China, a combination of the legal transplantation and the current political and financial situation is inevitable because the history of new China's personal insolvency law has been absent for 69 years. However, through the discussion made above, Chinese lawmakers' attitude toward the regime of personal insolvency law is uncertain, though it seems the need for a Chinese personal insolvency law is much in evidence. Therefore, the question, when facing the need for a personal insolvency regime, whether China should maintain the status quo or make some changes needs an answer.

3.2 Conclusion

In summary, the development of ancient Chinese civil law reveals a complex interplay between legal tradition and philosophical thought, in particular the profound influence of Confucianism. For centuries, the Chinese legal system focused more on criminal law and paid insufficient attention to civil law, resulting in deficiencies in civil legislation and frequent disregard for individual rights and

[121] Zhu Ying, 'Several Issues That Should Be Paid Attention to in Studying the History of Modern Chinese Institutional Change' http://www.sohu.com/a/215815643_692685 accessed 13 July 2021

[122] Taiwan Province is now still using the insolvency law of the Republic of China (1935).

private interests. Confucianism emphasises hierarchy and the public interest so that individual rights are often suppressed in favour of the rights of the state and its rulers.

The tradition of prioritising public rights not only hindered the development of civil law but also entrenched practices such as family liability for debts, which persist in modern Chinese culture. Historical practices and legislative documents show the enduring influence of Confucian principles, which shape people's views of financial responsibility and social roles.

The 1906 Chinese Bankruptcy Law marked an attempt, albeit a short-lived one. It aimed to address these issues by introducing elements of modern law. The law recognised the need to protect debtors while also respecting the rights of creditors. Despite its short lifespan, the law laid the foundations for future discussions on bankruptcy in China. At least there was a gradual transition towards a more balanced legal framework.

The historical lessons drawn from ancient legal traditions and Confucian thought remain crucial to Chinese modern legal development. The recognition of the need for a modern personal insolvency law is particularly important. It is difficult to balance the respecting of rich legal heritage and the adaption of modern economic realities. Therefore, the ongoing discussion about China's insolvency law reform should consider these historical precedents and the philosophical foundations of China's legal landscape. Such an approach provides insight into the current legal challenges. Also, it helps to establish a more equitable legal system that meets the needs of the individual while balancing the collective interests of society.

The history of Chinese legal transplantation, and in particular the implementation of the 1986 Enterprise Bankruptcy Law (for Trial Implementation), highlights the complexity and challenges of

the adaption of a foreign legal framework to a local environment. The original intention to modernise and improve the legal system is good. But the implementation process revealed serious problems with an insufficient understanding of the unique cultural, economic and social realities of China at the time. The need for localisation of transplanted laws was highlighted. Simply borrowing laws from other jurisdictions without adequate localisation can lead to unintended consequences. For example, insolvency laws that fail to effectively address the unemployment issues that accompany insolvencies.

Moreover, the phenomenon of companies using the law to avoid financial responsibility shows the importance of a strong regulatory framework and social safety nets. The lessons learned from this experience are not only applicable to corporate insolvency law but also have important implications for China's proposed personal bankruptcy law today - that is, the abuse of personal insolvency law. With the development, there is both anticipation and caution about the possibility of effective legal transplantation. While society's acceptance of reform has improved significantly over past decades, legislators must carefully consider local needs and challenges when introducing personal bankruptcy laws. It needs to be careful when making new legislation. In other words, incorporating elements of existing legal traditions while addressing contemporary economic realities is necessary. In this way, China can take full advantage of the benefits of legal transplantation without falling into the pitfalls of the past.

3.2 English Personal Insolvency: the history, policies and models

3.2.1 Some Changes in the Historical Development of English Personal Insolvency Law

Compared with the historical development of Chinese bankruptcy law, the legal development in England is more proactive. English personal insolvency law has a long history of more than 450 years and is reasonable to regard as a pioneer of bankruptcy law’s development around the world. Other jurisdictions, such as the USA and Australia, have adopted a large part of the English system despite

the development directions of some of them diverging.[123] This chapter will mainly discuss several notable early English bankruptcy laws, which could reflect the general route of English Bankruptcy Law's development. It will also compare the ancient Chinese debt mechanism to English bankruptcy law.

3.2.2 16th Century: the First English Bankruptcy Law in 1542 (the statutes 34 & 35 Henry VIII)

At the beginning of the historical development of English bankruptcy law, it only dealt with individual debtors. This began with the statutes 34 and 35 of Henry VIII, titled "An act against such persons as do make bankrupt," in 1542.[124] Statutes 35 & 35 Henry VIII is accordingly regarded as the first English bankruptcy law, which also first used in the word "bankrupt"[125] English legislation created the two important elements for all bankruptcy laws, including a summary assets' realization and an administration or distribution that could benefit every creditor.[126]

The preamble of the statutes 34 & 35 Henry VIII: "Where divers and sundry persons craftily obtaining into their hand's great substance of other men's goods do suddenly flee to parts unknown or keep their houses, not minding to pay or restore to any their creditors their debts and duties, but at their own will and pleasure consume the substance obtained by credit of other men, for their own pleasure and delicate living, against all reason, equity and good conscience", clearly showed its main aim at punishing the absconding debtor.[127] Moreover, creditors' confidence can be restored by dealing with fraudulent

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[123] As for the US bankruptcy law, will discuss later. The most different point between UK and US is that the English Bankruptcy is more pro-creditor, while the US is more pro-debtor. After the large-scale transplantation of English bankruptcy law into US, US found its own way and change the directions to support the debtors.

[124] Companies with limited liability did not emerge until the mid-19th century.

[125] As for the etymology of the word "bankrupt", it is mostly regarded that the word comes from the Latin *bancus rupees,* though there are some views that favours the idea that the origin of the word is the Italian *banco rotto,* see *Judine v. Da Cossen*, I New Report 234 (Eng. 1805) For the details of the etymology of "bankrupt", see T. Jackson, The Logic and Limits of Bankruptcy Law (1986).

[126] Louis Levinthal, 'The Early History of English Bankruptcy' (1919) 67(1) *University of Pennsylvania Law Review and American Law Register* 1-20

[127] Insolvency Law Review Committee, *Cork Report* (1982) Cmnd 8558, para 35

debtors.[128] In other words, as debt and credit are inevitable in the trading market, if the debts are always uncollectible, the creditors might lose the confidence to continue trading. However, the statutes are totally pro-creditor without considering the status of honest debtors. A creditor, under the old common law in medieval times, had the right to seize either the debtor's body or effects, but the debtor could not commit any legal offence.[129] To some degree, it straightly defines all creditors as good persons and regards all insolvent debtors as not only evasive at best but also fraudulent at worst by treating these two parties differently.[130]

Moreover, statutes 34 & 35 of Henry VIII had the punitive nature of English bankruptcy law. The statutes provided that the Chancellor or other bankruptcy commissioners can summon and examine the bankruptcy. Also, the Chancellor or other bankruptcy commissioners were authorized to imprison the absconding bankrupt.[131] Statutes 34 &35 Henry are more likely to be criminal legislation only aimed at the absconding debtors.[132] However, the absconding debtors could be the main inducement of the statutes 34 & 35 Henry because the debtor had various ways to evade imprisonment before the 14th century.[133] For instance, debtors could take refuge in a sanctuary that enabled them to escape arrest and imprisonment, and the debtors would leave the country without any repayment of the debts successfully.[134] Though statutes 34 & 35 Henry VIII lack of several essential elements of a modern

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[128] David Milman, *Personal Insolvency Law, Regulation and Policy* (Markets and the Law, Ashgate Publishing 2005)
[129] Insolvency Law Review Committee, *Cork Report* (1982) Cmnd 8558, para 31
[130] Michael Quilter, 'Daniel Defoe: Bankrupt and Bankruptcy Reformer' (2004) 25(1) *The Journal of Legal History* 53-73 https://doi.org/10.1080/0144036042000216377
[131] 34 & 35 Hen 8, c 4 (1542, The commissions could summon before them and examine any individual believed to be in possession of the bankrupt's property. A debtor who attempted to leave the kingdom could be declared "outside of the King's protection", and anyone who aided the absconding debtor could be imprisoned.
[132] Robert Weisberg, 'Commercial Morality, the Merchant Character, and the History of the Voidable Preference' (1986) 39 *Stanford Law Review* 1537
[133] Treiman, 'Escaping the Creditor in the Middle Ages' (1927) 43 *Law Quarterly Review* 230, as cited in Jacob Cohen, 'The History of Imprisonment for Debt and its Relation to the Development of Discharge in Bankruptcy' (1982) 3(2) *The Journal of Legal History* 153-171
[134] WS Holdsworth, *A History of English Law* (1922-1966) 229-245 (16 vols)

bankruptcy law, such as the equal distribution of debtor's assets and the discharging of the debts, it is still the English earliest bankruptcy statute.

The 13 Elizabeth I, c.7 (hereafter the 1571 Act), compared with the statues 34 & 35 Henry VIII, made more differences.[135] Firstly, the act 1571 provided a narrowed scope of the debtors who could be declared bankrupt. Under the 1571 act, the scope was only within the "merchant or other person using or exercising the trade of Merchandise by way of Bargaining Exchanging Rechange Barter Chevisance (making of contracts) or otherwise, in gross or by retail, of seeking his or her trade of living by buying and selling".[136] In other words, non-traders were excluded. Secondly, by introducing equal distribution, the 1571 act authorized the Chancellor to seize and distribute the assets of bankrupts with "a portion, rate and rate alike" among the creditors.[137]

As mentioned above, as the earliest English bankruptcy law, the statutes of 34 & 35 Henry VIII were not likely to be real modern bankruptcy law; contrarily, the English bankruptcy was able to show the important features of a modern bankruptcy, the introduction of equal distribution of the 1571 act. That is the reason why there is a misunderstanding that the 1571 Act is the first English bankruptcy law. However, the 1571 Act did not lose the root of the punitive nature of English bankruptcy law.

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[135] Milman views that the 13 Elizabeth I, c.7 is more significant for the further development of bankruptcy law. See David Milman (n128)

[136] Private Act, 13 Eliz I, c 7 (1571)

[137] However, until 19th century, non traders could make bankruptcy and apply the equal distribution. A rigorous process of bankruptcy was described by Ian P. H. Duffy: "After receiving a creditor's petition, the lord Chancellor appointed commissioners to determine whether the debtor was a trader and had committed a fraudulent act of bankruptcy. If satisfied, the commissioners could take any steps necessary to collect the estate and distribute it rarely among the creditors. They were authorized to seize the bankrupt, examine him and his wife under oath, break down the door of his house and sell his goods and land. People found guilty of hiding his property were to forfeit twice the value of the goods concealed and those who hid his body would be fined or jailed. In addition, bankrupts who failed to surrender were to be proscribed, those refusing to answer questions were to be jailed and perjurers were to be pilloried and to lose an ear, as those who conceal property worth more than £20." see Ian PH Duffy, 'English Bankrupts, 1571-1861' (1980) 24(4) *The American Journal of Legal History* 283-305

Therefore, despite the equal distribution of debts, another indispensable principle of modern bankruptcy law was not introduced in England until the 18th Century.

3.2.3 18th Century: Discharging the Debt by the 1705 Act

The statutes of 4 Anne c.17 & 15 (hereafter the 1705 act) first introduced the discharge of the debts into England. Daniel Defoe, famous for his pen, proposed the bankruptcy discharge through his essay, saying that: "the laws are generally good, and above all things are tempered with Mercy, Lenity, and Freedom. But bankruptcy law has something in it of Barbarity; it gives loose to the Malice and Revenge of the Creditor, as well as Power to right himself, while it leaves the Debtors no way to shoe themselves honest: it contrives all the ways possible to drive the debtor to despairs. Encourages no new industry, for it makes him perfectly incapable of anything but starving."[138] Defoe first admitted the laws are generally good and then directly pointed out that bankruptcy law treats debtors harshly but encourages creditors to seek revenge.[139] The 1705 Act first showed kindness to the honest debtors, seemly, by introducing the debt discharge, which required a certificate from bankruptcy commissioners, the consent of two-thirds of creditors and the oath stating that the certificate was it was obtained without fraud. With the debt discharge, the creditors would give up the rest of the debts. However, such a discharge could possibly be a tool to make debtors adhere to and cooperate with the creditors.[140] Besides the debt discharge, under the 1705 Act, compliant debtors could also get the reservation of five per cent (up to 200 pounds) of their

[138] It is misleading to claim that through the Debtors Act 1869, the imprisonment for private debt was ostensibly abolished. See G.R. Rubin, A5 in G.R. Rubin and D. Sugarman, *Law, Economy and Society* (1984) as cited at Milman, D. (2005). *Personal Insolvency law, regulation and policy* (Markets and the law). Aldershot: Ashgate Pub

[139] for the discussion of the recognition of misfortune, see W.S. Holdsworth, A History od English Law, 2nd edn (1937) vol. VIII, 236.

[140]John C McCoid II, 'Discharge: The Most Important Development in Bankruptcy History' (1996) 70 *Am Bankr L J* 163.)

estates.[141] It also provided that the clothes of debtors and their families should not be seized.[142] The 1705 Act showed a change in the legislators' attitudes towards debtors.

However, it is not so convincing if it only looks at the beautiful side mentioned above. Firstly, the death penalty was designed for the fraudulent debtors and honest debtors who did not surrender. Actually, the debt discharge of the 1705 Act was a kind of 'apparent relaxation', which continued to strengthen its harshness to debtors.[143] Still, then, it was ironic that Daniel Defoe, who was not only a trader and writer but also a bankruptcy reformer, was not discharged his old debts after he came back from a business trip to Scotland because the law had been amended to require consent of four-fifths of creditors to obtain a discharge certificate.[144] Simply saying, the markable reformer of debt discharge was never free from his old debts. The 1705 Act was only alive for three years. Anyway, on the subject of debt discharge, the 1705 act was the turning point of English bankruptcy law, which would possibly change the situation of 'bankruptcy is considered as a crime and a bankruptcy in the old law is called an offender'.[145]
However, the stigma of bankruptcy is difficult for the laws and policies to change, as the mantra of "once a bankrupt, always a bankrupt", bankrupts would be shamed for bankruptcy forever. That might

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[141] Cohen, J. (1982). The history of imprisonment for debt and its relation to the development of discharge in bankruptcy. *The Journal of Legal History, 3*(2), 153-171.
[142] Andrew argued that bankruptcy laws should consider four stakeholders' interests, including creditors, debtors, society and debtors' families. see Keay, Andrew. (2001). Balancing interests in bankruptcy law. *Common Law World Review, 30*(2), 206-236. also see *Royal Bank of Scotland, plc v Fielding*, which discusses the bankruptcy's impacts on a bankrupt's child, available at:https://login-westlaw-co
uk.ezproxy.lancs.ac.uk/maf/wluk/app/document?&suppsrguid=i0ad69f8e000001671c63fa6daa9a6d62&docg
uid=I90558740E42811DA8FC2A0F0355337E9&hitguid=I90556030E42811DA8FC2A0F0355337E9&rank=3&spos=3&epos=3&td=3&crumb-action=append&context=10&resolvein=true
[143] Article 37, The cork report. for the details, *supra* note 16
[144]*Fowler v Padget* (1798) *7* Term Rep 509; 101 ER 1103*,* it also worth noting that there had been a debate that whether the bankruptcy law or creditors should have the prerogative to discharge the debtors. see Milman, D. (2005). Personal Insolvency law, regulation and policy (Markets and the law). Aldershot: Ashgate Pub
[145] D. Defoe, An Essay Upon Project From the Earlier Life and The Chief Earlier Works of Daniel Defoe (H. Morley ed. 1889)

result from the imprisonment for debts, which had been enacted for seven hundred years and finally ended in the 1970s.[146] Nobody could image how deep he or she would fall when they are jailed in a squalid prison. By comparing with the Chinese bankruptcy law, it is no surprise that the pro-creditor tradition of UK and China is similar. As mentioned in Chapter 1, in ancient China, debts and unpaid debtors were dealt with by criminal law, which applied different criminal penalties to debtors. Coincidentally, the early English bankruptcy laws were quasi-criminal. In other words, both two only saw the interest of creditors and merely considered the rationality of bankruptcy, such as misfortune, markets, and other uncontrollable features. From the aspect of morality, not paying back the debts or being bankrupt is immoral, as someone breaks his or her promises. The difference is that the English bankruptcy policy was likely to recognize the misfortune of business and started to grant limited privileges to honest indebted traders, but ancient Chinese criminals continued to keep the original until the exotic powder forced it to make a change through wars and taking the lands.[147]

3.2.4 19th Century: Relieving the Insolvent Debtors and Officialism

To survey the English legislation development in 19th century, it could mark the year of 1813, 1831, 1861, and 1883, with the keywords of relieving the insolvent debtors, the power of creditors, and officialism. The establishment of the relief of insolvent debtors through the 1813 Act(53 Geo III C.102) mitigated the plight of insolvent debtors who were the non-traders.[148] It enabled the

[146] Michael Quilter, 'Daniel Defoe: Bankrupt and Bankruptcy Reformer' (2004) 25(1) *The Journal of Legal History* 53-73. Some authors argue that Daniel Defoe also suggested voluntary bankruptcy in his essay. For the discussion, see John C McCoid II, 'The Origins of Voluntary Bankruptcy' (1988) 5(2) *Bankruptcy Developments Journal* 361-389

[147] It is worthing noting that the plight of debtors could come from the condition of imprison, which depended on debtors' society position. Although the debt prisons were state-owned, they were also operated out of the private profit. A accommodation with good condition, for example, have the access to a shop and bar, could be offered if the debtors could afford. Contrarily, poor debtors were jailed in the squalid prison, see John C McCoid II, 'The Origins of Voluntary Bankruptcy' (1988) 5(2) *Bankruptcy Developments Journal* 361-389

[148] wearing heavy handcuffs. See John White, 'Pain and Degradation in Georgian London: Life in the Marshalsea Prison' (2009) 68(1) *History Workshop Journal* 69-98

imprisoned debtors to register and petition for relief to the court.[149] In other words, It was possible for debtors who did not make a living by buying and selling to be free from imprisonment for debts.

However, despite the change in 1813, the non-traders could not apply for bankruptcy until the 1861 Act, which broadened the scope of bankruptcy from "trader only" to "any person". In the year of 1831, the first English bankruptcy court was set up which means that bankruptcy is within the function of Chancery courts, particularly the bankruptcy commissioners.[150] The commissioner had the right to decided whether the debtors were eligible to be bankrupt and supervise the contribution of bankruptcy estates. Further, the regime of official signee attached to the London Bankruptcy Court was introduced, which reduced the predominant role of the creditors in the process of the administration of assets.151 After selling the bankruptcy assets, the appointed official signee should deposit the proceeds into the Bank of England. Without the private signee, it got rid of the creditor's interruption. Unfortunately, this new administration system did not prevent corruption, and it was finally abolished in 1869.152 A new creditor-oriented bankruptcy regime enacted through the 1869 Act provided creditors powers to control several essential issues in the bankruptcy process, for instance, the appointment of signees.153 It indicated the key dispute about the English bankruptcy law in the 19th century, which focused on the power of handling the administration of bankruptcy assets.[154] The legislation first reforms and then

[149] the Debtors' prison records, including the London debtors' prison, Lincoln jail and Lancaster jail, could be search on the website of the National Archives

[150] David Milman (n 129)

[151] Insolvency Law Review Committee, *Cork Report* (1982) Cmnd 8558, para 47, the creditors has the power to appoint a private signee.

[152] ibid

[153] David Skeel, *Debt's Dominion: A History of Bankruptcy Law in America* (Princeton University Press 2001)

[154] Brougham made his efforts to push the introduction of official signees by arguing that the state should conduct the function of administration via the official signees, instead the private signees appointed by creditors. see David Milman (n 129))

returns to the original regime; it clearly shows its self-contradictory nature. The 1883 Act finally ends the irresolution. In 1883, the English bankruptcy law started an administratively run regime.

The president of the Board of Trade argued that every good bankruptcy law must see two main principles, including “the honest administration of bankruptcy estates, with a view to the fair and speedy distribution of the assets among the creditors whose property they were” and “the idea that prevention was better than cure, to do something to improve the general tone of commercial morality, to promote honest trading, and to lessen the number of failures”. Under the 1883 Act, the official receivers who exercised the administration function as the Board of Trade's representative finished the creditors' domination in the bankruptcy process. The interesting point is that, to process a bankruptcy petition, a fee of £5 should be levied. £5 in 1883 was equal to £590.47 in 2018, as the prices in 2018 are 11,709.37% higher than prices in 1883, according to the figures from the Office for National Statistics composite price index. £5 in the 19th century was not equal to £5 in the 21st century, simply because £5 in 1883 was still a large amount of money for poor insolvent debtors, which might not have been affordable to them.

By relieving insolvent debtors from prison and transferring the power of administration to the official person, the modernization of English Bankruptcy law made further progress in the 19th century. It could be said that the English bankruptcy law constantly developed earlier than other jurisdictions. It is a pity that the development of Chinese bankruptcy law in the 19th century made little progress compared to English bankruptcy law. Without the ambitions inside the country and government, Chinese bankruptcy law could only be pushed to move slowly under the force of Western countries, which did not correspond to Chinese society and economy.

3.3 Conclusion

The history of personal insolvency law in the UK is long and profound, spanning over 450 years. A pioneer in the field of law worldwide, UK insolvency law has laid the foundations for modern insolvency systems in many countries, including the US and Australia. Its evolution reflects a shift from strict protection of creditor interests to a greater focus on the situation of the debtor, particularly where insolvency has occurred through no fault of their own.

Initially, UK insolvency law (as evidenced by the statute of 1542) was punitive in nature, focusing on controlling and punishing debtors who absconded. The legislation regarded bankruptcy as a form of fraud and ignored the possibility of honest insolvency. However, the principle of equal distribution of assets, introduced in the 1571 Act, became an important cornerstone of modern bankruptcy law, allowing creditors to receive fair compensation. Nevertheless, the stigma attached to bankruptcy persisted, and it was not until the 18th century that debtors received some relief with the introduction of the Act of 1705, which provided for debt forgiveness. This marked an important step in balancing the interests of creditors and debtors.

In the 19th century, English insolvency law underwent important reforms to modernise it. The Act of 1813 provided relief from insolvency for non-traders, while the establishment of the Bankruptcy Court in 1831 marked the systematic and formalised supervision of insolvency proceedings. However, the conflict between creditor control and official supervision persisted. The Act of 1869 favoured creditors, while the Act of 1883 further consolidated the role of the official receiver in administering insolvent estates. This shift towards officialism and state involvement in insolvency administration marked an important turning point in the modernisation of personal insolvency law in the UK.

In contrast, Chinese insolvency law, particularly in the 19th century, did not undergo the same degree of positive development. Influenced by Western law only under external pressure, China's legal system has continued to develop insolvency law slowly and in a way that is not well aligned with social and economic realities. While English law recognised the importance of commercial misfortune and began to provide protection for honest debtors, China's legal system continued to view bankruptcy primarily as a criminal matter.

Overall, the development of personal insolvency law in the UK reflects a gradual modernisation of the approach to accommodate the realities of business insolvency and financial distress while constantly striving to balance the rights and interests of creditors and debtors. It highlights the unique historical journey of UK law in global insolvency practices. Further, more attention was shown to debtors' interests.

Chapter 4 Current Position in UK

4.1 Individual Voluntary Arrangement

4.1.1 Initiation: an IVA Proposal

Individual Voluntary Arrangement (IVA) is a popular personal insolvency procedure in the UK. IVAs were introduced in the late 1980s and from 2000 onwards, commercial IVA companies developed IVAs as a popular consumer insolvency remedy. This shift prioritises creditor recovery and the interests of insolvency practitioners over the rehabilitative goals of personal insolvency policy.[155] In recent years, low-income creditors have increasingly been targeted by the IVA market widespread misconduct and

[155] Joseph Spooner, 'Bankruptcy Policy in a Dematerialised Insolvency Law: Glimpses of a Hidden System' (2019) 32(1) Insolvency Intelligence 30

aggressive sales practices in the sale of IVAs have been uncovered by regulators.[156] This is contrary to the original purpose of introducing IVA. IVA was initially used mainly for high-end debt cases involving businessmen with complex affairs.[157] By entering into an IVA debt repayment agreement with creditors, debtors can resolve their debt distress without the stigma of bankruptcy and creditors are able to receive greater repayments. IVAs are also relatively costly, with thousands of pounds paid to the IVA company in each case. IVA has gradually shifted from public management to private management, aligning with the ideals of New Public Management, which involves the marketisation and privatisation of certain public services, with the government assuming a regulatory role. However, the primary beneficiaries of the marketisation of debt relief are not debtors or creditors.[158] The greatest beneficiaries are the bureaucratic elites involved in bankruptcy services.[159] Therefore, society has concerns about the fairness and accessibility of debt relief services.[160] How to regulate marketised debt relief is closely related to how the government fulfils its regulatory responsibilities.

The Insolvency Act of 1986 (IA 1986) strongly emphasises the legislation governing IVAs. Part VIII of the Act (sections 252 to 263G) addresses the basic procedure before the bankruptcy procedure, and Part 5 of the Insolvency Rules contains the more detailed workings of the scheme. An IVA proposal is essential for the initiation of an IVA case. Further, an insolvency practitioner plays an important role in an IVA, as an IVA must be established by an insolvency practitioner acting as the debtor's nominee. Based on information provided by the debtor, the nominee creates the IVA proposal.[161] The information should include a document outlining the terms of the voluntary arrangement proposed by the debtor and

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[156] Joseph Spooner, 'Explaining Personal Insolvency and the Law' (Oxford Law Faculty Blog, 23 July 2020) https://www.law.ox.ac.uk/housing-after-grenfell/blog/2020/07/explaining-personal-insolvency-and-law accessed 1 April 2025

[157] Ibid

[158] Katharina Möser, 'The Changing Infrastructure of Debt Relief: Privatisation, Bureaucracy and Public Choice' in Johanna Gardner, Mary Gray and Katharina Möser (eds), *Debt and Austerity – Implications of the Financial Crisis* (Edward Elgar Publishing 2020) 94

[159] Ibid

[160] Ibid

[161] Insolvency Act 1986, s 256A

a statement of his affairs containing such particulars of his creditors, debts, other liabilities, and assets as prescribed, and such other information as prescribed.[162] A debtor will face imprisonment, a fine or both if the debtor makes any false representation or fraudulently does or omits anything to obtain the approval for an IVA proposal of creditors, even if the creditors do not approve the proposal.[163]

The proposal prepared by the nominee should explain why an IVA is in the best interests of the creditors and include complete information about the funds and assets available to the creditors. Typically, an IVA is set for a 5-year term. Then the nominee should submit the IVA proposal to the court, together with his or her comments on its merits. As a result of the Insolvency Act 2000 amendments, an interim order is no longer required for an IVA. However, where there is an impending legal action, for example, the creditors may petition a bankruptcy against the debtor, the nominee may also apply to the court for an interim order. During the period that the interim order is in effect, no bankruptcy petition relating to the debtor may be presented or proceeded with, no landlord or other person to whom rent is payable may exercise any right of forfeiture by peaceable re-entry in relation to premises let to the debtor, and no other proceedings, execution, or other legal process may be commenced or continued, and no distress may be levied against the debtor or his property without the permission of the court.[164] An application for the interim order may be rejected by the court if the court think such a proposal is hopeless. In the judgment of the proposal is not serious and viable as 'it is an essay in make-believe'.[165] The court has a discretion

[162] ibid
[163] The Insolvency Act 1986, s262A, it is worth mentioning a private prosecution of false representation case in 2018. A jury at Manchester Crown Court unanimously convicted Andrew John Camilleri of making false representations in an Individual Voluntary Arrangement proposal in violation of section 262A of the Insolvency Act 1986. By accepting Calilleri's offer, it would mean that one of Camilleri's creditors would receive £29,025 to cancel the £2.25 million debt that he owed.
[164] Insolvency Act 1986, s 254
[165] *Davidson v Stanley* [2004] EWHC 2595 (Ch), [2005] BPIR 279

to act as a filter to avoid a unnecessary and wasteful creditors' meeting if the debtor does not have a serious and viable proposal.[166] It is not fair to expose creditors to the cost and expense of a meeting.[167]

4.1.2 Creditor's Meeting: Approval of an IVA Proposal

According to section 257 of the Insolvency Act 1986, the nominee must seek approval of the proposed voluntary arrangement from the debtor's creditors.[168] The decision of creditors should be made via a creditor's decision procedure.[169] Part 15 of the Insolvency Rules 2016 prescribes several ways of decision-making procedures, such as correspondence, electronic voting, virtual meetings, physical meetings, or any other decision-making procedure that allows all creditors who are entitled to participate in the decision to do so equally.[170] As for the physical meeting, it may request for a physical meeting before or after the notice of the decision procedure or deemed consent procedure is delivered, but it must be made no later than five business days after the date on which the convener delivered the notice of the decision procedure or deemed consent procedure.[171]

Regarding the approval of an IVA proposal, it should be approved without any modifications or with the modifications that the debtor agrees.[172] Further, it grants no authority to the nominee or the chair of the creditor's meeting to disregard creditor-proposed changes, whether such disregarding is conducted out of the interest of the nominee himself or herself or the interest of the debtor.[173] That means the nominee has no authority to exercise discretion and professional judgment over a modification that is incompatible with an IVA Proposal but only to discuss it with the debtor and creditors. That will involve a case of material irregularity. The approval of the IVA proposal requires 3/4 (75 per cent)of the creditors to vote

166 *Fletcher v Vooght* [2000] BPIR 435
167 ibid
168 Insolvency Act 1986, s 257(2)
169 Insolvency Act 1986, s 257(2A)
170 Insolvency Rules 2016, r 15.3
171 Insolvency Rules 2016, r 15.6
172 Insolvency Act 1986, s 258(2)
173 *RBS v Munikwa* [2020] EWHC 786 (Ch)

in person or by proxy at the meeting.[174] With the 3/4 vote for the IVA proposal, it will bind all the creditors by the terms of the arrangement regardless of whether they voted or not. However, without the consent of preferential creditors and secured creditors, an IVA proposal must not reduce their rights. A clause in an IVA plan that precludes the secured creditor from initiating or continuing proceedings against debtors for any personal liability does not affect the secured creditor's right to enforce his or her security.[175] In practice, creditors may open a 'negotiation' regarding the IVA terms.[176] For instance, creditors may request a higher monthly payment or receive a payment from the sale of assets that the debtor does not want to lose.[177] In this case, the nominee should advise the debtor on the specific terms of the IVA.[178] Once the creditors' meeting approves the proposal, it will bind all creditors entitled to vote and were given notice of the meeting.[179] Regarding the decision of the creditor's meeting, the decision should be reported to the court on whether the creditors approve the IVA proposal or not.[180] If the report indicates that the creditors have declined to approve the IVA proposed under the section 256 of the Insolvency Act 1986, the court may discharge any interim order that is currently in effect about the debtor.[181] In practice, the next step after the creditors reject the IVA proposal depends on the reasons for rejection. If the nominee believes that the debtor's IVA proposal can be modified by making acceptable changes, the IVA proposal may be redrafted.

The creditors can accept an IVA plan and also can be challenged by the creditors. Under the section 262 of the Insolvency Act 1986, an approved IVA plan may be challenged in the case of unfairly prejudicing

[174] Here it has to note that the 3/4 (75 percent) refers only to those who vote, and the creditors who is assumed to receive notice of the proposal.
[175] *Rey v FNCB Ltd* [2006] EWHC 1386 (Ch), [2006] BPIR 1260
[176] House of Commons Library, 'Individual Voluntary Arrangement' (Briefing Paper, House of Commons, 2023) https://commonslibrary.parliament.uk/research-briefings/sn05165/ accessed 4 May 2024
[177] Ibid
[178] Ibid
[179] Insolvency Act 1986, s 260
[180] Insolvency Act 1986, s 259(1)
[181] Insolvency Act 1986, s 259(2)

the interest of a creditor of the debtor.[182] Also, when there is some material irregularity related to creditors' decision procedures, the IVA plan can be challenged.[183] Such an application for challenging should be made within 28 days of the decision if a creditor was given notice of the meeting within 28 days of a report to the Court under s.259(1)(b), or within 28 days of becoming aware of the meeting if no notice was given.[184] The court may consider to extent the time before or after the time limit expires if the court thinks fit.[185]

Registrar Baister made a decision in *Re Plummer* regarding the challenge that is not within the scope(materials irregularity or unfairly prejudicing) of section 262 of the Insolvency Act 1986. The IVA proposal should not be approved if less than 75% of creditors vote for it, though the chairman calculates the votes wrongly and believes there are sufficient votes for the approval of the IVA plan. That is, 'there is a difference between circumstances which give rise to something which may be described as a material irregularity and something which invalidates approval or means that approval was simply never achieved'.[186] Therefore, it argues that as such, an IVA was a nullity, so it never existed, and it did not apply to the 28-day limit set in section 262 of the Insolvency Act. However, Briggs LJ decided to have a broader view on the definition of irregularity, viewing that at which irregularity was sufficient to render the IVA null and void, it remained within s.262 and thus subject to the time limits.[187]

4.1.3 The Implementation of an IVA

The nominee in an IVA shall be appointed as the supervisor after the IVA proposal is approved.[188] Under the supervision of the supervisor, it ensures the IVA term is followed by the debtor. During the IVA period, which is usually a 3 to 5-year term, the supervisor shall be notified when the debtor's situation

[182] The Insolvency Act 1986, s262(1)(a)
[183] The Insolvency Act 1986, s262(1)(b)
[184] The Insolvency Act 1986, s262(3)
[185] The Insolvency Act 1986, s376, see Tanner v Everitt [2004] EWHC 1130 (Ch)
[186] Re Plummer [2004] BPIR 767
[187] *Narandas-Girdhar and Anr v Bradstock* [2016] EWCA Civ 88
[188] The Insolvency Act 1986, s263

changes. According to section 276, the court may make a bankruptcy order on a petition made by the supervisor or creditors bound by the IVA plan if the debtor has breached his obligations under the voluntary arrangement.[189] In this case, the IVA will be terminated. However, if the IVA is still in the best interest of the creditors, the court has the discretion to decide whether to continue the IVA.[190] Regarding the subsequent payment after failing to pay the instalment in accordance with the IVA plan, the court thinks the bankruptcy order shall not be adjourned where there is a specific provision that such a subsequent payment could not be the remedy of the default.[191]

A debtor will be fully discharged from all liabilities if he or she follows the IVA plan and finally completes it. Any of his or her outstanding debt that has not been repaid is discharged. Here, it is worth noting that the co-debtor is still liable to the debts, though the debtor has reached an IVA plan with their creditors. In the *Jones v Financial Conduct Authority*, the appellant Jones fail to argue that the individual voluntary arrangements made by the other partners of the former partnership relieved him of the debt.[192] In other words, the Financial Conduct Authority reserved the right to pursue Jones for the debt.

4.1.4. Protocol for IVA

Several insolvency practitioners use the IVA Protocol (currently, the 2025 version). This voluntary agreement provides an agreed-upon standard framework for dealing with simple consumer IVAs. It applies to both IVA providers and creditors. In essence, the Protocol establishes voluntary guidelines. The IVA Protocol addresses several issues, including what the insolvency practitioner should do to verify the debtor's income and expenses, how the debtor's home equity should be handled, what to do if the debtor's income and outgoings increase or decrease, and what should happen if the debtor does not make

[189] The Insolvency Act 1986, s276
[190] *Kaye v Bourne* [2004] EWHC 3236 (Ch), also see Bonney v Mirpuri [2013] BPIR 412, it is proper for the court to decide an adjournment of a bankruptcy petition when it is in the best interests of all creditors to allow an auction of a relevant property and to give the debtor more time to resolve his financial situation.
[191] *Clarke v Birkin* [2006] EWHC 340 (Ch)
[192] *Jones v Financial Conduct Authority* [2014] C.L.Y. 1826

any payments? The Protocol also requires the insolvency practitioner to ensure that the debtor has received complete information on the various options available with his or her debts.

4.1.5 Recognized Professional Organisations

Individual insolvency practitioners (including those acting as an IVA's nominee or supervisor) must be members of a "Recognised Professional Body" (RPB), which also serves as their regulatory body. RPBs are in charge of ensuring that the quality of advice provided by insolvency practitioners is acceptable. The Small Business, Enterprise, and Employment Act of 2015 (SBEEA 2015) established new statutory regulatory principles and objectives to which RPBs must adhere. In addition, the Secretary of State can establish a single regulator of insolvency practitioners. This authority will expire (if not used) on September 30, 2022. The Insolvency Service visited each RPB between November 2016 and November 2017 to assess how they carry out their monitoring and regulatory functions. It also researched how insolvency practitioners who work as volume IVA providers are monitored and regulated. There have been two significant developments in the use of IVAs in recent years: First, according to Insolvency Service statistics, the number of people seeking debt relief through an IVA has increased significantly from 49,400 in 2016 to over 59,000 in 2017. Until 2003, there were fewer than 10,000 per year. Second, how IVAs are supervised has consolidated into a small number of "volume providers," with ten providers accounting for more than 80% of new IVAs registered in 2017.

An insolvency practitioner is frequently an employee who supervises many IVA cases. This is a distinct method of operation compared to conventional insolvency procedures. On September 26, 2018, the Insolvency Service published a "Review of the Monitoring and Regulation of Insolvency Practitioners," which detailed serious concerns about the practices and regulation of insolvency practitioners. Insolvency practitioners who work for IVA volume providers. It resulted in a few recommendations The Insolvency Service has pledged to continue its oversight activities in the coming months as it considers whether to establish a single regulator of insolvency practitioners, as proposed.

SBEEA 2015 provides for this. The Insolvency Service is aware that some RPBs are currently investigating the feasibility of a voluntary code for IVA providers to strengthen self-regulation. A separate Library briefing paper, "Insolvency Service Review: Volume Providers of Individual Services," contains more detailed information.

4.2 Debt Relief Order

4.2.1 Before Debt Relief Order: the Administration Order Designed for Debtors with Low Income and No Assets

Before the introduction of the debt relief order (DRO), the administration order(AO) was the main procedure for solving the insolvency problems of poor debtors. The AO procedure drifted for a hundred years.[193] Though the trader restriction on Insolvency was abolished in 1861, the poor non-trader debtors faced inequality.[194] The bankruptcy regime in force at the time was unsuitable for poor debtors.[195] Here, the poor debtors could be working-class debtors and small businessmen debtors. This was unsuitable because, when entering bankruptcy, such poor debtors would suffer discrimination. Based on the class nature of bankruptcy law, it was hard for poor debtors to reach bankruptcy law.[196] Secondly, the situation was such that there was no direct deduction from the wages of wage earners as repayment.[197] A poor person might be prosecuted by a large debtor and be imprisoned without having any way to reach an agreement with his or her creditors.[198] Moreover, after getting out of prison by repaying the debt owed to the specified creditor, debts owed to other creditors were still not relieved.[199] On the contrary, the

[193] Iain Ramsay, *Personal Insolvency in the 21st Century: A Comparative Analysis of the US and Europe* (Hart Publishing 2017)
[194] For discussion of imprisonment, see above
[195] Iain Ramsay (n 193)
[196] ibid
[197] Wages Attachment Abolition Act 1870
[198] HC Deb 3rd ser, vol 277, cols 834(1883) https://api.parliament.uk/historic-hansard/commons/1883/mar/19/second-reading#column_834 also Bankruptcy Act 1883, s 122
[199] Ibid

large debtor with assets could easily gain relief from debts.[200] As mentioned in the previous section, it wasn't until 1970 that working-class debtors weren't facing jail time.

In 1883, Joseph Chamberlain introduced ‘one important provision which was entirely new’ that ‘had an important bearing on the interesting question of the total abolition of imprisonment for debt’, in other words, the unfairness.[201] The entirely new provision, named administration order, was based upon the Scottish concept of *cession bonorum*.[202] *Cession bonorum* means ‘Surrender of the goods’, a surrender of assets to a tribunal, usually in the context of bankruptcy or preparatory to satisfying an award of restitution.[203] Under an administration order, a judge of the County Court might make an order requiring a debtor who owes less than £50 to pay the whole or any part of the debt by instalments or otherwise.[204] Through an instalment or an arrangement of the debts, the position of the small debtors was exactly the same as that of the large debtor who had succeeded in reaching a settlement with his creditors or arranging a liquidation scheme.[205]

The reform made via the 1883 bankruptcy law brought hope to poor debtors. However, the results of this promising system have not been impressive in practice. The reform of the 1883 bankruptcy law brought hope to poor debtors. However, the results of this promising system have not been impressive in practice. In the first ten years of the AO's implementation, the average number of Orders was 3,265.5.[206] In the twenty years since the AO's implementation, the number of orders experienced two increases and two

[200] ibid
[201] ibid
[202] David Milman (n 129)
[203] Aaron X Fellmeth and Maurice Horwitz, *Guide to Latin in International Law* (2nd edn, Oxford University Press 2022)
[204] HC Deb 3rd ser, vol 277, col 834 (1883) https://api.parliament.uk/historic-hansard/commons/1883/mar/19/second-reading#column_834
[205] Ibid, the Insolvency Act 1883 gives the High Court and the County Court jurisdiction over bankruptcy cases.
[206] Patrick Polden, *A History of the County Court, 1846-1971* (Oxford University Press 1999)

decreases. In 1904, the number of AO peaked (6947 cases).[207] Over 6,000 AO cases per year continued for nine years until 1911.[208] Beginning in 1912, the number of AOs began to decline. From 1917 to 1921, the number of AO per year was only a few hundred, and for the next decade or so, the number of AO per year was less than 2,000.[209] From 1948 to 1964, the maximum number of AO per year was only 40. In 1963, the number of AO was only two.[210] AO's unpopularity stems from a number of reasons. For example, as mentioned in the Report of the Departmental Committee on Bankruptcy Law, debtors can only apply AO proceedings when they have received an unfavourable judgement. Also, the provision that AO only accepts debtors who owe a little under £50, the upper limit on the amount of debt is too low.[211] From the 1960s to the 1980s, there were five adjustments to the cap of debt. In 1981, the debt ceiling rose to £5,000.

The Cork Committee recommended introducing a new procedure called Debts Arrangement Orders (DAO) to replace the current administration order procedure.[212] The Review Committee's report (the Cork Report) analysed the system's main weaknesses and acknowledged the urgency of introducing a simple, accessible, and inexpensive system to address the debt problems of ordinary consumer debtors.[213] An eligible DAO debtor was an individual with unsecured debts between £200 and £10,000 who had no significant realisable property.[214] In the case where the debt of the applicant exceeded £10,000, the court might still make a DAO if other conditions(no significant assets, no investigation required based on the existing information, had a future income, and the debtor was able and willing to pay to the court regularly) were satisfied.[215] However, the recommendation to introduce DAO was not adopted.

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[207] ibid
[208] ibid
[209] ibid
[210] ibid
[211] ibid
[212] Cork Report of the Review Committee (Cmnd 8558), para 281
[213] Cork Report of the Review Committee (Cmnd 8558), para 272
[214] Cork Report of the Review Committee (Cmnd 8558), paras 272, 286
[215] Cork Report of the Review Committee (Cmnd 8558), para 286

A similar adjustment of the administration order was provided in s13 of the Courts and Legal Service Act 1990 after the Civil Justice Review conducted by the Lord Chancellor's office.[216] The court might make a 3-year administration order with composition provisions.[217] Even though these reforms have been enshrined in the law, it is a pity they have never been implemented.[218]

In 2007, the government still tried to reform the administration via the Tribunals, Courts and Enforcement Act 2007. Similarly, the provisions never took effect. The government finally announced that it had given up the outstanding power provided by the Tribunals, Courts and Enforcement Act 2007. Also, the government suspended work on introducing 'the reformed Administration Order scheme and the Enforcement Restriction Order in 2009 due to cost, and there are no current plans to revisit this.[219]

Without any reforms or abolishment, the Administration order is still a formal, legal and in-court way for debtors to seek relief from debt at the moment. Individuals with at less two debts (£5000 for the maximum) and at least one county court or High Court judgment against to him or her, might apply to the procedure of administration order. There are not any specified debts excluded from an AO case and there is no upfront fee in an AO case. A debtor in an AO case shall follow the agreement he or she reached with his or her creditors and make repayments to creditors. The court will take £10 monthly to support its expenses. However, the low ceiling on the amount of debt and the requirement of a court judgement as a necessary condition for the application of the procedure are harsh thresholds that have stopped a large number of debtors. Today's £5,000 can no longer be equated with the £5,000 of the 1980s. Today's £5,000 can no longer be equated with the £5,000 of the 1980s, it is not as big a debt as it once was. Further, people in

[216] Iain Ramsay (n 193)
[217] Courts and Legal Services Act 1990, ss 13(4), (5) and 112B
[218] David Milman (n 64)
[219] Ministry of Justice, Response to FOI Request (9 October 2015), as cited in Iain Ramsay, *Personal Insolvency in the 21st Century: A Comparative Analysis of the US and Europe* (Hart Publishing 2017) 86

debt today carry much more than £5,000. As can be seen from Kempson's report, the administration order cases also suffer from a high rate of defaults.[220] There is a high incidence of administration orders being revoked after months of forgetting or failing to make payments; sometimes, the debtors were not notified about the revocation by the court.[221] Moreover, after the revocation, many debtors experience various forms of debt collection by creditors.[222] Therefore, after a hundred years of ups and downs, the AO program eventually seemed to disappear completely, even though it was still part of the current debt enforcement regime. Still, no one paid any attention to it.

4.2.2 The Introduction of DRO in 2009

As discussed above, the administrative order has lost its function of efficiently resolving NINA or LINA debt problems in public oblivion. The consultation paper A Choice of Paths: Better Options to Manage overindebtedness and Multiple Debt was published in 2004 to seek public views on the options available to indebted people to resolve their debt problems, especially multiple debts. Among other things, the consultation paper proposed the introduction of a No Income No Asset Debt Relief scheme administered by the insolvency service to provide debt resolution options for the can't pay group. The can't pay group are vulnerable people who are financially excluded from the debt relief remedies available at the time. Debt relief remedies in this context are individual voluntary arrangement (IVA), county court administration order, a non-statutory debt management plan and bankruptcy. Debtors in this group usually have relatively low levels of indebtedness, no assets in excess of a nominal amount, and no residual income that can be used for debt relief. The no-asset procedure inspired the No Income No Asset Debt Relief scheme in the 2002 New Zealand Government document, which was designed to relieve debtors who were unable to pay their debts and could not access other statutory insolvency procedures.

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[220] Elaine Kempson and Sharon Collard, *Managing Multiple Debts: Experiences of County Court Administration Orders among Debtors, Creditors and Advisors* (2004)
[221] ibid
[222] ibid

It is worth noting that the administration order remains the system that the Consultation Paper seeks to reform, to improve the existing process to increase the success rate of administration orders and to improve cost-effectiveness by limiting the scheme's application to the ability-to-pay group. However, the proposal to reform the administration order ultimately came to nothing.

On 31 March 2005, the Insolvency Service published a consultation paper entitled "Relief for the Indebted - An Alternative to Bankruptcy" to seek views on a proposed new debt relief order procedure. The consultation paper seeks views on a proposed new debt relief order. The proposed new debt relief order is out-of-court, simple to administer and less costly. Out-of-court debt relief orders enable low-value cases to be diverted to the insolvency service without the court having to take on the responsibility of issuing a debt relief order. The court does not have to take on the responsibility of issuing a debt relief order. The Ministry of Justice, which initially proposed the NINA process, refused to administer it through the courts because it would be costly and not central to the court's role in dispute resolution. The DRO, transplanted from New Zealand, came into force on 6 April 2009 via section 108 of the Tribunals, Courts and Enforcement Act 2007. Personal bankruptcy law can serve as a safety net for family debt. However, the complexity of modern debt and the existing framework pose additional challenges for low-income families.[223] There is an argument say that The DRO reforms provide a solution for consumer debtors, but the fundamental problem with personal insolvency is not solved. It just undercuts the fundamental problem with personal bankruptcy as a method of debt forgiveness.[224]

4.2.3 What is DRO and How is it Processed?

[223] Joseph Spooner, 'Can Bankruptcy Relieve the Crisis of Household Debt?' in Andreas Wiedemann and Paolo Brunori (eds), *Financing Prosperity by Dealing with Debt* (UCL Press 2022) 60

[224] John Tribe, 'Consumer Protection Problems Created by the Structure of English Personal Insolvency Law' in Frederico Ferretti (ed), *Comparative Perspectives of Consumer Over-Indebtedness – A View from the UK, Germany, Italy and Greece* (Eleven International Publishing 2016) [European and International Insolvency Law Studies].

Debt Relief Order (DRO) is designed to address personal debts that are beyond NINAs and LINAS's ability to repay. An eligible debtor must apply through an official receiver of an approved intermediary to initiate a DRO to relieve his or her qualifying debts.[225] It is free for debtors to get help from an approved debt advisor who will find the best way to debt relief by going through the debtor's situation. The debt advisor will complete a DRO application for the debtor if a DRO is suitable.[226] Section 251A lays out that qualifying debt should be unsecured debt, which is for a 'liquidated sum payable either immediately or at some certain future time' and is not an excluded debt.[227] The excluded debts include child maintenance or anything you owe under family proceedings, student loans, budgeting and crisis loans from the Social Fund, debts secured against any possessions you own, damages for personal injury or death a court has ordered you to pay, and unpaid TV license fees.[228] For a specific debt indicated in the application and owed to the specified creditor, the official receiver is required to consider it as qualifying debt as long as The information provided in the application suggests that it meets the criteria. There are no indications that the information provided is incomplete or inaccurate, and the official receiver has no reason to think otherwise.[229] It is the duty of the debtor to assist the official receiver at any stage of the DRO.[230] In case where there is any error or omission from the supplied information or any changes in the debtor's circumstances during the DRO application that would affect or would have affected the official receiver's decision. The debtor must notify the official receiver as soon as possible.[231]

[225] Insolvency Act 1986, s 251B, there are 9 approved intermediaries and Advice UK deals with the most of the DRO application.
[226] Insolvency Act 1986, s251B provides the documents required for the DRO application.
[227] Insolvency Act 1986, s251A
[228] Insolvency (England and Wales) Rules 2016, r 9.2
[229] Insolvency Act 1986, s251D (3)
[230] Insolvency Act 1986, 251J
[231] ibid

Upon receiving an application, the Official Receiver can process a Debt Relief Order (DRO) without involving the court.[232] However, the Official Receiver also reserves the right to reject an application or postpone a decision while awaiting additional information.[233] The official receiver will make a debt relief order after he or she considers the application is satisfied.[234] A copy of the order should be given to the debtor, and each creditor of the qualifying debt should be notified of the order and its effect.[235] Once the order is made, other debt management arrangement, including an administration order, an enforcement restriction order and a debt repayment plan approved under Chapter 4 of Part 5 of the Tribunals, Courts and Enforcement Act 2007, cease to be in force.[236] Typically, a DRO remains in effect for a period of 12 months. That means the debtor under a DRO will be relieved from making repayments and any accruing interest to creditors during such a one-year moratorium period.

Also, the creditors are prevented from creditors are prevented from starting a creditor's petition in respect of the debt or any action or other legal proceeding against the debtor.[237] Debtors in DRO must not break the restrictions for one year. Debtors are prohibited from obtaining a loan of £500 or more, either individually or jointly with others, without disclosing to the lender that they have been notified of the debt cancellation. Additionally, debtors must not conduct business under a name different from the name under which they were registered in the Debtors' Register without informing all their business contacts that they have been placed on the Debtors' Register. Furthermore, debtors are not allowed (either directly or indirectly) to participate in the promotion, management, or formation of a limited company or to serve as a directors of a company without obtaining permission from the court. Debtors must also inform the

[232] Insolvency Act 1986,S251B provides that an DRO application is only to be regarded as having been made until the applicaiton has been submitted to the official receiver.
[233] Insolvency Act 1986, s251C
[234] Insolvency Act 1986, s251C, s251E
[235] Insolvency Act 1986, s251E
[236] Insolvency Act 1986, s251F
[237] Insolvency Act 1986, s251G

bank or building society of their debt restructuring case before applying for an overdraft, and they are prohibited from issuing cheques that may bounce.

The moratorium period may be extended by the official receiver in case an investigation under section 251K(creditor's objection) may be carried out or completed or provides the debtor with an opportunity to make arrangements for repaying the debts after the official receiver makes a decision to revoke the order.[238] Further, It is possible for the court to exercise the power to extend the moratorium period if there is an application made.[239] It is worth mentioning that even though the DRO is an out-of-court debt relief process, the legislation still gives the court the power to ensure the quality of the DRO in specific cases.[240] Once the moratorium period expires, the debtor is discharged from the old debts.[241] Any liability of the debtor's partner or co-trustee will not be released. Also, the debtor's liability as surety for the debtor or as a person like such a surety will not be released.[242]

4.2.4 DRO Restrictions

A Debt Relief Order imposes specific restrictions on individuals while they are under its protection. If the Insolvency Service believes the individual has been dishonest or engaged in misconduct, they can apply either a Debt Relief Restriction Undertaking (DRRU) or a Debt Relief Restriction Order (DRRO). These restrictions include not being able to borrow more than £500 without informing the lender about their DRO status, continuing a business under a different name without disclosing that their previous business was subject to a DRO, and setting up or acting as a company director without obtaining permission from the court. These measures can extend the restrictions for up to 15 years, preventing the

[238] Insolvency Act 1986, s251H
[239] Insolvency Act 1986, s251M, s251L
[240] David Milman, 'Debt Relief Orders: A New Option for the Distressed Individual Debtor' (2009) 22 *Insolvency Intelligence* 153-155
[241] Insolvency Act 1986, s251I
[242] ibid

individual from engaging in various financial and business activities during this period. In addition to the restrictions described above, the Debtor will be subject to many other restrictions as the BRO.

4.2.5 DRO after the 2024 Spring Budget

The procedure for a debt relief order is known as the lite-bankruptcy procedure. However, this simplified procedure, from the time it takes effect, imposes relatively strict access conditions on the debtor. The criteria for a DRO is the important part, especially the amount of debt, surplus income and the total value of debtor's assets. The cap of these three conditions has undergone several reforms over the years. When the DRO was first introduced, an eligible debtor was one whose debts did not exceed £15,000, whose monthly income did not exceed £50, and who owned property valued at no more than £300 but could own a car worth no more than £1,000. Since 2015, the second version of the allowable amount of the debt increased to £20,000 after the reform, along with the increased allowable total value of assets of £1000.

During the pandemic, the government asked the public for their views on reforming the DRO in 2021.[243] The outcome of the consultation was to raise the threshold of the value of assets that a debtor can hold and qualify for DRO from £1,000 to £2,000, also to increase from £1,000 to £2,000 the value of a single motor vehicle that can be excluded from the total value of assets, to increase in the amount of surplus income a debtor can have before paying creditors from £50 to £75 per month and to grow in the total amount of debt allowed under DRO from £20,000 to £30,000.[244] It was estimated that there would be

[243]Debt Relief Orders Consultation on changes to the monetary eligility criteria available at https://www.gov.uk/government/consultations/debt-relief-orders/debt-relief-orders-consultation-on-changes-to-the-monetary-eligibility-criteria. A government Impact Assessment document showed three options were put forward: option one was do nothing, meaning that some individuals who were financially distressed and had no hope of repaying their creditors would continue to be denied adequate debt relief. Option two is One option is to increase awareness and use of DROs. By increasing the monetary limits to enable debtors with debts between £20,000 and £30,000 and monthly incomes between £50 and £75 to use DROs for debt relief. The third option , the Government's preferred option, is to introduce new debt relief measures through secondary legislation to provide debtors with more choice.

[244] HM Government, 'Consultation Outcome: Debt Relief Order' https://www.gov.uk/government/consultations/debt-relief-orders accessed 3 June 2023

more than 50% of debtors who enter into a DRO had more than £20,000 in debts but had assets, surplus income and vehicles that were within the previous monetary limits.[245] Further, in 2022, the government published a document seeking evidence to review the current personal insolvency framework. It mainly includes questions on the purpose of personal insolvency law, the costs and fees of personal insolvency law, whether the current personal insolvency law is working correctly and what innovations are needed. The government also asked whether there are international personal insolvency law regimes to which reference can be made.[246]

The part of this consultation on DROs and the corresponding adjustments to DROs in budget 2024 will be discussed here. Firstly, on the question of whether the DRO procedure fulfils the purpose of the personal insolvency legislation, as the DRO is a debt resolution procedure designed for NINAs or LINAs, it is natural that the DRO is more oriented towards fulfilling the purpose of the personal insolvency legislation of 'fresh start'. However, respondents argue that the limitations on the amount of surplus income in the DRO's conditions of access will encourage debtors to maintain their current income and not to do more work and earn higher wages. Obtaining a higher wage could be a disincentive to enter a DRO. Simply resolving past debt difficulties without raising income does not give debtors a real fresh start. There are specific debts, such as student loans, that are not automatically discharged at the end of a DRO and will continue to plague DRO debtors. Among the several reasons why some DRO-eligible debtors preferred to file for Bankruptcy rather than a DRO, as also investigated in the Bankruptcy Service's study, was that these debtors feared that if their surplus income increased during the 12-month moratorium period, and the debtor's surplus increased, the debtor's DRO would be revoked and their

[245] HM Government, 'Ad-hoc Statistics on the Breakdown of Newly Eligible Debt Relief Orders by Eligibility Criteria Change, England and Wales, 1 July 2021 to 30 June 2022' https://www.gov.uk/government/statistics/ad-hoc-statistics-on-the-breakdown-of-newly-eligible-debt-relief-orders-by-eligibility-criteria-change-england-and-wales-1-july-2021-to-30-june-2022/ad-hoc-statistics-on-the-breakdown-of-newly-eligible-debt-relief-orders-by-eligibility-criteria-change-england-and-wales-1-july-2021-to-30-june-2022 accessed 2 July 2022

[246] will discuss

debts would be reinstated. In the 2024 Budget, there is no corresponding adjustment to surplus income in the DRO eligibility criteria.

Furthermore, the issue of DRO fees has always been a hot topic of debate. The upfront £90 DRO fee, even if small, has been a barrier to NINAs and LINAs' opting for DRO to alleviate their debt difficulties. Nine out of ten DRO or bankruptcy debtors are struggling with fees. One debt charity reports that people seeking its advice are left with an average of £3.69 a month after paying for essentials.[247] This means such debtors need to save for 25 months before they can start applying for a DRO. Regarding the question of how the DRO should be funded and structured, Respondents to the consultation felt that support should be available for vulnerable people and that there was a strong public policy case for some public funding to ensure that cost was not a barrier to accessing services. Some respondents suggested that the cost of each of the three statutory processes should be set at between £50 and £70, which would remove cost as a determining factor in any individual's recourse to a formal solution. In the case of upfront fees for DROs, there was a suggestion that such an upfront fee could be funded by the bank's current levy where a means test has been carried out, and it has been determined that the debtor cannot pay the fees.

However, a means test on the debtor for the fee may raise other costs of the DRO, such as the cost of time. Excessive waiting times are why some suitable debtors give up applying for a DRO in favour of Bankruptcy. Therefore, it is not practical to waive the upfront fee for some DRO debtors by means of testing. Also, some of the respondents suggested that the government should fund the DRO fee. At 2024 Spring Budget, the £90 administration fee has been abolished from 6 April 2024 onwards.[248] At this point, the DRO becomes a free formal debt relief process, which is likely to make it more popular.

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[247] HM Government, 'Call for Evidence Outcome: Review of the Personal Insolvency Framework: Summary of Responses and Next Steps' https://www.gov.uk/government/calls-for-evidence/call-for-evidence-review-of-the-personal-insolvency-framework/outcome/review-of-the-personal-insolvency-framework-summary-of-responses-and-next-steps accessed 5 April 2024

[248] HM Treasury, *The 2024 Budget*, para 3.41

As for the effectiveness of DRO, many respondents felt that the DRO should be more flexible. The main thing that would make DRO more flexible would be to make the eligibility criteria for DRO more inclusive to allow more debtors to enter the DRO program. This means that the maximum debt limit, asset limits, and the value of motor vehicles the debtor holds should all be adjusted. Citizens Advice shared the case of Shaun, a typical situation: Shaun was a self-employed businessman with a substantial income[249]. After experiencing a relationship breakdown with his partner and depression, he was unable to continue his self-employment. The impact of the epidemic on the industry has also made it impossible for him to find suitable work. Shuan's debts have mounted to £40,000. to pay off some of his debts, his Universal Credit has been deducted by 25%, the maximum deduction permitted. Shuan's income is limited, and he relies heavily on his sister to cover his daily needs. In these circumstances, he would be awkward if he tried to resolve his debt difficulties through formal debt relief procedures. Debts totalling over £30,000 prevented using a DRO, but Shuan could not afford to pay the £680 bankruptcy administration fee. Debt totalling more than the conditions for applying for a DRO but not being able to pay the high bankruptcy fees is a very typical illustration of the lack of flexibility of a DRO.

The limitations on the total amount of a debtor's property in a DRO application, including the requirement that the value of motor vehicles held by the debtor must not exceed £2,000, have kept some debtors out of the DRO by failing to keep pace with the rise in the price of second-hand cars. In addition, for sole traders, a reliable motor vehicle is a necessary means of production, and the value of such a motor vehicle is often more than £2,000. This means that a sole trader whose business has failed may not be able to get a fresh start through a DRO because of his or her motor vehicle holdings.

[249] Citizens Advice, *Priced Out of Debt Relief: How Upfront Insolvency Fees Keep People Stuck in Debt Purgatory*
https://www.citizensadvice.org.uk/Global/CitizensAdvice/Consumer%20publications/Priced%20out%20of%20debt%20relief%20(1).pdf accessed 5 May 2024

To increase the flexibility of DROs, it also suggested having a mechanism for periodic revision of eligibility criteria on an annual or biannual basis to ensure that DROs are kept up to date.[250] Such a mechanism is feasible, but more research is needed on how to develop and operate it. Thus, the 2024 Budget only adjusts the total amount of DRO debt and the total amount of property held by the debtor if the 2024 budget is seen as the government's policy response to the consultation on the 2022 personal insolvency frame. Through the adjustment of the 2024 Budget, the government increased the maximum debt threshold for DRO from £30,000 to £50,000 and increased the maximum price of a motor vehicle that an individual can keep from £2,000 to £4,000.

In summary, from 6 April 2024, NINAs and LIlAs can access the DRO free of charge. From 28 June 2024, DROs will be available to debtors with a total debt of up to £50,000, a surplus income of up to £75 per month, and who satisfy the other DRO eligibility criteria, and who continue to hold a motor vehicle with a value of up to £4,000. The DRO, after the 2024 budget, offers more households with debt problems the possibility of debt relief and a fresh start. Of course, it remains to be seen how well the DRO process will work with the new eligibility criteria.

4.3 The Breathing Space Scheme in the Debt Despite Scheme

4.3.1 Introduction of The Breathing Space Scheme

Personal insolvency numbers in England and Wales tripled in the decade to 2010, before gradually declining each year since. But this does not mean that people are taking on less debt. On the contrary, as the number of official personal insolvencies has fallen, the personal debt situation has worsened. R3

[250] HM Government, 'Call for Evidence Outcome: Review of the Personal Insolvency Framework: Summary of Responses and Next Steps' https://www.gov.uk/government/calls-for-evidence/call-for-evidence-review-of-the-personal-insolvency-framework/outcome/review-of-the-personal-insolvency-framework-summary-of-responses-and-next-steps accessed 5 May 2024

predicted that around 1.75m debtors were using non-statutory debt management plans to deal with their debts in 2015.[251] That means many people in debt do not choose to enter an official debt relief procedure for different reasons. Being unable to make the right decision on debt relief without professional debt advice could be one of the reasons. And there are many reasons why people do not seek debt counselling, even though the debt advisor service is right here. For example, they are reluctant to admit that they have a debt problem and are embarrassed by it. The consequences of not seeking debt counselling may make the difficulties even more difficult. Debt counselling is important because professional debt counsellors will provide debtors with professional advice and help them choose the appropriate formal debt relief options. This prevents debtors from choosing unsuitable options because they are eager to be relieved from the constant pressure of creditors or do not understand the different debt relief procedures. Making it possible, in other words, ensuring that debtors can have debt advisors provided by authorized debt advisors is one of the main ways that the breathing space scheme could help.

In addition, before discussing the breathing space scheme, it is worth mentioning the mental health of debtors. Money, finance and debt are the most common sources of anxiety and are often associated with the development or deterioration of mental health conditions.[252] A Royal College of Psychiatrists around Debt and mental health study cites the example of Edward, a man living on disability benefits, who, due to an error on the application form, inevitably fell into debt in the year it took to resolve the benefits.[253] Also, it found that one in four adults will suffer from mental health problems at some point in their lives, one in two adults with debt will have mental health problems, and one in four adults with mental health

[251] R3, 'Breathing Space: A Proposed New Tool for Individuals in Debt' (R3 Blog, 24 March 2007) https://www.r3.org.uk/press-policy-and-research/r3-blog/more/28680/page/1/breathing-space-a-proposed-new-tool-for-individuals-in-debt/ accessed 5 Aug 2024

[252] Mental Health Foundation, *Living with Anxiety: Understanding the Role and Impact of Anxiety in Our Lives* (2022) https://www.mentalhealth.org.uk/sites/default/files/2022-09/living-with-anxiety-report.pdf. accessed 6 September 2024

[253] Royal College of Psychiatrists, 'Debt and Mental Health' https://www.rcpsych.ac.uk/mental-health/mental-illnesses-and-mental-health-problems/debt-and-mental-health accessed 7 August 2024.

problems will also have debt.[254] It can be said that debt problems and mental health problems may be the root cause of each other, or they may be the reason that each other becomes more serious. Debt problems and mental health problems are both abysses for people, and for a debtor with mental health problems, he/she in the abyss of a double vicious circle. Therefore, after controlling for the effects of other socio-economic and demographic factors, the suicidal tendency of people with debt problems is still twice that of people who have not fallen into financial difficulties.[255] A longitudinal study of 2,406 people in the UK showed that mentally ill people with financial difficulties were less likely to recover from their illness during treatment than those without financial difficulties and were more likely to relapse over a certain period of time.[256]

Recurring mental health problems increase the burden on social and medical resources. Similarly, from a socio-economic perspective, debt problems are always one of the reasons for economic inactivity. And, in the case of debtors with mental health problems, creditors also find it difficult to obtain repayment. Therefore, whether it is from the perspective of the interests of both parties to the debt, from the perspective of reducing the burden on social resources, or from the perspective of restoring socio-economic vitality, it is wise to take mental health problems into account when solving debt problems. Here, another main way that the breathing space scheme will help debtors could be introduced: offering more space by protecting creditors from enforcement. A mental health crisis breathing space is also available for debtors with mental health problems.

In the 2017 general election, the Conservative Party pledged in its election manifesto that ‘it will adopt a Breathing Space scheme, with the right safeguards to prevent abuse, so that someone in serious problem

[254] ibid

[255] H Meltzer, P Bebbington, T Brugha, R Jenkins, S McManus, and M Dennis, 'Personal Debt and Suicidal Ideation' (2011) 41(4) *Psychological Medicine* 771

[256] P Skapinakis, S Weich, G Lewis, N Singleton, and R Araya, 'Socio-economic Position and Common Mental Disorders: Longitudinal Study in the General Population in the UK' (2006) 189(2) *British Journal of Psychiatry* 109.

debt may apply for legal protection from future interest, charges, and enforcement action for a period of up to six weeks. If appropriate, they will be offered a statutory repayment plan to help them pay back their debts in a manageable way.' The promised "breathing space scheme" and "a statutory repayment plan" formed the later debt respite scheme.

In 2015, R3 proposed a 28-day breathing space period, during which creditors could not take enforcement action, to give debtors the breathing space they needed to make the right decision. This breathing space would allow debtors to access adequate professional debt advice. R3 believes that this is an important scheme that balances the interests of debtors and creditors and emphasises that the breathing space scheme is not a tool for debtors to avoid their debts.[257] In October 2017, the Treasury launched its first consultation on the debt respite scheme to seek public views. As the specific implementation time of the statutory scheme is still unclear, the focus will be on the breathing space scheme.[258]

In the response released by the Treasury in June 2018, it was raised that the government recognises the importance of establishing an effective safety net for people with debt problems, including the provision of adequate debt counselling and appropriate debt solutions. It can be said that the breathing space scheme is a procedure that fully benefits debtors. As mentioned above, debtors who enter the breathing space scheme will be protected for a period of time without the need to enter a formal personal bankruptcy procedure and will be able to receive professional debt advice. Debtors who have received professional debt advice are less likely to fall into a situation where their debts snowball. Before the breathing space scheme was implemented, debtors could only receive statutory protection after entering formal personal bankruptcy proceedings, including bankruptcy, IVA, DRO, and administration order. Dr John Tribe

[257] R3, 'Breathing Space: A Proposed New Tool for Individuals in Debt' (R3 Blog, 24 March 2007) https://www.r3.org.uk/press-policy-and-research/r3-blog/more/28680/page/1/breathing-space-a-proposed-new-tool-for-individuals-in-debt/ accessed 5 Aug 2024.
[258] HM Government, 'Breathing Space: Call for Evidence' https://www.gov.uk/government/calls-for-evidence/breathing-space-call-for-evidence accessed 5 September 2024.

mentioned in his report for the insolvency service as early as 2009 that the existing debtor advice in the UK is diverse, including some charitable organisations, but suffers from uneven distribution and quality. It also recommends the creation of a more systematic, officially-supported, unified portal that consolidates all free counselling services to ensure that debtors receive timely and accurate help. The MoneyHelper website, a web portal for debt advice, can now be found on the UK government website on the Breathing Space page, and through the MoneyHelper website, debtors are able to access confidential debt counselling.[259]

In addition to formal personal bankruptcy proceedings, even if debtors and creditors voluntarily enter into an agreement through a Debt Management Plan (DMP) that freezes interest and fees and suspends debt collection and enforcement actions, creditors can still take further action to undermine the plan's effectiveness. The consultation respondents believed that requiring debtors to obtain debt counselling before being allowed to enter the breathing space scheme would prevent its abuse.[260] However, such a pre-requisite for entry into the breathing space scheme is not appropriate for debtors with psychological problems.[261] Furthermore, some respondents believe that entry conditions are necessary to prevent abuse.[262] However, some respondents also felt that the entry requirements would reduce the flexibility of the breathing space scheme.[263] Indeed, if a procedure's flexibility is reduced, the extent to which its objectives are achieved will also be greatly reduced. Regarding the time interval between the debtor being able to enter the breathing space scheme multiple times, most respondents pointed out that an individual's eligibility to obtain breathing space multiple times within a short period of time should be restricted. Some suggested that such a limit could be modelled on the 12-month interval requirement for triggering

[259] John Tribe, *Personal Insolvency Law in England and Wales: Debtor Advice, Debtor Education and the Credit Environment* (Insolvency Service, 2013) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1393312 accessed 1 April 2025.
[260] Ibid
[261] Ibid
[262] Ibid
[263] Ibid

a moratorium under the Scottish Debt Arrangement Scheme.[264] In addition, regarding whether the breathing space scheme should be recorded in the credit record, some respondents believed that recording the breathing space scheme in the credit record may reduce its attractiveness, as people may not use the breathing space scheme for fear of affecting their credit score. This will also affect the achievement of the breathing space's objectives.

In October 2018, the Treasury issued a further consultation. The Treasury's response was published on 19 June 2019. Also published was an oral statement from the Economic Secretary to the Treasury, which said: 'Millions of people struggle with problem debt and the burdens it brings. The Government has committed to helping these people take control of their finances and get back on a stable financial footing.' The Treasury has thus confirmed that the introduction of the debt despite scheme will go ahead. The Financial Guidance and Claims Act 2018 (FGCA 2018) received Royal Assent on 10 May 2018. Part 1 of the FGCA 2018 consolidates the three existing government-sponsored guidance services to create a new Single Financial Guidance Body (SFGB) and provides for the establishment of the debt despite scheme, giving the Treasury the power to make legislation for the debt despite scheme.[265] In May 2021, the Breathing Space Moratorium and Mental Health Crisis Moratorium (England and Wales) Regulations 2020 came into force. 2021 is the middle of the pandemic, and the implementation of the Breathing Space Moratorium and Mental Health Crisis Moratorium (England and Wales) Regulations 2020[266] also provides more breathing space for people in debt distress due to the pandemic. Currently, there are two types of Breathing Space Moratorium that debtors can apply for the standard Breathing Space Moratorium and the mental health crisis breathing space.

4.3.2 How does the Breathing Space work?

[264] Ibid
[265] Financial Guidance and Claims Act 2018, ss 6, 7
[266] Breathing Space Moratorium and Mental Health Crisis Moratorium (England and Wales) Regulations 2020, s 24(3)

To qualify for ‘standard breathing space’ in England and Wales, a debtor must be an individual, owe ‘qualifying’ debts, such as credit card debts, personal loans, utility bill arrears, joint debts, guarantor loans, etc, be resident in England or Wales and not be involved in another formal debt resolution (DRO, IVA, bankruptcy). They also cannot have had a breathing space in the past 12 months. Debt advisers must confirm that the debtor is unable to pay their debts and that breathing space is appropriate.[267]

For mental health crisis breathing space, the same conditions apply, but the debtor must also be receiving mental health crisis treatment. There is no limit to the number of times a debtor can enter a mental health crisis breathing space. However, the guarantor will not be protected by the breathing space moratorium unless the eligible guarantor applies his or her own breathing space moratorium. The breathing space moratorium begins the day after the Secretary of State enters the debtor's information in the register.[268] Once the debtor's information has been entered into the register, the Insolvency Service is duty-bound to send a notice to all known creditors.[269] The notice can be sent electronically if the creditor chooses to use an electronic system, via email or via post. Creditors should receive a notice informing them of the start date of the breathing space moratorium and the relevant qualifying debt. Creditors are deemed to have received the notice on the day it is sent electronically, four business days after it is sent by post, or the day it is delivered to their address. A creditor who sold a debt should notify the debt assignee about the moratorium and provide contact details of the assignee to the debt advice provider.

A Standard Breathing Space ends either after 60 days if cancelled by a debt adviser or court, or on the day after the debtor’s death. It cannot be extended beyond 60 days. A debt adviser must make a midway

[267] Breathing Space Moratorium and Mental Health Crisis Moratorium (England and Wales) Regulations 2020, s 24(4)
[268] Breathing Space Moratorium and Mental Health Crisis Moratorium (England and Wales) Regulations 2020, s 26
[269] Breathing Space Moratorium and Mental Health Crisis Moratorium (England and Wales) Regulations 2020, pt 4

review on the situation between days 25 and 35 to decide if the moratorium should continue or be cancelled. If the debtor complies with their obligations, the moratorium continues until its end date. The moratorium may be cancelled in the case of failing to meet the debtor's obligations or a debt solution is in place for all covered debts, or the adviser cannot communicate with the debtor.

In the case of Mental Health Crisis Breathing Space, it expires 30 days after mental health crisis treatment finishes or 30 days after a debt adviser receives no response from the debtor about the treatment. Here there will not be a midway review made by the debt advisor. However, a regular confirmation that the debtor is still receiving the mental health crisis treatment should be made by the debt advisor. A mental health crisis breathing space will be cancelled if evidence of treatment is found to be inaccurate or fraudulent, and cancellation is not unfair or there is a requirement of cancellation made by the debtor.

During the breathing space moratorium, the debtor must notify their debt advice provider of any significant changes in their circumstances or financial situation. The debtor should also pay any ongoing liabilities if they can. Debtors must engage appropriately with their debt advice provider. Moreover, a debtor who is in a breathing space moratorium is prohibited from obtaining additional credit that exceeds £500, either individually or jointly, including under-hire purchase or conditional sale agreements.

As mentioned above, the breathing space moratorium provides protection to debtors from being charged interest, fees, penalties, or being charged on qualifying debts during the moratorium by the creditors. Also, creditors cannot collect debts, initiate legal proceedings, enforce judgments, or take similar actions without court permission during the Breathing Space.[270] Creditors are prohibited from instructing agents to perform any actions that are prohibited under the moratorium. For the existing legal proceedings,

[270] Breathing Space Moratorium and Mental Health Crisis Moratorium (England and Wales) Regulations 2020, s 7

creditors must notify the court if legal proceedings (e.g., bankruptcy) were underway when the breathing space starts. The court must pause bankruptcy proceedings until the moratorium ends or is cancelled. Unless authorized by the court or tribunal, enforcement actions related to a breathing space debt must be halted during the breathing space, including holding hearings, issuing or serving orders, warrants, writs of control, writs of execution, or judgment summons and instructing enforcement agents to take such actions. Once the breathing space ends or is cancelled, existing legal proceedings can resume. If the enforcement time limit expires during the breathing space, it is extended by 8 weeks after the breathing space concludes.

A series of court proceedings between the creditor Ivan Kaye and the debtor Amanda Lees illustrates the breathing space scheme's application in practice.[271] The background to the case was that Ms Lees owed Mr Kaye unpaid damages for nuisance and/or harassment made by a judge under the Protection from Harassment Act 1997. The court made an interim order in March 2019 and a final order in June 2019, the payment orders comprising judgment debt and interest accruing on that debt and interest arising from that debt. In March 2020, Judge Kanwar made a sale and payment order against Ms Lees, which required Ms Lees to pay £290,925.88 by 3 April 2020 or her flat would be sold for no less than £470，000. In this payment order, the defendant, Ms. Lees, was required to deliver possession of the property to the plaintiff, Mr. Kaye. In June 2021, a warrant for the eviction of Ms Lees was made, and the eviction notice was issued in July 2021, with the eviction date set for 24 August 2021. However, this eviction order was cancelled due to the Breathing Space Moratorium that Ms. Lees obtained on 30 June 2021. In September 2021, Judge Althaus ordered that the proceedings be transferred to the High Court for the purpose of enforcement.

[271] There are 4 cases between Ivan Kaye and the debtor Amanda Lees under the same background.

On 12 October 2021, another eviction order was issued against Ms. Lees, but again, this was cancelled due to a Mental Health Crises Moratorium granted to Ms Lees on 26 October 2021. On 12 January 2022, Ms Lees was granted a further moratorium but was still evicted from the flat on 13 January 2022, as Mr Kaye was granted a Notice to Quit on 5 January 2022. This eviction order was executed pursuant to the order for sale and possession made on 6 March 2020. Subsequently, on 24 February 2022, Ms Lees filed an application for a declaration that the eviction and execution of the order of 6 March 2020 were void under section 7(12) of the 2020 Regulations. Judge Dight heard the application and delivered his judgment on 13 May 2022. By the time the Judge Justice heard the application, Mr Kaye had sold the flat to Chelsea Dixon on 10 March 2022 and the sale proceeds had been distributed in accordance with the order of 6 March 2020, including the payment of £188, 963.90 to Santander to discharge Ms Lees's mortgage on the flat at Leysfield Road. The judge gave judgment for Ms Lees: "Both the execution of the writ of possession on 13 January 2022 and the purported sale of the property to [Chelsea Dixon], said to have occurred on 10 March 2022 are null and void.".[272] Under reg. 7(2)(b), a creditor may take enforcement measures with the leave of the court. However, the court may only grant leave to take enforcement measures if it is reasonable and not 'prejudicial to the interests of the debtor' under reg. 7(5).

In this case, the court held that the applicant was seeking leave to take possession of the apartment. Evicting Ms Lees from the apartment would, in plain language, be prejudicial to her.[273] For the court application by creditor for cancellation of the moratorium, the question of the case is Whether Mr Kaye can pursue an application under regulation 19 of the 2020 Regulations to cancel the moratorium granted on 12 January 2022 and/or a successor moratorium granted on 15 February 2022. Judge Justice viewed that "The 2020 Regulations establish a scheme for the time within which review proceedings may be initiated, may be determined by the debt advice provider, and for any subsequent application to a court.

[272] *Ivan Kaye v Amanda Lees* [2022] EWHC 1151 (QB)
[273] *Ivan Kaye v Amanda Lees v Chelsea Dixon*[2022] EWHC 3326 (KB)

The language used is prescriptive. I can see no reason to go behind the ordinary and clear meaning of those words" and "The court has no power to extend time to allow an application to be made, and since that is the position, there is no need to consider the further submission made, that there was good reason to exercise the power to extend time."[274]

As mentioned above, the breathing space scheme is a procedure that favours the interests of debtors; as Judge Justice, in this case, said: "It is readily apparent that, as made, the 2020 Regulations are intended to and do strike the balance between debtors and creditors in favour of debtors. This is particularly striking for mental health crisis moratoriums."[275] In January 2023, the application of Mr Kaye to cancell Ms Lees's mental health crises moratoriums and the application for an injuction to restain Ms Lees from seeking a further moratoriums are sucessful.[276] The court considered that there was an was a material irregularity in Ms Lees's mental health crises moratoriums. Under reg.28(2)(e), two conditions should be satisfied for a moratorium. Firstly, the debtor had to be suffering from a mental disorder of a serious nature, secondly, they had to be receiving crisis, emergency or acute care or treatment for that disorder. However, the evidence before the court was insufficient to prove either that Ms Lees suffered from a serious mental disorder or that she was receiving urgent mental health treatment. Furthermore, the current moratorium had caused unfair prejudice to the plaintiff's interests. The judge listed six points, including the fact that the judgment debt was large, had been outstanding for a long time, and interest was continuing to accrue, that the defendant had made no attempt to repay the debt, and that one of the legislative purposes of the breathing space moratorium was to allow debtors the space and opportunity to obtain debt advice and plan for the resolution of their debts. At the same time, there was no evidence that Ms Lees needed further protection, but there was evidence that she had the ability to continue

[274] para 24 Jugment of Ivan Kaye v Amanda Lees v Chelsea Dixon[2022] EWHC 3326 (KB)
[275] *Ivan Kaye v Amanda Lees v Chelsea Dixon* [2022] EWHC 3326 (KB), [25]
[276] *Ivan Kaye v Amanda Lees* [2023] EWHC 152 (KB) for more cases about the cancellation of mental health crises, see *Axnoller Events Ltd v Brake and another, Brake and others v Chedington Court Estate Ltd* [2021] EWHC 2308 (Ch)

working and earn a good income.[277] As to whether an injunction should be granted to restrain Ms Lees from seeking further conservatory relief, the judge granted the injunction relief in the interests of Mr Kaye and in the absence of Ms Lees at the hearing to allow the judge to consider the balance of interests between her and Mr Kaye as a creditor.[278]

After that, Mr Kaye applied to the court for an extension of the injunction against Ms Lees, and the court refused his request. The court held that Parliament had given debtors the unfettered right to apply to debt advisors for the breathing space moratorium and mental health crises moratorium.

Ms Lees had applied for both Breathing Space and a mental health crisis, and in fact, her attempts to abuse the process to avoid repaying her debts were obvious. However, the judge considered that the mistake that allowed Ms Lees to be granted approval time and time again was made by the debt advisers, who should have rejected her application but instead approved it. For Ms Lees, she was receiving mental health treatment, and she may have thought she had the right to make the application. Therefore, although it appeared that the application made by the defendant should be rejected based on the information received by the court, the court could not determine whether the debt adviser would necessarily reject any application made by her, and the court would not intervene.[279]

Prior to the case of Ivan Kaye v Amanda Lees, there were also cases where the debtor was prohibited from seeking further moratorium injections. The county court in central London ruled in the case of West One Loan v Salih that the Salih family's joint debtors were prohibited from continuing to apply for the breathing space moratorium for a period of time because the joint debtors had applied for the protection

[277] *Ivan Kaye v Amanda Lees* [2023] EWHC 152 (KB), [41]
[278] Ibid
[279] *Ivan Kaye v Amanda Lees* [2023] EWHC 758 (KB), [38]–[55]

of the breathing space moratorium one after the other, which caused unfair prejudice to the creditors and constituted an abuse of the breathing space moratorium.[280]

4.4 Bankruptcy

4.4.1 How Bankruptcy Works?

Bankruptcy in English law applies only to natural persons. As the name suggests, a person who is unable to pay his or her debts is declared bankrupt by the court following a voluntary petition or a creditor's petition and statutory bankruptcy proceedings and is granted a Discharge after twelve months to be released from his or her old debts and make a fresh start. In a bankruptcy proceeding, the bankrupt's assets are sold, and the proceeds are distributed to creditors in the statutory order. However, the bankruptcy process has the obvious disadvantage of being unfriendly to the debtor, i.e., when entering bankruptcy, the debtor's assets are placed in the hands of the trustee, and control over the bankruptcy estate is lost. And the bankruptcy order remains on the bankrupt's credit record for six years after he or she is discharged. Therefore, it is important for debtors who cannot make their payments to seek professional debt advice before filing for bankruptcy to ensure that the bankruptcy process is the most realistic for their situation. The above comparison of how the process of IVA, DRO bankruptcy begins shows the complexity of the different application routes and eligibility criteria for each process. As a result, a single portal system for personal bankruptcy filings is being advocated. Such an online system can act as a central platform to make optimal recommendations for debtors through standardised assessments.[281] The challenge of filing options for debtors posed by the diversity of procedures has also led scholars to propose the consolidation of existing procedures into a single consumer insolvency law. Of course, such a huge and time-consuming reform would need to start small, by first filling in the flaws

[280] *West One Loan v Salih*, Claim No H10CL170 (CC)

[281] Joseph Spooner, *Routes into Insolvency and a Single Portal – A Report for the Personal Insolvency Review* (August 2024) https://www.lse.ac.uk/law/Assets/Documents/joseph-spooner/2024-Spooner-Routes-into-Insolvency-A-Report-for-the-Personal-Insolvency-Review.pdf accessed [28 March 2025]

and gaps in the current law.[282] The report making these recommendations also raise the issue of the quality of debt counselling services at the same time.[283] On this issue, the conclusions presented in personal bankruptcy reports more than a decade apart remain consistent.

As mentioned above, under the Insolvency Act 1986, one or more unsecured creditors can apply to the court to declare a debtor bankrupt, provided that the debtor has debts of up to £5,000.[284] It is important to note that bankruptcy proceedings brought by creditors are dealt by the court. As mentioned earlier, under the Insolvency Act 1986, one or more unsecured creditors may apply to the court to declare a debtor who is unable to repay his debts bankrupt, provided that the debtor owes debts of up to £5,000. s268 provides that where a debtor appears to be unable to pay his debts and the debt is immediately payable, and before the creditor applies for bankruptcy proceedings, a demand in the prescribed form has been served on the debtor, or the debtor has been requested to provide security or demand for settlement has been made. Such a demand has been served for at least 3 weeks and has not been fulfilled by the debtor or has not been rescinded by the rules.[285] Or, before the creditor applies for bankruptcy proceedings, there is a judgment, order, writ of execution, etc., issued by any court in favour of the creditor, and it has not been satisfied in whole or in part. In the case where the debt is not immediately payable, the creditor shall issue a statutory demand in the prescribed form to the debtor at least three weeks before applying for bankruptcy proceedings, requiring the debtor to be able to repay the debt when it becomes due. Such a demand has not been satisfied by the debtor or revoked by the rules.[286] As for the secured creditor, if the secured creditor is willing to waive the security in favour of all insolvent creditors, the secured creditor may also apply to declare the debtor's insolvency, provided that the other

[282] ibid
[283] ibid
[284] Insolvency Act 1986, ss 264, 267
[285] Insolvency Act 1986, s 268
[286] Ibid

conditions for application are met.[287] Where a creditor holds both a secured and an unsecured claim, the creditor should clarify that his petition does not involve a secured claim.[288] Irrespective of whether the bankruptcy proceeding is initiated by one creditor or several creditors, if the bankruptcy case involves several creditors, all creditors should receive a fair distribution since bankruptcy proceedings are not a means for a creditor to recover the private debt.[289]

It is worth noting that, unlike an insolvency proceeding initiated voluntarily by the debtor, an insolvency proceeding initiated by a creditor is heard by the court, which has the discretionary power to decide.[290] The Enterprise and Regulatory Reform Act 2013 introduced a reform about debtors' bankruptcy applications. On 6 April 2016, this new insolvency application regime came into force. Instead of filing to the court, the debtor can now make a bankruptcy application through an online portal. The application will be reviewed and decided by an adjudicator.[291] s263J sets out the conditions for submitting a bankruptcy application, which include providing prescribed details about the debtor's creditors, debts, liabilities, and assets, along with any other required information.[292] The application is valid only if the required fee or deposit is paid within the prescribed time frame. The bankruptcy fee is £680. Once submitted, the application cannot be withdrawn. Additionally, the debtor must inform the adjudicator if, before a bankruptcy order is made or refused, the debtor can pay their debts or if a bankruptcy petition has been presented to the court.[293]

After receiving a bankruptcy application, an adjudicator must verify that specific requirements are met: the adjudicator had jurisdiction when the application was made, the debtor is an eligible debtor under

[287] Insolvency Act 1986, s 269
[288] Ibid
[289] *Go Capital v Phull* [2020] EWHC 1235 (Ch)
[290] Ibid
[291] Enterprise and Regulatory Reform Act 2013, s 71, Sch 18, also see s263H, the Insolvency Act 1986
[292] Insolvency Act 1986, s 263H
[293] Ibid

s263I and is unable to pay their debts at the time of determination, no bankruptcy petition is pending, and no bankruptcy order has been made for the debts in question. If all these conditions are satisfied, the adjudicator must issue a bankruptcy order against the debtor. If any of these conditions are not met, the adjudicator must refuse the order. The decision must be made within the "determination period."[294] When an adjudicator makes a bankruptcy order following a bankruptcy application, the order must be issued in a prescribed form. The adjudicator must then provide a copy of the order to the debtor and notify certain prescribed persons about the order.[295] Where the adjudicator makes a refusal, they must inform the debtor of the reasons for the refusal and explain the debtor's rights to request a review.[296] Where there is a decision of refusal in the review applied by the debtor, the debtor has the right to appeal against the refusal to the court within a prescribed period.[297] If the debtor requests a review within the prescribed period, the adjudicator must reassess the original information. After the review, the adjudicator must either confirm the refusal or issue a bankruptcy order. If the refusal is confirmed, the adjudicator must again notify the debtor, providing reasons for the confirmation and explaining that the debtor has the right to appeal the decision to the court within a specified period.[298]

The case *Re Budniok* [2017] EWHC 368 (Ch) is the first to address the procedural issues under the new regime. According to s263I of the Insolvency Act 1986, an adjudicator can only determine a bankruptcy application if the debtor's main interests are in England and Wales, or in another EU member state (excluding Denmark) with an establishment in England and Wales. If these conditions aren't met, jurisdiction can still be established if the debtor is domiciled in England and Wales, or has lived, had a

[294] Insolvency Act 1986, s 263K
[295] Insolvency Act 1986, s 263M
[296] Insolvency Act 1986, s 263N
[297] Insolvency Act 1986, s 263N(5)
[298] Ibid

residence, or carry on business there within the past three years. "Carrying on business" includes activities by a firm, partnership, or agent on behalf of the debtor.[299]

In the case of Mr Budniok, a German citizen who moved to London in 2014, Mr Budniok was employed by a debt-like consultancy called Blackpearl Business Partners Limited, which offered services to German citizens to improve their chances of success in bankruptcy in the UK. Unable to repay his debts, Mr Budniok applied online for bankruptcy proceedings in the UK. Under s263L, the adjudicator is entitled to require the debtor to provide additional information in order to make a proper decision on whether to grant a bankruptcy order. Mr Budniok submitted the information requested by the adjudicator several times. After considering Mr Budniok's submissions, the adjudicator concluded that there was doubt as to the existence of his centre of main interests (COMI) in the UK and therefore refused his bankruptcy petition. The adjudicator based this conclusion on three grounds: firstly, there was no evidence that Mr Budniok was paying the rent on his flat in the UK, even though he claimed that the rent was paid by his company; secondly, Mr Budniok's move to the UK was motivated by a relationship; and Thirdly, Mr Budniok worked for a company that provided services to German debtors on how to successfully go bankrupt in England and Wales. Mr Budniok therefore applied for a review. The adjudicator reviewed the decision but came to the same conclusion. Mr Budniok therefore appealed to the court. Chief Registrar Baister *overturned the* adjudicator*'s decision,* granted the appeal and made a bankruptcy order. Chief Registrar Baister found that there was no dispute in Mr Budniok's evidence that the court should believe that his COMI had moved to England at this time. Case *Doyle v Quinn* was referred to in this case. In *Doyle v Quinn*, the debtor's debtors and creditors were in Ireland.[300] However, the court found that his COMI was in England because at the time of the application, his main consumer and business interests were in England. In determining COMI, several factors should be considered,

[299] Insolvency Act 1986, s 263I
[300] *Doyle v Quinn* [2015] BPIR 226

including that a person can only have one COMI; it must be ascertainable by third parties (especially creditors); it must be durable; and although a person is free to change his COMI, even in the period immediately before insolvency, any such change must be material and not merely a change of appearance.[301]

In addition, as the first case to hear an out-of-court debtor bankruptcy application, Chief Registrar Baister also discussed the debtor's court-initiated 'appeal' in s263N(5). He believes that although the word used is 'appeal', it is not the strict sense of 'appeal' as stipulated in the Civil Procedure Rules 1998. In fact, it is closer to an appeal against the decision of an office-holder.[302] Furthermore, in many cases, the creditor does not need to be notified of the existence of such an 'appeal' or involved, but the court has the power to make an order to notify or involve the creditor.[303]

4.4.2 The Official Receiver: the First Trustee in Bankruptcy

The official receiver is the first trustee who get involved in a bankruptcy case. According to the s291A, upon the issuance of a bankruptcy order, the official receiver becomes the trustee of the bankrupt's estate. When a person is appointed trustee, they must notify the bankrupt's creditors or advertise the appointment as directed by the court.[304] In the case of transferring Bankruptcy from an IVA, the court may appoint the IVA's supervisor as the trustee. Once the supervisor is appointed, the notice or advertisement must also explain how to establish a creditors' committee in accordance with section 301.[305] The official receiver has investigatory duties on the bankrupt's financial affairs.[306] In the case where there is no sufficient to appoint a private trustee authorised by an appropriate professional body, the official receiver will also act as a trustee in Bankruptcy.[307]

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301 *Re Budniok* [2017] EWHC 368 (Ch)
302 Ibid
303 Ibid
304 Insolvency Act 1986, s291A
305 Ibid
306 Insolvency Act 1986, s289
307 Insolvency Act 1986, s292

4.4.3 The Trustee in Bankruptcy: Dealing with Bankruptcy Estate

Once a bankruptcy order is made, the debtor's property will immediately be taken over in its entirety by the trustee, including the realisation of the bankruptcy estate and the distribution of the proceeds of realisation to creditors.[308] Therefore, the trustee plays an important role in bankruptcy proceedings. The trustee is the trustee of a bankruptcy estate.[309] The term 'bankruptcy estate' is defined in s283 of the Insolvency Act 1986 (IA 1986) as property that either belonged to or was of interest to the bankrupt at the time the bankruptcy order was made.[310] S436 of IA 1986 provides a broad definition of property included in the bankruptcy estate, encompassing money, goods, rights of action, land, and all types of property, tangible or intangible assets, wherever located. It also includes obligations and any interest, whether present or future, vested or contingent, related to the property.[311] The court refused to exclude property that could be classified as insolvency estate by restricting the interpretation of the statutory provisions.

For example, the court held that retirement annuity contracts and personal pension schemes entered into before the Welfare Reform and Pension Act 1999 came into force should be included in the insolvency estate and administered by the trustee. The court considered that before the Welfare Reform and Pension Act 1999 came into force, Parliament had deliberately chosen to exempt certain pension schemes from creditor claims, but to leave some schemes unprotected.[312] s11 of the Welfare Reform and Pension Act 1999 provides that if a bankruptcy order is made after the section comes into force, any rights under an approved pension arrangement are excluded from the bankrupt's estate. Approved pension arrangements include registered pension schemes and specific occupational pensions. However, if a pension scheme is deregistered or an appeal against a registration decision is unsuccessful, the rights may vest in the trustee

[308] Insolvency Act 1986, s306
[309] Insolvency Act 1986, s305
[310] Insolvency Act 1986, s283
[311] Insolvency Act 1986, s436
[312] *Krasner v Dennison* [2000] 3 All ER 234

as part of the bankruptcy estate.[313] For unrealized assets, such as the potential hope of receiving compensation, whether the debtor is still in bankruptcy proceedings or has been discharged, their hope of receiving compensation should not be considered part of the bankruptcy estate. This means that the mere possibility of receiving compensation does not constitute an asset that can be included in the bankruptcy estate.[314]

It is the function of the trustee to gather, realize, and distribute the bankrupt's estate in accordance with the provisions of the relevant chapter.[315] In fulfilling this role and managing the bankrupt's estate, the trustee has the discretion to make decisions, provided they comply with the applicable legal provisions.[316] The trustees in Bankruptcy are protected by contempt law but the court has the authority to restrain actions taken by trustees if those actions are deemed objectively unfair, even if the trustees are merely exercising their contractual rights. That is the rule set in the *ex-parte James*. According to s303, if a bankrupt, any of their creditors, or another party is dissatisfied with any act, omission, or decision made by the trustee of the bankrupt's estate, they may challenge the trustee by applying to the court.[317] The court has the authority to confirm, reverse, or modify the trustee's actions or decisions, provide directions, or make any other appropriate order. Additionally, the trustee may apply to the court for directions regarding any specific matter that arises during the bankruptcy proceedings.[318] This is also the role that the court plays in a bankruptcy case. If the trustee fails to properly identify assets in the bankruptcy estate, they may be held liable for claims arising from tort or statutory claims for misconduct or negligence.[319]

[313] Welfare Reform and Pensions Act 1999, s 11
[314] *Secretary of State for Business and Trade v Mustafa Hassanali Abdulali & Anor* [2024] EWHC 1722 (Ch)
[315] Insolvency Act 1986, s 303
[316] Ibid
[317] Ibid
[318] ibid
[319] Insolvency Act 1986, s 304

However, if the trustee can demonstrate that they had reasonable grounds to believe they had the authority to seize and dispose of the relevant assets, they may be exempt from liability for damages. If a claim is brought against the trustee after they leave office, section 299(5) of the Insolvency Act 1986 provides a defence for the trustee, unless the claim concerns misconduct or breach of duty under section 304(1) of the Insolvency Act 1986.[320] This defence protects the trustee from general claims after leaving office but does not shield them from claims related to misconduct or breach of duty during their tenure. Under s283A, the trustee has three years from the date of bankruptcy to deal with the bankrupt's house. The trustee has several options for dealing with the bankrupt's interest in a property. They can apply for an order of sale or possession to sell the property, seek a charging order to secure the value of the bankrupt's interest or negotiate an agreement with the bankrupt, their spouse, or a family member regarding the interest. These options allow the trustee to manage and potentially realize value from the property in ways that suit the circumstances of the case.

If the trustee does not exercise this power within the three-year period, the property interest in the family home will automatically revert to bankruptcy.[321] The three-year period may be extended in cases where the trustee is unaware that the bankrupt owns property. The court has the power to adjust the three-year period in exceptional circumstances.[322] Three years after the date of bankruptcy, the bankrupt's interest in the property is automatically re-vested in the bankrupt unless the trustee takes certain actions, such as realising the interest, applying for a sale order or making other specified legal applications. The three-year period may be extended if the bankrupt fails to inform the official receiver of their interest in the property. The three-year period during which the bankrupt's interest in the family home is subject to re-vesting may be extended by a court order, with the Secretary of State's sanction. This extension can be appropriate in several situations, such as when the property is under a matrimonial court order, held in

[320] Insolvency Act 1986, s 299
[321] Insolvency Act 1986, s 283A
[322] ibid

trust, or subject to a ‘buy-back’ agreement. It can also apply if the trustee cannot deal with the property due to issues like non-surrender or absence of the bankrupt and their spouse. In such cases, the trustee typically seeks an extension of six months from the time they are notified that the property interest is available, providing sufficient time to manage it effectively.[323]

In addition, the trustee, in assuming the function of administering and disposing of the bankruptcy estate, has the right to claim ownership of property not owned by the debtor at the time of the commencement of the bankruptcy proceeding. trustees have the right to make adjustments to pre-bankruptcy transactions such as transactions at an undervalue, preferences and the like.[324] According to s339, the act of trading at an undervalue includes, firstly, a gift or gratuitous transfer, whereby one's property is given to another person as a gift or transferred to him without receiving any consideration by entering into a contract of trade; secondly, entering into a contract of trade with another person for the purpose of a marriage or a civil partnership; and, thirdly, entering into a transaction at a manifestly unjustifiably low price. If such an undervalued transaction took place within two years prior to the commencement of the bankruptcy procedure, the trustee may apply to the court to set aside the undervalued transaction without further investigation of the debtor's financial situation at the time of the transaction. Where the undervalued transaction did not take place within two years, but not more than five years, before the commencement of the bankruptcy procedure, the trustee is required to prove that the debtor had a cause of insolvency at the time of the transaction. There is a reversal of the burden of proof here, i.e., when the counterparties to the transaction are partners or associates with whom the debtor has a business or work relationship, the burden of proof is on the party to the transaction to prove that the transaction should not have been cancelled. The court will decide, after review, whether such a transaction should be set aside in order to protect the interests of creditors. Also, the trustee is the only subject of a lawsuit under the bankruptcy

[323] Insolvency Service, 'The Family Home - Bankruptcy Only' https://www.insolvencydirect.bis.gov.uk/freedomofinformationtechnical/technicalmanual/ch25-36/chapter31/part3/part3/part_3.htm accessed 8 August 2024

[324] Undervalued transactions and preferences can lead to a Bankruptcy Restrictions Order, will be discussed later.

code that can petition for avoidance of references. s340 sets forth the basic elements of references. First, the debtor must have acted in a manner that benefits a creditor or a surety or guarantor of the debt. Second, the debtor has done something to put the creditor, surety or guarantor in a better position for the subsequent bankruptcy proceeding. Preference undermines the fundamental principle of bankruptcy law that all creditors of the same class are to be paid in the same proportion.[325] Preferences can be cancelled if they occur within six months before the commencement of the bankruptcy proceedings. However, if the references occurred between the debtor and a partner or colleague with whom the debtor had a business or work relationship, the trustee may apply for the cancellation of the references that occurred within two years prior to the commencement of the bankruptcy procedure. It is worth noting that the above mentioned reversal of the burden of proof and It is worth noting that the above reversal of the burden of proof and the extension of the period for preferences to two years do not involve employees who have only a purely employment relationship with the debtor. In addition, when the debtor's conduct includes both transactions at an undervalue and preferences, the trustee can apply to the court for avoidance based on the retroactive period of the undervalue transaction.

4.4.4 Bankruptcy Restrictions Order and Bankruptcy Restrictions Undertaking

The Bankruptcy Restrictions Order (BRO) is provided for in Schedule 4A to the Insolvency Act 1986. s2 of the Annex lists the grounds leading to a BRO, which include the failure of a bankrupt to keep records of losses of property (including losses of property in the course of carrying on a business) in the two years prior to the filing of a bankruptcy proceeding; failure to provide appropriate records on the request of the trustee; undervalued transaction; preference; a breach of contract which results in the counterparty to the contract bringing a valid claim in the bankruptcy proceeding; entering into a transaction when it knew or ought to have known that it would be unable to repay or pay before the

[325] Ian F Fletcher, *The Law of Insolvency* (5th edn, Sweet & Maxwell 2017)

bankruptcy proceedings Transactions before the commencement of a bankruptcy proceeding when the debtor knew or should have known of his or her inability to repay or pay; indebtedness before the commencement of a bankruptcy proceeding when there was no reasonable expectation of ability to pay; the debtor's engaging in gambling, risky investments, or unexplained spending sprees between the filing of a petition and the commencement of the bankruptcy proceeding that materially contributed to or exacerbated the insolvency; and fraudulent or deceptive breaches of fiduciary duties. (c) Fraudulent or deceptive breach of trust; failure to co-operate with the official receiver or trustee, etc..[326] Any dishonest or blameworthy behaviour may lead to BRO.[327]

The application for a BRO should be before the discharging of the bankrupt, or later with the permission of the court. A letter about the BRO applicaiotn will be send to the bankrupt and the bankrupt have 21 days to reply the letter. A Bankruptcy Restrictions Undertaking(BRU) will be offered to whom accept the allegations. The only one difference between BRO and BRU is that the bankrupt will not going to the hearing.

BRO or BRU shall take effect immediately once it is made and shall terminate upon the expiration of the period specified in the BRO or BRU, which shall not be less than two years and shall not exceed fifteen years.[328] The BRO or BRU resulted in disqualifications of the debtor covering many aspects. Bankrupts who are subject to BRO or BRU cannot act as a company director, form, manage, or promote a company without court permission. They must disclose their They must disclose their bankruptcy status when borrowing more than £500 or trading under a different name. They are also barred from being trustees of

[326] Schedule 4A to the Insolvency Act 1986，s2.
[327] Insolvency Service, *Bankruptcy Restrictions Orders and Undertakings: Guidance* (4 April 2017) https://www.gov.uk/government/publications/bankruptcy-restrictions-orders-and-undertakings/bankruptcy-restrictions-orders-and-undertakings accessed [20 March 2025].
[328] Schedule 4A to the Insolvency Act 1986，s4.

charities or pension schemes, holding certain roles in education, or being a trustee of a company. They are also barred from being trustees of charities or pension schemes, holding certain roles in education (such as school governors), working in specific health industry positions, and holding posts in public authorities or similar organisations. Further, the insolvency law also set restrictions of taking positions within the areas of public office births, deaths and marriages, education, family, financial matters, health and medical, nuclear industry, police and Crime, transport, tribunals, trustees, utilities and public contracts.[329]

The BRO or BRU will be annulled if the bankruptcy procedure is annulled, but the application of BRO, BRO or BRU will remain if the bankruptcy procedure is annulled by paying all debts or an IVA agreement. Once a BRO or BRU comes to an end, the bankrupt will be restored to her or his full qualifications.

The consequences of disenfranchisement resulting from BRO and BRU, even if not directly caused by bankruptcy, effectively perpetuate the stigma associated with bankruptcy. A bankrupt individual's BRO and BRU may last for up to 15 years. This renders the positive impact of a one-year discharge period on the bankrupt individual's ability to rehabilitate themselves minimal. The employment restrictions imposed by BRO and BRU may make it extremely difficult for a bankrupt individual to return to their profession after bankruptcy, even if they do not pose a risk of causing harm when they works.[330] The restrictions imposed by BRO and BRU effectively declare to society that the bankrupt individual remains untrustworthy.[331] This is contrary to the principle of giving individuals a fresh start. In the big data era

[329] Insolvency Service, *Schedule of Bankruptcy Restrictions* (April 2019) https://assets.publishing.service.gov.uk/media/5f15796f3a6f405c059f607d/schedule_of_bankruptcy_restrictions_BRO_BRU.pdf accessed March 20 2025.
[330] Katharina Möser, 'Restrictions after Personal Insolvency' (2013) 7 *Journal of Business Law* 679.
[331] Ibid

market environment, the personal responsibility of consumers is overemphasised. The overly harsh penalties in the law are also a result of this overemphasis on personal responsibility.

BRO and BRU should be treated as civil measures aimed at preventing the public from being exposed to certain risks, rather than as measures that emphasise punishment.[332]

4.4.5 The Family Home in the Bankruptcy

As noted above, under section 283, the trustee is required to follow the use it or lose it rule and dispose of the bankrupt's family home within three years of the date of the court's bankruptcy order. The trustee can dispose of the bankrupt's family home by realising the interest in the property, applying for an order for sale, applying for an order for possession, applying for a court order under s313, or entering into an agreement with the bankrupt for the bankrupt to incur specified debts in return for the interest in the property ceases to be part of the bankruptcy estate. If the trustee's application is dismissed, the interest in the property will still revert to the bankrupt unless the court decides otherwise. The question of when the three-year period begins is worth mentioning. Re Khilji (In Bankruptcy) can be cited as a typical case.

In this case, the focus was on section 283A of the Insolvency Act 1986 about when the trustee in bankruptcy becomes ‘aware’ of the bankrupt's interest in the property and when the three-year period begins. The court ruled that the trustee must have been expressly informed or actively informed of the interest and that the bankrupt’s vague or ambiguous statements were insufficient to trigger the three years.[333] However, the court also noted that the trustee did not need to know precisely what the legal nature of the interest was, and that the three-year period could begin to run as soon as basic information was obtained. This case provides trustees with legal protection against the loss of an interest due to a bankrupt's vague representations but also reminds trustees to exercise caution and to investigate and act as early as possible when they become aware of a potential interest.

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[332] Ibid

[333] *Khilji v Mehers & Anor* [2025] EWHC 548 (Ch)

One of the less favourable aspects of the bankruptcy procedure for the bankrupt is that the bankruptcy estate will no longer be under the control of the bankrupt. Among the various types of bankruptcy property, in most cases the family home will be the most important and most valuable property owned by the bankrupt. The family home is not just property, it also often means a safe living environment and a happy and warm family life. But unfortunately, the bankruptcy procedure aims to realise the debtor's property and distribute it proportionally to all creditors, so that the debtor can finally be relieved from the debt burden and have the opportunity to start again. The bankrupt's family home may consist of more than one property, and it could be freehold or leasehold, registered or unregistered, owned individually or jointly. It could also be located abroad. If the bankrupt debtor owns the family home, the trustee may sell the family home in the interests of creditors, subject to certain exceptions. In certain situations, the sale of the family home can be postponed for up to one year if the bankrupt's spouse or children are living there, starting from the date of the bankruptcy order. If the trustee applies for possession or sale of the family home after waiting for one year, the court should apply the mandatory assumption that the creditors' interests take priority over all other considerations, including the needs of the bankrupt. However, the court can still consider the impact of granting possession or sale of the family home in exceptional circumstances, such as when the bankrupt is living with their minor children.[334] Further, after this one-year period, the court will generally only refuse an order for sale in exceptional cases, such as when the bankrupt's beneficial interest in the property is valued at less than £1,000.[335] This monetary limit of £1,000 under section 313A(2) of the Insolvency Act 1986 is prescribed by the Insolvency Proceedings (Monetary Limits) (Amendment) Order 2004.

The low-value exception will leave the family home to the bankrupt, ‘the feeling is that the marginal benefit to creditors from realizing such an asset is outweighed by the disproportionate suffering imposed

[334] *Brittain v Haghighat* [2009] 1 FLR 1271.
[335] Insolvency Act 1986, s 313

upon the bankrupt by the loss of his home' in this case.[336] But then again, if you look at the house price in the UK, you will ask: Where in the UK is there a house worth less than £1000? On the UK's most commonly used home buying and selling websites, the lowest house value in the search criteria is £50.000. Regarding the right of residence of the bankrupt's spouse in the family home while divorce proceedings are still underway. The Family Law Act 1996 protects the bankrupt spouse's right of residence in the family home from being affected before a divorce judgment is made. s336 of the Insolvency Act 1986 addresses the rights of occupation for a bankrupt's spouse or civil partner concerning a dwelling house included in the bankrupt's estate.

During the initial period of bankruptcy, no new home rights arise under the Family Law Act 1996 regarding the property. However, if the spouse or civil partner already has home rights as a charge on the estate, those rights continue despite the bankruptcy and bind the trustee and others. However, it does not create any form of proprietary interest superior to that of the trustee.[337] In cases where the bankrupt solely owns the family home and is undergoing divorce proceedings with their spouse, the spouse's right to occupy the matrimonial home is protected by a freezing order and an order under section 33 of the Family Law Act 1996. However, this does not affect the automatic vesting of the bankrupt's property in the trustee. The trustee's position regarding the family home is essentially the same as that of the bankrupt.[338] In the case of a home with co-ownership, it is an issue for the court to consider to balance the competing interests, between the creditors and the bankrupt's spouse, as Judge Goulding said in Re Lowrie (A Bankrupt): "The court, in exercising its discretionary jurisdiction to order or not to order a sale…has to effect a comparison of merits and hardship which in its nature is very difficult because the position of creditors on the one hand and a family on the other are in themselves hard to compare."[339]

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[336] David Milman and Peter Bailey, *Sealy & Milman: Annotated Guide to the Insolvency Legislation* (27th edn, Sweet & Maxwell 2024)
[337] Insolvency Act 1986, s 336
[338] *Re Ruiz (a bankrupt)* [2011] EWHC 913 (Fam)
[339] *Re Lowrie (A Bankrupt)* [1981] 3 All ER 353

4.4.6 The Motor Vehicle as Exempt Property

The Insolvency Act defines the bankrupt's estate as including all property owned by the bankrupt at the time of bankruptcy, but it allows for specific exemptions. These exemptions cover tools, vehicles, and equipment essential for the bankrupt's personal use in their employment or business, as well as clothing, furniture, household items, and provisions necessary to meet the basic domestic needs of the bankrupt and their family. Whether a motor vehicle is exempt property depends on its necessity for the bankrupt's work, business, or family life. The bankrupt must provide evidence that the vehicle is essential, with no practical alternatives available. If the bankrupt's car is purchased through a hire purchase agreement, then the hire purchase agreement itself is considered the bankrupt's property, rather than the car itself.[340] The trustee can sell the car and use the proceeds to repay the bankruptcy debts.[341]

For work use, the bankrupt must show that the vehicle is required for daily operations, such as for a self-employed driver or tool transport. If public transport is a viable option, the vehicle is less likely to be exempt. For family use (e.g., transporting children or for disability mobility), the bankrupt must prove no other transport options exist and that the vehicle is vital for independence. If the vehicle needs repairs, the official receiver may give the bankrupt 21 days to fix it and provide proof; otherwise, it will not be exempt. Vehicles bought through financing agreements are not exempt, and the trustee can sell them. High-value vehicles may be sold, with funds provided for a cheaper replacement. The bankrupt can also propose a third-party buyer to avoid the sale. If necessity isn't proven, the vehicle becomes part of the bankruptcy estate and can be sold to pay debts.

4.4.6 Household Property as Exempt Property

Certain household items necessary for meeting the basic domestic needs of the bankrupt and their family are exempt from the bankruptcy estate. This includes clothing, bedding, furniture, household equipment,

[340] *Mikki v Duncan* [2016] EWCA Civ 1312
[341] ibid

and provisions. In exceptional circumstances, a vehicle may also be considered exempt property. High-value items, such as antiques, may still be claimed by the trustee. Electrical items like stereo systems, televisions, DVD players, and computers are generally not considered exempt unless they are essential for the bankrupt's employment or business. When exempting a computer, data protection laws must be considered, especially regarding third-party data collected by the bankrupt. If the data is no longer needed for its original purpose, the computer cannot be treated as exempt property and must be recovered according to procedures. Data used for personal or household purposes is not subject to data protection legislation principles. The Insolvency Act allows certain tools, books, vehicles, and equipment to be exempt from bankruptcy if they are essential for the bankrupt's personal use in work, business, or profession. Common examples include tools used by builders or plumbers. Items like bookstore inventory or accounting books are not exempt.

For businesses primarily involved in rentals, such as car hire, rented items are usually not considered personally used by the bankrupt and are not exempt. However, some vehicles may be retained if it benefits the estate more than selling them. The exemption doesn't apply to large, valuable equipment, regardless of its importance to the business.[342] "Other equipment" doesn't cover inventory or business premises, and if these prevent the bankrupt from continuing their business, tools and equipment may still be part of the estate. The trustee has discretion to exempt items necessary for a second or non-profit trade but should limit exemptions to necessary assets without excess value, particularly if the business isn't generating income. Even if the bankrupt is unemployed, items may be exempt if their absence would significantly reduce future job prospects. The exemption also applies to informal caregivers for disabled relatives who use vehicles in their caregiving role.[343]

4.4.7 Fresh Start: Discharge

[342] *Pennell v Elgin* [1926] SC 9
[343] *Wood v Lowe and Others* [2015] All ER (D) 133 (Sep)

Bankruptcy usually lasts one year but can be extended. At the same time, under s279, the period of discharge may be suspended by the debtor's failure to fulfil the debtor's obligations, such as hiding the property or failing to truthfully disclose information relating to the property. The suspension of the period of exemption is applied for by the trustee to the court and decided by the court. In other words, in the case of that, there is no extension or suspension, the bankrupt is automatically discharged from liability for the payment of former debts after 1 year, and the bankrupt is relieved of most of the debts and restrictions associated with bankruptcy, even if creditors have not been paid or certain assets remain unsold. The automatic discharge here means that the bankrupt does not need to petition the court for a discharge. Accordingly, if the 12-month period has not expired, the bankrupt may not apply to the court for an earlier discharge. However, the bankrupt may apply to the court for cancellation of the bankruptcy order if the conditions for an annulment of the bankruptcy order are met. The cancellation of a bankruptcy order and the bankruptcy exemption produce quite different results. Firstly, there are three circumstances in which an application for the annulment of a bankruptcy order can be made under s282. Firstly, if, at the time the bankruptcy order was made, there were reasons why it should not have been made. Secondly, if, after the bankruptcy order was made, the bankruptcy debts and bankruptcy-related expenses have been paid in full or secured by security recognised by the court. Thirdly, if the undischarged bankrupt has entered into an IVA with his creditors. Further, the court's approval of the cancellation of the bankruptcy order produces the result that everything is back to the way it was before the bankruptcy order was made, the bankruptcy order never affected the debtor, and the bankruptcy estate reverts to the debtor**, e**xcept for the portion already disposed of by the Trustee.[344]

Returning to the discussion of bankruptcy discharging, reducing the 3-year discharge for bankruptcy to 1-year discharge in the UK is a result of the reform of the Enterprise Act 2002. Although the insolvency

[344] Insolvency Act 1986, s282

service's research shows that the 2002 reform of the Enterprise Act, which reduced the discharge period of bankruptcy, did not significantly affect the debtor's decision to opt for an insolvency procedure,[345] the reduction of the discharge period is a move that makes the bankruptcy procedure a little more pro-debtor at the level of the institutional set-up. It is an important manifestation of the liberalisation of personal insolvency law in the UK.

Upon discharge, the bankrupt is released from most debts and restrictions associated with bankruptcy, even if no payments have been made to creditors or some assets remain unsold. However, discharge does not affect certain debts, such as court fines, debts from fraud, family-related payments, personal injury damages, post-bankruptcy debts, and student loans. While discharge frees the bankrupt from most obligations, it does not restore control of assets to them; the trustee retains control over any remaining assets and can continue managing or selling them after discharge. Further, the bankrupt must continue to make any payments agreed upon under an Income Payments Agreement (IPA) or an Income Payments Order (IPO). During the one-year bankruptcy period, if a bankrupt individual has surplus income after covering normal living expenses, the trustee may arrange for regular payments towards their debts through an Income Payments Agreement (IPA). An IPA is typically not arranged if the bankrupt's income consists solely of state benefits. If the trustee and the bankrupt cannot agree on the payment amounts, the trustee can request an Income Payments Order (IPO) from the court. However, the court will not issue an IPO if it leaves the bankrupt without enough income for everyday needs. If an IPO is made and the bankrupt fails to comply, the trustee can seek a court order to extend the bankruptcy period.

After obtaining a bankruptcy discharge, the bankrupt's bankruptcy record is retained for six years.

4.5 Conclusion

[345] Andrew Keay and Peter Walton, *Insolvency Law: Corporate and Personal* (4th edn, LexisNexis 2017) 376.

The UK's current personal insolvency laws provide debtors with several options to alleviate their debt distress. The introduction of DRO and the Breathing Space Scheme reflects the UK government's efforts to address the various financial difficulties faced by debtors, especially those with low incomes, no incomes, and no assets. IVA is a flexible out-of-court debt restructuring system under the UK personal insolvency law. It is suitable for debtors with sufficient income or assets. Through an IVA, debtors can avoid the stigma of bankruptcy and retain control of their property. Furthermore, an IVA does not affect a debtor's ability to hold a job. An IVA is a confidential agreement between a debtor and creditors.

The DRO system was recently reformed in 2009 through the 2024 Spring Budget, keeping up with the times and adjusting the entry criteria. After the reform, DRO became a free out-of-court debt relief procedure. More low-income, low-asset, no-income, no-asset debtors have the opportunity to get out of debt through DRO. Debtors who can choose DRO do not have to choose the costly bankruptcy procedure. When debtors are unable to use other personal personal insolvency procedures, bankruptcy would be the final debt relief mechanism.

In bankruptcy proceedings, the trustee holds all the bankrupt's assets and distributes them to creditors after they are realized. At the same time, bankruptcy proceedings are more binding on the debtor than the other procedures mentioned above. The official receiver and trustees play roles in Bankruptcy by ensuring that the bankruptcy estate is managed effectively and creditors receive a fair distribution of bankruptcy assets.

Finally, the Breathing Space Moratorium and the Mental Health Crisis Moratorium were introduced in 2021. They provide sufficient breathing space for individuals in severe debt distress and allow debtors to access professional advice to identify ways to alleviate their debt distress. The law also stipulates that debtors must accept debt advice in order to receive the protection of the Moratorium. During the

Breathing Space Moratorium and the Mental Health Crisis Moratorium, debtors are protected from creditor action. The Mental Health Crisis Moratorium is the result of the UK lawmakers' concern for debtors with mental health problems. The impact of mental health and debt is mutual.

Chapter 5 Current Position in China

5.1 Introduction Regulation of Shenzhen Special Economic Zone on Individual Bankruptcy

The Regulation of Shenzhen Special Economic Zone on Individual Bankruptcy (hereinafter referred to as "the Shenzhen Regulation") came into force in March 2021. By considering the interests of creditors, debtors and society, it aims to achieve the purpose of balancing the rights and obligations among the debtors, creditors and stakeholders, promoting the debt recovery of honest debtors and improving the system of socialist market economy.[346] By the end of January 2020, 3,298,000 commercial entities were registered in Shenzhen, of which 1,236,000 were self-employed, accounting for 37.5 per cent. In addition, there are a large number of self-employed commercial entities that participate in the market in the form of micro-businesses, e-commerce, freelancers, etc. However, before the Shenzhen Regulation, none of them could relieve themselves of their debts with limited liability under the existing national legislation. The director of the Legal Affairs Committee of the Shenzhen People's Congress, Shuguang Liu, says it is now the consensus to build a personal insolvency regime in China. The Opinions on Accelerating the Improvement of the Socialist Market Economy System in the New Era, published by the Central Committee of the Communist Party of China and State Council, specifies the promotion of establishing a personal insolvency regime in China.[347] Further, documents with the name of the issuing governmental

[346] Article 1, *Regulation of Shenzhen Special Economic Zone on Personal Insolvency*(Shenzhen People's Congress, 2020)

[347] The Opinions on Accelerating the Improvement of the Socialist Market Economy System (关于新时代加快完善社会主义市场经济体制的意见)

department printed in red and sent by the Legislative Affairs Commission of the National People's Congress show support for Shenzhen's exploration of the establishment of the personal insolvency regime. The strong support is also demonstrated in the Guidance issued by the Supreme People's Court of the People's Republic of China.[348]

Thus, having the policy support, as the special zone with rapid development, it is appropriate for Shenzhen to play a model role in building a personal insolvency system first, which will provide experience in establishing the Chinese personal insolvency regime. Interestingly, since 1992 Shenzhen was authorized, legislative power, more than 70% of which is for early and pilot implementation and innovative adaptations, has filled the legal gaps in the relevant fields.[349] The draft Shenzhen Individual Bankruptcy Regulation had two versions. After discussing whether Shenzhen needed a pilot personal insolvency law in 2014, the first version was published in May 2016. Then, in June 2020, the second draft was published to call for comments and suggestions from the public. It is worth noting that the chapter on the reorganization procedure was set before the liquidation procedure chapter, and the procedure of the debt settlement plan was not in the draft. The formal version of the Shenzhen Regulation puts the liquidation procedure before the reorganization procedure and adds the debt settlement procedure into the legislation. Such modification reflects the importance of debt discharging, which is the nature of bankruptcy.

However, adding the debt settlement procedure still shows that the lawmaker hopes indebted debtors can legally solve their debt problems without being declared bankrupt, and then creditors will get more repayment. Thus, we could ask several questions, for example, is Shenzhen Individual Bankruptcy

[348] Opinions on Supporting and Guaranteeing Shenzhen's Construction of an Early Demonstration Zone of Socialism with Chinese Characteristics (关于支持和保障深圳建设中国特色社会主义先行示范区的意见)

[349] Shenzhen's Construction of an Early Demonstration Zone of Socialism with Chinese Characteristics' (People's Daily, 28 August 2020) http://sz.people.com.cn/n2/2020/0828/c202846-34257205.html accessed 30 December 2020

Regulation pro-debtor or pro-creditor? Does it completely change the Chinese traditional view of debts? Also, it has to be noted that the Shenzhen Individual Bankruptcy Regulation is a local regulation, meaning it applies only to the Shenzhen Special Economic Zone.[350] In other words, it is not a nationwide act or code by the National People's Congress.[351] That would might, therefore, lead to an issue of bankruptcy tourism.

According to the Shenzhen Regulation, a natural person who is residing in Shenzhen and has participated in Shenzhen Social Insurance for at least 3 years consecutively may apply the bankruptcy regimes where he or she becomes insolvent or has insufficient assets to pay all the debts due to unsuccessful production and operation of business or living consumption.[352] The bankruptcy regimes include the procedure of liquidation (known as bankruptcy procedure in the UK insolvency law, to declare a debtor bankrupt and discharge the debtor after 3 to 5 years), reorganization (to deal with the debts via an approved reorganization plan) and debt settlement plan (to reach an agreement with creditors out of the court or via the court) that had emerged in the EU.[353] Indebted individuals from other cities and provinces in mainland China would try to make themselves bankrupt in Shenzhen as they do not have a personal bankruptcy regime or only have an executive procedure similar to bankruptcy at their local. In this

[350] Shenzhen Special Zone is authorised to tailoring various economic regulations to its own situation.

[351] In 1992, the Twenty-sixth Session of the Standing Committee of the Seventh National People's Congress made a decision to authorise the Shenzhen Municipal People's Congress and its Standing Committee to enact regulations for implementation in the Shenzhen Special Administrative Region in accordance with specific circumstances and actual needs, by following the provisions of the Constitution and the basic principles of laws and administrative regulations.

[352] In Dec 2020, Zhejiang Province published its local quasi-bankruptcy rules, which has some similarities to Shenzhen bankruptcy regime, but is different to the Shenzhen one. Thus, debtors can compare different local bankruptcy regimes and choose the preferred one. This will be discussed below.

[353] Article 2, Regulation of Shenzhen Special Economic Zone on Individual Bankruptcy. The Civil Code of the People's Republic of China recognises the position of nature person by replacing the chapter of citizen with the chapter of the natural person. In this way, the natural person has the same position as the legal person, which makes the bankruptcy of the natural person possible. The Civil Code of The People's Republic of China became effective on 1st Jan 2021. The Civil Code of the People's Republic of China still requires the individual to be careful with bankruptcy.

chapter, we will first overview the Shenzhen Individual Bankruptcy Regimes and then discuss the potential bankruptcy issues that will come with the Shenzhen Regulation.

5.2 The Overview of Shenzhen Individual Bankruptcy Regime

5.2.1 General Provision: Strict Provision of Applicable Object[354]

By comparing it with the draft of the Shenzhen Regulation, we could see the more strict limitations provided in the formal regulation. The draft wrote that the debtors should include: (1) a natural person who has registered in Shenzhen; (2) a natural person who has participated in Shenzhen Insurance for at least 1 year; (3) a self-employed business (个体工商户, equally individual) registered in Shenzhen;[355] And (4) a natural person with actual business in Shenzhen. The scope of the applicable object is wider in the draft. That means many insolvent individuals could have no opportunity to apply for the Shenzhen bankruptcy regime if they only have an actual business in Shenzhen or have only participated in Shenzhen Insurance for one or two years. In other words, it is difficult for some honest debtors in Shenzhen to have a fresh start by starting a bankruptcy process.

Under the current Shenzhen Individual Bankruptcy Regulation, whether the business has been registered in Shenzhen is not the condition, only where the natural person who operates the self-employed business has participated in Shenzhen Insurance for 3 years consecutively could file a bankruptcy petition in Shenzhen. It also seems that the condition of 3-year Shenzhen Insurance is stricter. Furthermore, it seems that the Shenzhen bankruptcy regime refuses to offer a fresh start for honest businessmen from other cities who come to Shenzhen for a new business for a short time but fail at the beginning,

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[354] It has to note that 'liquidation' is translated from Chinese 破产清算, 'reorganisation' is translated from Chinese 破产重整, and the 'debt settlement plan' is translated from Chinese 破产和解. Here, the liquidation procedure is available to individuals, which is different from the liquidation procedure in UK corporate insolvency law. Similarly, the personal reorganisation procedure is different from the reorganisation procedure in American corporate bankruptcy law.

[355] Refers to the self-employed who use personal or family property as business capital, are approved and registered according to the law, and are engaged in non-agricultural industrial and commercial business activities within the statutory scope.

unfortunately. It accords with the interpretation made by the Legal Public Committee of the Standing Committee of the Shenzhen Municipal People's Congress (深圳市人大常委会法公委): the regulation mainly considers those Debtors who already have a stable work relationship, living relationship and property relationship. Those debtors' property registration and social insurance information has been completed. It could be seen that the effort of the lawmakers of the Shenzhen bankruptcy regime to make the regime not so debtor-friendly via the stricter provision of applicable objects.

In a liquidation proceeding, when a debtor cannot pay his or her debts due, creditors who separately or jointly hold claims of no less than ¥500,000 against the debtor may file a liquidation petition with the court to declare the debtor bankrupt.356 However, there is no such requirement for the number of claims if creditors file a reorganisation petition. Thus, it would be easier for creditors to start a reorganisation procedure. Generally, creditors get more returns in the reorganisation procedure than in the liquidation procedure. That is, the Shenzhen bankruptcy regime prefers to protect the interests of creditors rather than the honest debtor's interest.

5.2.2 The Role of the Court

The court plays an important role in the whole bankruptcy procedure. According to Article 5 of the Shenzhen Regulation, the individual's bankruptcy case should be heard by the Municipal Intermediate People's Court, unless a basic people's court is designated to hear the case by the law. Within 5 days of receiving a bankruptcy petition with the documents submitted by debtors or creditors, the court shall give notice to all known creditors, the debtor and the bankruptcy affairs management department (破产事务管理部门).[357] Unless the case is complicated, generally, the court shall examine bankruptcy

[356] Article 9, *Regulation of Shenzhen Special Economic Zone on Personal Insolvency*(Shenzhen People's Congress, 2020)

[357] According to Article 8, where the debtor file a bankrupt petition, he or she shall submit (1) A written bankruptcy petition, reasons for bankruptcy, and an explanation of the process; (2) Income condition, a certificate

petitions through written investigation. If the case is complicated, the court may conduct a hearing.[358] The court shall investigate whether the petitioner complies with the condition of filing a bankruptcy, whether the petitioner has an illicit purpose when filing a bankruptcy petition, such as removing property, defaming another person, whether there is any false statement, etc.[359] Within 30 days after receiving the bankruptcy application, the court shall decide whether the application can be accepted. In exceptional circumstances, with the court's president's permission, the court may determine within 45 days after receiving the bankruptcy petition.[360] Where the court accepts a bankruptcy petition, the written ruling shall be sent to the petitioner (if the creditor files it, the written ruling shall also be sent to the debtor) within 5 days.[361] At the same time, the debtor shall be restricted from conducting according to Article 23 of the court.[362] The court shall announce the debtor's bankruptcy petition within 20 days after the court decides to accept the petition. The court shall also convene the first creditors' meeting within 15 days after the claim filing period expires. A chairman may be appointed among creditors by the court. As for discharging the debtor, the Shenzhen Regulation sets an observation period of 3 years, which means the debtor will not be automatically declared bankrupt.[363] The court has the right to extend the observation period to no more than 2 years if the debtor is found to violate the conduct restrictions.[364] The maximum observation period is 5 years. A written ruling of discharging shall be delivered to the debtor and creditors by the court. Also,

social insurance, and tax records; (3) A schedule of separate property and community property; (4) A schedule of claims and debts; (5) A written commitment to honesty. And Article 9 provides the materials that the creditor shall submit if the creditors file a bankruptcy petition.

[358] Article 12, *Regulation of Shenzhen Special Economic Zone on Personal Insolvency* (Shenzhen People's Congress, 2020)

[359] Article 12, *Regulation of Shenzhen Special Economic Zone on Personal Insolvency* (Shenzhen People's Congress, 2020)

[360] ibid

[361] Article 15, *Regulation of Shenzhen Special Economic Zone on Personal Insolvency* (Shenzhen People's Congress, 2020)

[362] Article 19, *Regulation of Shenzhen Special Economic Zone on Personal Insolvency* (Shenzhen People's Congress, 2020)

[363] Article 95, *Regulation of Shenzhen Special Economic Zone on Personal Insolvency* (Shenzhen People's Congress, 2020)

[364] Article 96, *Regulation of Shenzhen Special Economic Zone on Personal Insolvency* (Shenzhen People's Congress, 2020)

an announcement of discharging shall be made. In a bankruptcy case, the court shall cooperate with the trustee.

5.2.3 The Trustee in Bankruptcy Procedure

Interestingly, the formal and final Shenzhen Individual Bankruptcy Regulation significantly modifies the draft of the Shenzhen Individual Bankruptcy Regulation. The draft wrote that the court shall appoint a trustee as soon as the court accepts the liquidation or reorganisation petition. However, in the formal Shenzhen Individual Bankruptcy Regulation, creditors may separately or jointly recommend a candidate for a trustee to the court. If the court approves the recommended candidate for the trustee, it will decide to appoint the trustee when it enters a ruling of acceptance of the bankruptcy petition.[365] If creditors recommend different candidates, the court may appoint one or more trustees from those candidates.[366] Where the creditors fail to recommend a candidate for the trustee or the court holds that the candidate is not the suitable trustee, the court shall notify the bankruptcy affairs management department. The court shall decide the trustee's appointment within 8 days after the bankruptcy affairs management department proposes the candidate.[367]

Here, we can see that the court has no direct right to appoint a trustee in a bankruptcy case. And creditors' right to recommend one or more trustees may lead to an inevitable problem, that is, in practice, the trustee may exercise in favour of the creditors who recommended him or her. In the case of more than one creditor, it may be unfair for other creditors who do not recommend a candidate for trustee. However, the provisions could make lazy creditors exercise their right actively. Again, the feature of pro-creditor of the Shenzhen Regulation could be seen.

5.2.4 Property of the Debtor and Exempt Property

[365] Article 17, *Regulation of Shenzhen Special Economic Zone on Personal Insolvency* (Shenzhen People's Congress, 2020)
[366] ibid
[367] Article 18, *Regulation of Shenzhen Special Economic Zone on Personal Insolvency* (Shenzhen People's Congress, 2020)

According to Chapter 3 of the Shenzhen Regulation, the property that belongs to the debtor at the time when the court accepts the bankruptcy petition and the property acquired by the debtor before discharging shall be treated as the property of the debtor. Here, the property or interests in property in the name of the debtor's spouse, a minor child, or relatives living with the debtor shall be filed to the court. In contrast, the debtor files his or her property and the interests in the property to the court. It lists in Article 33: (1) cash asset, such as wages, deposits, cash, compensation for service, etc; (2) a stock, investment insurance, or any other financial product or wealth management product; (3) a property interest as a result of investing in a unlisted joint stock limited company, limited liability company, or registering an sole proprietorship enterprise, or partnership enterprise, etc; (4) an intellectual property right, a beneficial interest in a trust, a dividend payment by a collective economic organization, etc; (5) ownership or shared ownership of land use right or other property; (6) a means of transportation, machinery, equipment, product, raw materials, etc; (7) valuable personal collection such as a antique, a painting, a piece of writing, etc; (8) property interest based on inheritance, gift, nominee, etc; (9) any property or property interest that the debtor may expect before the acceptance of the bankruptcy petition; (10) any other property or property interest that worth disposition. And debtor's overseas property or property interest shall be disclosed to the court.[368]

Further, some situations shall be explained to the court, for example, the property or property interest of debtor's child was acquired when he or she was minor, or a third party is in possession of the property of the debtor, or real property, specific personal property or other property rights of the debtor is registered in the name of a third party.[369] Where there are changes specified in Article 35 occurred in property of the debtor within 2 years before the date when the court accepts the bankruptcy petition,

[368] Article 33, *Regulation of Shenzhen Special Economic Zone on Personal Insolvency* (Shenzhen People's Congress, 2020)
[369] Article 34, *Regulation of Shenzhen Special Economic Zone on Personal Insolvency* (Shenzhen People's Congress, 2020)

the debtor shall file to the court, which includes (1) donating, transferring, or leasing the property; (2) creating a security interest on the property; (3) waiving a claim or extending the period for payment of a claim; (4) making a payment of more than RMB50,000; (5) having community property divided in a divorce; (6) paying a debt before the debt is due; (7) other significant changes in the property.

It is worth noting that China's current system of rural residence land makes the nature of rural housing very different from that of ordinary housing. This also means that in bankruptcy proceedings, the treatment of rural housing that is part of the bankruptcy estate will be different from ordinary housing. The homestead system is an important part of the land system with Chinese characteristics, the core of which is to safeguard the collective ownership of rural land and to guarantee the basic housing rights of peasants. Since the founding of New China, through evolution, the framework of China's rural residential land system has been basically formed, and its basic features are ‘collective ownership, member use, one household, one house, limited area, gratuitous acquisition, long-term possession, planning and control, internal circulation’.

To put it simply, firstly, the ownership of homesteads belongs to the rural collective, and farmers can share homesteads and obtain the right to use homesteads without compensation; secondly, if a farmer wants to share a homestead and build a house on the homestead, he or she must be a member of the rural collective economic organisation of the village, i.e., the farmer must be from this village, unless there is a special policy permission. Ownership of rural houses built on homesteads is vested in the farmer. Therefore, rural housing can be treated as bankruptcy property and be dealt with in bankruptcy proceedings. Thirdly, a household can only be allocated one homestead, and the size of the homestead used is approved according to the population of the farming household and local government

regulations.[370] However, it is generally recognised that this does not prevent a farmer from acquiring a second home built on a homestead through purchase or sale after he has been allocated one homestead. Fourthly, the sale of rural housing is usually restricted to members of the same rural collective organisation. This is due to the provisions of the homestead system described above. Even if the farmer owns the house, it is built on land held by the collective. Therefore, if the buyer does not have the qualification to use the residential land, the procedures for transferring the ownership of the house and the right to use the residential land cannot be carried out. In judicial practice, even if the buyer and seller are both farmers, since they are not farmers of the same rural collective, the court considers the transaction to be legally ineffective, as farmers can only own the right to use the residential land in their own village. Urban residents, on the other hand, are strictly prohibited from buying rural housing in the countryside.[371]

As a unique usufructuary right in China, the system of residential land use rights has, over a certain period of time in history, played a role in guaranteeing the survival of villagers living in rural areas, and provided a material basis for the formation of the rural society as well as for the economic and social development of the countryside. However, with social and economic development, many farmers are no longer dependent on land for their survival, and their sources of income have gradually diversified, so that the property value of rural dwellings exceeds their social security value.[372] In recent years, China has carried out a reform of the rural land system, which includes ‘moderately liberalising the use rights of residence bases and farmers’ houses'. In the pilot areas of the reform, contracts for the purchase and sale of rural housing by urban residents and non-members of the same rural collective

[370] Land Administration Law of the People's Republic of China (2019 Revision), art 62
[371] Ministry of Natural Resources, *Circular on Strengthening the Management of Land Transfers and Strictly Prohibiting Land Speculation* (2021) art 2
[372] Xiaojun Chen, ‘Zhaijidi Shiyongquan de Zhidu Kunju yu Pokai zhi Wei [The Institutional Dilemma of Rural Homestead Land Use Rights and Its Resolution]’ (2019) 3 *Faxue Yanjiu (Chinese Journal of Law)* https://fzzfyjy.cupl.edu.cn/info/1058/10565.htm accessed 03 April 2025

economic organisation are considered valid, and the buyer can acquire the ownership of the house and the right to use the residence land in accordance with local policy. Therefore, in the practice of Shenzhen's personal bankruptcy regulations, the disposal of rural housing in farmers' bankruptcy cases should follow the provisions of China's rural residence land system.

The above discussion on the personal bankruptcy law in respect of the disposition of property under China's special property regime also implies that when studying the potential of China's personal bankruptcy law, it is necessary to constantly think about how a new system can be connected with the existing system, especially the one that is full of Chinese characteristics, i.e., adapting to the local conditions. Exempted property, as an indispensable part of personal insolvency law, is also set out in the Shenzhen personal insolvency regulations taking into account the local socio-economic development of Shenzhen.

The regulation allows the debtor to keep some property for the essential life of the debtor and his or her dependents. Within 15 days after the court accepts the bankruptcy petition, a list of exempt estates with the statement of the corresponding value or amount of property shall be submitted to the court.[373] The trustee shall examine and prepare a report that gives an opinion on the exempt property and submit to the creditor's meeting for voting within 30 days after the list of exempt property is submitted.[374] The court shall enter a ruling if the creditor's meeting does not pass the list of exempt property.[375] In the bankruptcy liquidation procedure, all the bankruptcy estates shall vest in the trustee.[376] The debtor can keep a

[373] Article 37, *Regulation of Shenzhen Special Economic Zone on Personal Insolvency* (Shenzhen People's Congress, 2020).
[374] Article 38, *Regulation of Shenzhen Special Economic Zone on Personal Insolvency* (Shenzhen People's Congress, 2020).
[375] Ibid
[376] Article 39, *Regulation of Shenzhen Special Economic Zone on Personal Insolvency* (Shenzhen People's Congress, 2020).

necessity or reasonable expense for the life, education, or medical care of the debtor or debtor's dependents.[377]

Also, the debtor may be allowed to have an item or reasonable expense that meets professional development needs.[378] An item of special commemorative significance to the debtor, metal, or other items in recognition of the honour, personal insurance with no cash value, personal damages to the debtor, a social insurance benefit, and a minimum living security benefit shall be the excluded property.[379] To ensure the interest of creditors, it provides that the total value of the item or reasonable expense for the debtor's career development, the item of special commemorative significance to the debtor, and other property that shall be used to pay debts following the law or public order and good customs shall not exceed RMB200,000.[380] Further, where the value of the property listed above is too large to be treated as exempt estate, it is fair to put such property into the pool of bankruptcy estate and distribute it to creditors.[381] It can see the balance of interest of the debtor and creditors. According to basic accounting, RMB200,000 is enough for a family of three to live in Shenzhen for 1 year. Theoretically, having the basic expense for the first year allows the bankrupt debtor to find a job or start a new business in a year without being worried about the livelihood. That is the way to get a fresh start. However, the circumstance of no property to be liquidated could be a different matter.

5.2.5 Cancellable and Void Transactions

For one of the purposes of the bankruptcy law, which is to reasonably adjust the rights and obligations of the debtor, creditors and other interested parties, the Shenzhen Personal Bankruptcy Regulations make

[377] Article 36, *Regulation of Shenzhen Special Economic Zone on Personal Insolvency* (Shenzhen People's Congress, 2020).
[378] Ibid
[379] Ibid
[380] Ibid
[381] Ibid

provisions on the debtor's property transactions, including property disposal before and after the bankruptcy proceedings, the right of avoidance, invalidation, the right of property retrieval and the right of set-off, with the aim of preventing the debtor from maliciously transferring property to the detriment of creditors' interests, and to ensure a fair distribution of bankruptcy estates. .

Firstly, within two years prior to the bankruptcy application, the trustee may request the court to set aside if the debtor has disposed of property without compensation, engaged in manifestly unreasonable transactions, provided additional security for unsecured debts, established a right of abode, paid off an outstanding debt in advance, exempted the debt or maliciously prolonged the time period for its fulfilment, or provided a guarantee for a person who is not a relative or an interested party.[382] In addition, a debtor may also be set aside if, within six months prior to the bankruptcy petition, it has made individual payments to individual creditors or, within two years prior to the bankruptcy petition, it has made individual payments to relatives or interested persons, unless the payments benefited the debtor's estate or were necessary for his or her normal living. In the previous chapter, the provisions of the English personal insolvency law on transaction undervalue and preference have been discussed.[383]

Secondly, acts of evasion involving the debtor, such as concealing, transferring or improperly disposing of property, or fictionalising or admitting an untrue debt, are void.[384] The trustee has the right to recover from a third party who acquires the debtor's property as a result of an invalid or voidable act, and shall be liable for compensation if the third party, knowing or ought to have known that the debtor was

[382] Article 40, *Regulation of Shenzhen Special Economic Zone on Personal Insolvency* (Shenzhen People's Congress, 2020).

[383] Article 41, *Regulation of Shenzhen Special Economic Zone on Personal Insolvency* (Shenzhen People's Congress, 2020).

[384] Article 42, *Regulation of Shenzhen Special Economic Zone on Personal Insolvency* (Shenzhen People's Congress, 2020).

insolvent or on the verge of insolvency, commits such an act with him or her and causes the creditor to incur losses.[385]

In addition, the trustee may, after the court has ruled that the bankruptcy application is admissible, recover the property pledged or retained by paying the debt or providing security; if the property in the debtor's possession belongs to another person, that person may recover it from the trustee; and, in a sale transaction, if the debtor has not yet received the goods and has not yet paid the full price, the seller may recover the goods in transit, and the administrator may also demand that the seller fulfil the obligation to make the delivery by paying the full price.[386]

section 47 sets out the scope of the application and limitations of the right of set-off in insolvency. Generally, if a creditor is simultaneously indebted to the debtor prior to the acceptance of the insolvency application, it may claim set-off from the administrator to reduce its losses. However, in order to prevent unfair set-off, the law stipulates three situations in which set-off is not permitted: firstly, after the bankruptcy application is accepted, the debtor-indebted person's claims on the debtor acquired through the assignment of other people's claims on the debtor shall not be used for set-off, in order to prevent the malicious acquisition of claims for unfair set-off; secondly, the creditor is known to be insolvent or has applied for bankruptcy of the debtor, and still undertakes a new debt to the debtor, it shall not be set-off, but because of the (ii) Where a creditor knows that the debtor is insolvent or has filed for bankruptcy and still assumes new debts against the debtor, such debts shall not be set off, except for debts arising from reasons provided for by law or occurring two years prior to the bankruptcy petition; and (iii) Where a debtor-liability person knows that the debtor is insolvent or has filed for bankruptcy and still acquires a

[385] Article 43, *Regulation of Shenzhen Special Economic Zone on Personal Insolvency* (Shenzhen People's Congress, 2020).
[386] Article 44, 45，46， *Regulation of Shenzhen Special Economic Zone on Personal Insolvency* (Shenzhen People's Congress, 2020).

claim on the debtor, such claims shall not be used for the purpose of set-off, except for claims acquired for reasons provided for by law or occurring two years prior to the bankruptcy petition

The definition of property transactions in the Shenzhen Personal Bankruptcy Law is also in line with Article 6 of the Chinese Civil Code, which states that 'Civil subjects engaging in civil activities shall follow the principle of fairness and reasonably determine the rights and obligations of all parties'. The principle of fairness in personal insolvency law must reflect the value that 'in personal bankruptcy proceedings all creditors' claims can be paid in an orderly and fair manner in accordance with the law, and individual debtors are prohibited from paying off individual creditors'.[387]

5.3 Bankruptcy Liquidation: the Regime of Debt Discharging

5.3.1 Bankruptcy Declaration and Distribution

Bankruptcy liquidation is the procedure for a debtor's bankruptcy declaration. The debtor or the trustee may apply to the court for bankruptcy declaration where the report on the debtor's property, the list of exempt property, and the list of the creditors' claims have been passed or verified by the meeting of creditors and confirmed by the court.[388] The court shall declare the debtor bankrupt if it considers that the debtor meets the conditions for bankruptcy declaration.[389]

In terms of the property of the debtor, the debtor's property shall be the bankruptcy estate after the bankruptcy declaration. A trustee shall sell the bankruptcy estate by the rules of auction and realization set by the court, mainly via the online auction or other ways on a public platform.[390] It could find the

[387] Dingku Jiang (ed), Legal Practice of Personal Bankruptcy (Law Press 2022).
[388] Article 84, *Regulation of Shenzhen Special Economic Zone on Personal Insolvency* (Shenzhen People's Congress, 2020)
[389] ibid
[390] Article 84, *Regulation of Shenzhen Special Economic Zone on Personal Insolvency* (Shenzhen People's Congress, 2020)

online auction of estates of Shenzhen corporate insolvency cases on the platform of Ali Paimai (阿里拍卖), which Alibaba operates. As the earliest Shenzhen personal insolvency cases are still pending, none of the cases have yet reached the stage of the realization of bankruptcy estates.

However, it could be estimated that the realization of bankruptcy estates will be processed via such an online platform. According to the Shenzhen Regulation, it shall ensure the reserve price for the auction is fair. The trustee shall determine the reserve price for the auction by referring to the market price.[391] Also, the reserve price may be determined by soliciting bids online or from specific bidders.[392] If the auction fails twice, the trustee may realise the estates online or in any other way at an appropriate price unless otherwise provided by any resolution of the meeting of creditors, law, or administrative regulation.[393] With the approval of the meeting of creditors, the estate that is not suitable for realization because the realization cost is higher than the value of the estate or for other reasons may be returned to the debtor.[394] That means the disposal of such an estate is abandoned.[395] After the realization of bankruptcy estates, the bankruptcy expenses and community liabilities will be paid as a priority. Then, the creditors will receive the repayment in the order provided in the Shenzhen Regulation.

Firstly, the domestic support and damages exclusively for the personal injury component owed by the debtor will be paid. Secondly, the following debts shall be repaid: the wages; medical, injury, and disability subsidies; pensions; and other expenses owed by the debtor to employees; contributions to the basic pension insurance and other social insurance payable to the employees; and other compensations payable to the employees by the law. Thirdly, it will be distributed to the taxes owed by the debtor. After

[391] ibid
[392] ibid
[393] ibid
[394] Article 88, *Regulation of Shenzhen Special Economic Zone on Personal Insolvency* (Shenzhen People's Congress, 2020)
[395] ibid

that, unsecured creditors will be paid. A spouse and former spouse, a close relative living with the debtor, or an adult child of the debtor shall only be paid after other unsecured creditors have been fully paid.[396] Fines for illegal or criminal conduct will be the last category to be paid. Where the bankruptcy estates are insufficient to be distributed to the creditors in the same group, they shall be paid in proportion.[397]

A draft plan of distribution shall be submitted to the meeting of creditors by the trustee. It is worth mentioning that a distribution plan in the bankruptcy liquidation procedure shall specify the way of distributing the debtor's future income, which is similar to the reorganization plan in the reorganization procedure. After being passed by the meeting of creditors, the draft plan of distribution of the bankruptcy estates shall be submitted to the court for approval. The court shall decide to terminate the bankruptcy liquidation procedure and make an announcement to the public if the court approves the distribution plan.[398] The distribution plan in the liquidation procedure is the only personal insolvency plan that the trustee shall implement.[399] To ensure transparency, it shall announce the amount of each distribution and the number of claims to the public if the trustee makes a distribution by the plan more than one time.[400] Where the trustee makes the last distribution, the last distribution and specifies matters about the deposit of each distribution shall be indicated in the announcement. According to the regulation, the distribution shall be deposited by the trustee: (1) a claim subject to a condition about the effectiveness or a condition subsequent loses effect;[401] (2) any creditor does not receive a

[396] Article 89, *Regulation of Shenzhen Special Economic Zone on Personal Insolvency* (Shenzhen People's Congress, 2020)
[397] ibid
[398] Article 90, *Regulation of Shenzhen Special Economic Zone on Personal Insolvency* (Shenzhen People's Congress, 20)
[399] Article 91, *Regulation of Shenzhen Special Economic Zone on Personal Insolvency* (Shenzhen People's Congress, 2020)
[400] ibid
[401] Here if the conditional claim does not become effective or the conditional claim does not lose effect on the announcement day of the last distribution, the distribution shall be made to the creditor. Conversely, the distribution shall be made to other creditors.

distribution of bankruptcy estates;[402] (3) a claim involved in pending litigation or arbitration when the bankruptcy estate is being distributed.[403]

5.3.2 Discharge Bankrupt: after a 3 to 5-year Observation Period

The Shenzhen Regulation stipulates an extended period for observing the bankruptcies strictly before discharging. The debtor may be discharged after a 3-year observation period if he or she performs the obligations of restricting conduct and other obligations provided in the regulation well. Otherwise, the court may decide to extend the observation period for no more than two years. In other words, the observation period may not exceed 5 years, and the debtor shall not be discharged automatically. According to the regulation, though the court has terminated the bankruptcy liquidation procedure after the approval of the distribution plan, the debtor shall continue to perform his or her obligations commenced at the beginning of the bankruptcy liquidation proceeding.

For example, without the court's permission, the debtor shall not go abroad. Also, debtor's conduct of consumption shall be restricted, which includes (1) the consumption of choosing the business class or first class of an airplane, a soft sleeper on a train, a second-class or higher-class cabin on a ship, or a first-class or higher-class seat on a high-speed train; (2) consuming in a nightclub, golf course, a hotel with not less than three stars or any other similar venue; (3) purchasing real property or a motor vehicle; (4) constructing, expanding, or interior decoration; (5) supporting children to go to a high-cost private school; (6) renting office space at a luxury office building, a luxury hotel, a luxury apartment, etc; (7) paying high premiums to buy insurance or wealth management product; (8) other conduct of unnecessary consumption for life and work.[404]

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[402] Here if the creditor fails to receive the distribution two months after the announcement day of the last distribution, it shall treat that the creditor has waived the right to receive the distribution. Thus, the deposit shall be distributed to other creditors.

[403] The deposit shall be paid to other creditors where the creditor fails to receive the distribution two years after the court terminate the bankruptcy liquidation procedure.

[404] Article 23, *Regulation of Shenzhen Special Economic Zone on Personal Insolvency* (Shenzhen People's Congress, 20)

Here, the consumption restrictions are largely the same as those for an executed person whose consumption is restricted in a civil execution procedure. Further, during the observation period, the debtor has an obligation to register and file information on personal income, expenditures, and the condition of the property in the Bankruptcy Information System of the Bankruptcy Affairs management department every month.[405] The information mentioned above shall be supervised and disclosed lawfully by the bankruptcy affairs management department.[406] The trustee shall take over and distribute the debtor's newly discovered property according to the distribution plan.[407] To ensure and protect the interest of creditors, the regulation set a rule to encourage bankrupts to repay debts in advance. It provides that in the following 3 circumstances, the observation shall be treated to be expired. The bankrupts may apply to the court for discharge: (1) the debtor pays the remaining debts, or the creditors discharge the debtor for all payment liabilities; (2) the debtor pays not less than 2/3 of the remaining debts, and there are less than 2 years left in the observation period; (3) more than 1/3 but less than 2/3 of the remaining debts are paid, and there is less than 1 year left in the observation period.[408]

Where the observation period has expired, and the debtor applies to the court for discharging, the trustee shall investigate any circumstances in which the debtor shall not be discharged according to Article 98 or if any outstanding debt cannot be discharged. It specifies that the debt of damage payable to anyone for personal injuries, domestic support arising from the statutory personal relationship, a claim based on the employment relationship, a debt hidden by the debtor, taxes, a fine for illegal or criminal conduct cannot be discharged.

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[405] Article 99, *Regulation of Shenzhen Special Economic Zone on Personal Insolvency* (Shenzhen People's Congress, 20)
[406] ibid
[407] ibid
[408] Article 100, *Regulation of Shenzhen Special Economic Zone on Personal Insolvency* (Shenzhen People's Congress, 20)

5.4 The Reorganisation Procedure

The reorganisation procedure is set to be one of the alternatives to the liquidation procedure. When filing a petition for reorganisation with the court, a debtor should ensure that he or she has predictable future income. Without predictable future income, a debtor can't deal with debt difficulties through the reorganisation procedure.[409] When the debtor files a reorganisation petition, the court must receive a reorganisation feasibility report on a draft reorganisation plan.[410] If a creditor files a liquidation petition, the debtor may file a petition for reorganisation after the creditor's petition is accepted by the court and before the debtor is declared bankrupt.[411] The court will accept the debtor's petition for reorganisation if it considers that the acceptance conditions are met.[412] Where the debtor is filing a petition for reorganisation while the creditor is filing a petition for liquidation, the court shall accept the debtor's petition if it is considered the court will accept the debtor's petition for reorganisation if it meets the reorganisation acceptance conditions.[413] The law could be seen as encouraging debtors to obtain debt relief via alternatives to the liquidation procedure. According to Chapter 8 of the Shenzhen Regulation, the maximum period of reorganisation is six months.[414] It should be mentioned here that once the personal reorganisation procedure is accepted by the court, the debtor is subject to the consumption restrictions set out in s19, which are the same as those for debtors applying for bankruptcy liquidation proceedings and bankruptcy settlement proceedings. The release of the debtor from the consumption restrictions will occur when the court decides to approve the reorganisation plan.[415]

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[409] Article 100, *Regulation of Shenzhen Special Economic Zone on Personal Insolvency* (Shenzhen People's Congress, 20)
[410] ibid
[411] Article 107, *Regulation of Shenzhen Special Economic Zone on Personal Insolvency* (Shenzhen People's Congress, 20)
[412] ibid
[413] Article 106, *Regulation of Shenzhen Special Economic Zone on Personal Insolvency* (Shenzhen People's Congress, 20)
[414] Article 108, *Regulation of Shenzhen Special Economic Zone on Personal Insolvency* (Shenzhen People's Congress, 20)
[415] Article 124, *Regulation of Shenzhen Special Economic Zone on Personal Insolvency* (Shenzhen People's Congress, 20)

Therefore, on the Shenzhen Personal Bankruptcy Information Disclosure Platform, it can be seen that each bankruptcy case is accompanied by a decision to restrict the debtor's behaviour in the publication of the decision document. A comparison of the different provisions of the Shenzhen personal insolvency regulations and the UK personal insolvency law in terms of restrictions on debtors can be seen here. Firstly, the Shenzhen Personal Insolvency Regulation imposes ex officio restrictions on debtors. That is, regardless of the type of personal insolvency proceedings the debtor applies for, he or she is automatically subject to consumption restrictions as long as the court decides to accept the application. On the other hand, the restriction rules in the UK, whether Bankruptcy Restrictions Order or DRO restrictions, do not restrict the debtor applying for the proceedings as a matter of course, but set out the conditions under which the trustee or official receiver can apply to the court for the restrictions, i.e., when the debtor has dishonest or reprehensible behaviours. or reprehensible behaviour on the part of the debtor. Furthermore, the Shenzhen personal insolvency regulations impose the same restrictions on debtors in all three types of personal insolvency proceedings without discrimination, as long as the court decides to accept the case. The UK personal insolvency law, on the other hand, sets BRO in Bankruptcy proceedings and DRRO in DRO proceedings. Same restrictions apply to debtors who are subjected to DRRO and BRO. Once a debtor is found to be dishonest, he and she are subject to the same restrictions whether he and she are in a bankruptcy proceeding or a DRO. Finally, the restrictions on the debtor in the Shenzhen's regulation are mainly in the area of consumption. This is related to the current problem of enforcement difficulties in China. In dealing with the problem of enforcement, China has chosen to classify debtors who have fulfilled their discharge obligations under civil litigation judgements as public 'laolai', which means dishonest debtors, those who refuse to pay back the money. Once a debtor is classified as a 'laolai', he or she is subject to restrictions on high spending. Interestingly, the provisions of the Shenzhen Personal Bankruptcy Law regulations restricting high consumption are basically the same as those restricting high consumption by 'laolai'. Does this imply that the Shenzhen Personal Bankruptcy Law Regulations are careful to treat debtors

applying for personal bankruptcy proceedings as laolai in the first instance, regardless of the circumstances?

5.4.1 The Role of Trustee

During the period of reorganisation, the trustee plays a vital role by performing supervision functions. Under the trustee's supervision, the property and business shall still be managed on the debtor's behalf.[416] If the trustee must take over the debtor's property and business, the debtor or the trustee may apply to the court.[417] With the permit of the court, the debtor's property and business may be managed by the trustee.[418] Further, where there are any circumstances found by the trustee: (1) it lacks the possibility of reorganisation because of the continual deterioration of the status of debtor's assets; (2) the property is reduced fraudulently or maliciously by the debtor or the interest of a creditor in property is conspicuously derogated by the debtor; (3) the act of the debtor renders the trustee's performance of duty impossible, the trustee shall notify the creditor within five days.[419] The creditor or trustee may also apply to the court to terminate the reorganisation proceedings and declare the debtor bankrupt.[420]

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[416] Article 109, *Regulation of Shenzhen Special Economic Zone on Personal Insolvency* (Shenzhen People's Congress, 20)
[417] ibid
[418] According to Article 110, as for the security interest in the specific property of the debtor, if such specific property is necessary for the reorganisation, the security interest shall be suspended from exercise. However, if the possibility of damage or impairment of the collateral is sufficient to damage security interest holder's right, the court may be requested by the security interest holder to resume the exercise of the security interest or require additional security provided by the debtor. As for the property of another person that is in possession of the debtor, the holder of rights in the property could get the property back if any condition agreed in advance is met.
[419] Article 112, *Regulation of Shenzhen Special Economic Zone on Personal Insolvency* (Shenzhen People's Congress, 20)
[420] ibid

A debtor or trustee must submit the draft reorganisation plan within 30 days of the court accepting the reorganisation petition.[421] On application from the debtor or trustee, a 30-day extension may be applied if there is any good reason for the court to consider.[422] The reorganisation plan shall contain the required information on the classes of claims, the debt that is excepted from the debts that could be discharged, a proposal of claim adjustment, a proposal of debt payment, a plan for predictable income and unexpected income distribution, the implementation period for the reorganisation plan, and other suitable measures for the reorganisation.[423]

It must be noted that the debtor's future income shall be arranged in the reorganisation plan, as predictable future income is one of the elements of the reorganisation procedure. The mortgage loan repayment plan may be submitted as part of the reorganisation plan.[424] Except for the mortgage loan repayment plan, the maximum implementation period for the reorganisation plan is five years, and repayment shall be made at least once every three months. The requirements of the reorganisation plan provide that the interests of secured creditors shall be protected and that the secured creditors shall get compensation for the loss caused by delayed payment.[425] Further, to ensure fair distribution, the reorganisation plan shall follow the order of debt payment provided in Article 89, and the same proportion of distribution shall be made to the same class of claims. The liquidation procedure also requires a lower payment ratio in the reorganisation procedure to achieve better repayment.

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[421] Article 113, *Regulation of Shenzhen Special Economic Zone on Personal Insolvency* (Shenzhen People's Congress, 20)
[422] ibid
[423] Article 114, *Regulation of Shenzhen Special Economic Zone on Personal Insolvency* (Shenzhen People's Congress, 20)
[424] If there is any written agreement that has been reached by the creditors and debtors before the court accepted the reorganisation petition, the debtor may include such an agreement as a part of the reorganisation plan. If the draft reorganisation plan does not amend the written agreement, or the court finds that the amendment of the written agreement does not materially derogate from the interests and rights of the creditor, it shall regard that the creditors vote on the reorganisation plan.
[425] Article 115, *Regulation of Shenzhen Special Economic Zone on Personal Insolvency* (Shenzhen People's Congress, 20)

However, creditors have the right to waive their interest. In this case, creditors may get less repayment, which may be exempted from the abovementioned requirement.[426] After the court approves the reorganisation plan[427]The trustee shall assist and supervise the debtor in completing the plan within the implementation period specified in the reorganisation plan. The debtor shall report the income, expenditures, and debt payment to the bankruptcy affairs management department and the trustee every month. Within 10 days after the expiration of the implementation period, the trustee shall submit an implementation report to the court and the bankruptcy affairs management department.

5.4.2 The Role of the Court

Like the liquidation procedure, the court often gets involved in a reorganisation proceeding. Within 15 days of receiving the draft reorganisation plan, the court shall convene a meeting of creditors to vote on the reorganisation plan. In the meeting of creditors, creditors shall vote on the draft reorganisation plan in groups provided in Article 116. It includes the group of (1) secured claims, (2) domestic support and damages for the personal compensation component, (3) the debt owed by the debtor to employees, (4) taxes and fines, and (5) unsecured claims.[428] If necessary, the court may add a subclass of small claims to unsecured claims. Each group shall accept the reorganisation plan if more than half of the creditors present at the meeting of creditors, representing not less than 2/3 of the total claims in value in the group, vote on the plan. All the groups accept the reorganisation plan, stating that it is received by all the creditors, which will bind all the creditors after the court's approval.[429]

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[426] ibid

[427] Article 125, *Regulation of Shenzhen Special Economic Zone on Personal Insolvency* (Shenzhen People's Congress, 20)

[428] Article 116, *Regulation of Shenzhen Special Economic Zone on Personal Insolvency* (Shenzhen People's Congress, 20)

[429] Article 119 and 123, *Regulation of Shenzhen Special Economic Zone on Personal Insolvency* (Shenzhen People's Congress, 20)

The reorganisation plan may be modified after the negotiation, and the creditors may make a decision again if they do not accept the original version.[430] However, such modifications shall not be made more than twice.[431] The debtor or trustee may apply to the court for approval within 10 days after the reorganisation plan is accepted in the creditors' meeting.[432] If one of the voting groups does not accept the draft reorganisation plan, the debtor or trustee may apply to the court for approval within 10 days after the voting day if it conforms to Articles 114 and 115 of the Shenzhen Regulation.[433] The court shall approve the reorganisation plan after examination within 30 days of receiving the application and make an announcement.[434] To protect the creditor's interests as a whole, the law gives the court discretion to approve a reorganisation plan that not all the voting groups accept. At the same time, the court may decide to remove the debtor's bankruptcy restriction.[435]

Further, the court shall terminate a reorganisation proceeding if creditors do not accept the draft reorganisation plan. The plan is not approved by the court until the expiration of the six months of reorganisation or the accepted plan is not approved by the court.[436] On application of the debtor or trustee, the court shall accept the debtor to enter into the liquidation procedure and declare the debtor's bankruptcy if the debtor is eligible.[437]

5.4.3 The Implementation of the Reorganization Plan

[430] Article 120, *Regulation of Shenzhen Special Economic Zone on Personal Insolvency* (Shenzhen People's Congress, 20)
[431] ibid
[432] Article 119, *Regulation of Shenzhen Special Economic Zone on Personal Insolvency* (Shenzhen People's Congress, 20)
[433] Article 121, *Regulation of Shenzhen Special Economic Zone on Personal Insolvency* (Shenzhen People's Congress, 20)
[434] ibid
[435] Article 123, *Regulation of Shenzhen Special Economic Zone on Personal Insolvency* (Shenzhen People's Congress, 20)
[436] Article 120, *Regulation of Shenzhen Special Economic Zone on Personal Insolvency* (Shenzhen People's Congress, 20)
[437] Article 122, *Regulation of Shenzhen Special Economic Zone on Personal Insolvency* (Shenzhen People's Congress, 20)

As mentioned above, the debtor shall implement an approved reorganisation plan. Within 15 days after the implementation of the reorganisation plan, the debtor may apply to the court to discharge the debtor from outstanding debts.[438] Suppose there is an impossibility of implementing the reorganisation plan for any reason not imputable to the debtor. In that case, the court may approve the implementation period for no more than 2 years upon the debtor's application.[439] Further, where the debtor can't implement the reorganisation plan for force majeure, an unexpected event or any other reason, the court may decide to discharge the debtor and terminate the implementation of the reorganisation plan if the debtor completes not less than 3/4 of repayment specified in the reorganisation plan.[440] The court shall also terminate the implementation and declare the debtor bankrupt upon the application of the creditors if the debtor fails or cannot implement the reorganisation plan or the debtor commits fraud.[441] Any conduct related to liquidation during the reorganisation shall still be valid.[442] The trustee of the reorganisation procedure shall continue to be the trustee of liquidation procedure.[443] As the reorganisation procedure is transferred to the liquidation procedure, to make the fair distribution among the creditors, creditors may continue to receive a repayment only when any other equally ranking creditor receives a payment with the same proportion.

5.4.4 Rights and Obligations of the Debtor's Spouse in Reorganisation Proceedings

Regulation s171 allows the debtor's spouse to apply the regulations simultaneously to insolvency liquidation, reorganisation or settlement. The debtor's here is not required to fulfil the conditions for application under s2 of the regulation. Spouses In the existing practice of personal bankruptcy

[438] Article 129, *Regulation of Shenzhen Special Economic Zone on Personal Insolvency* (Shenzhen People's Congress, 20)
[439] Article 127, *Regulation of Shenzhen Special Economic Zone on Personal Insolvency* (Shenzhen People's Congress, 20)
[440] Article 128, *Regulation of Shenzhen Special Economic Zone on Personal Insolvency* (Shenzhen People's Congress, 20)
[441] Article 130, *Regulation of Shenzhen Special Economic Zone on Personal Insolvency* (Shenzhen People's Congress, 20)
[442] ibid
[443] ibid

proceedings in Shenzhen, it is usually the case that both spouses file separate personal bankruptcy petitions to the court, and the court, after examination, will hear their cases jointly and apply the same reorganisation agreement. Here, two consolidated husband and wife bankruptcy reorganisation cases will be discussed. It is worth noting that, to date, there is no practice in which spouses are liquidated and jointly declared bankrupt.

5.4.5 Case Study: Joinder of Husband and Wife Insolvency Reorganisation Cases

Ms Li and Mr Wen jointly operated a soya milk shop. As a result of poor management, Mr. Wen was in debt of approximately 1 million, and Ms. Li was in debt of approximately 200,000. In January 2022, they each filed an application with the court for personal bankruptcy procedure. On 28 February 2022, the court ruled that the case should be accepted after review. Through the investigation, the court found that the property in each of their names was the joint property of spouses, and the debt was also the joint debt. There were 18 creditors with a total debt of 1053966.5 RMB, one of which was a secured creditor. On 15 April 2022, the court ruled to consolidate the two cases on the merits. While the bankruptcy proceedings were ongoing, Ms Li and Mr Wen applied to the court for the application of personal bankruptcy reorganisation proceedings and proposed a reorganisation plan. The reorganisation plan did not adjust the secured claims, which were to be fully settled by both debtors. Instead, ordinary claims were exempted except for the principal, and all ordinary creditors would be paid 100 % of the principal. On 12 August 2022, the court ruled that the bankruptcy proceeding was converted into reorganisation proceedings. On 16 December 2022, the court approved the reorganisation plan of the two debtors and that the reorganisation proceedings were terminated. This case is relevant in a relatively complex situation where a couple is jointly subject to bankruptcy proceedings and then converted to reorganisation proceedings.

Another case was similarly a case of indebtedness resulting from the failure of a business jointly operated by a husband and wife. Mr Wang and Ms Cai jointly operated a shop, which failed due to mismanagement

and the covid-19 epidemic, resulting in debts amounting to 1.8 million RMB. Mr. Wang and Ms. Cai filed separate reorganization petitions with the court. On 18 July 2022, the court ruled that the organisation cases of the two debtors were accepted after reviewing that they possessed the reasons for bankruptcy and the conditions for reorganisation. In this case, the court consolidated the debts in the couple's names, assets, future income and debt discharge and appointed the same administrator for both cases. According to s114 of the Regulation, if there is an outstanding home mortgage on the house in which the debtor and his dependents reside, the debtor may agree with the mortgagee on the principal, interest, and repayment period of the mortgage on the family home mortgage, which will be submitted as part of the draft reorganisation plan. However, in this case, the mortgage was not set on the family home, so the provisions of s114 did not apply.

In this case, the treatment of mortgages on non-family dwellings indicates similar situations in future personal insolvency cases. The settlement agreement between the two debtors and the secured creditor was that the mortgage claim, principal plus interest totalling 743277.19 RMB, would be fully satisfied. The loan claim was to be satisfied with the proceeds of the realisation of the property, and the one-year LPR was to compensate for the loss of deferred settlement due to the temporary inability to dispose of the property. Moreover, Wang Qiang and Cai Yazhu should realise the property promptly by real estate policies and market conditions, and the proceeds from the realisation of the property should be used as a priority to settle the housing mortgage loan claim.

Through the data collation of Shenzhen personal bankruptcy information public platform, there are 25 cases of husband and wife entering into personal bankruptcy and reorganisation procedures together, of which 7 cases were terminated after the court accepted the cases and failed to form reorganisation agreements and there is one case of husband and wife applying for personal liquidation procedures together, after the investigation of the administrator, the debtor violated the principle of honesty and credit, the debtor's indebtedness process was unclear, the reason for bankruptcy was doubtful, and there

was the possibility of negative debt repayment. The debtor's debts were unclear, the reasons for bankruptcy were doubtful, and there was a possibility of negative debt repayment. The Shenzhen Intermediate People's Court ruled that the bankruptcy application of Ma's Li Si and Tuo Jinmei should be rejected.

Obligations of the debtor's spouse are: firstly, at the stage when the debtor applies to the court for the application of personal insolvency proceedings, a list of the joint property of the husband and wife is included in the materials that the debtor should submit to the people's court. In practice, the debtor's spouse, in the stage of the debtor's application for personal insolvency procedures, should also fulfil the obligation to take the initiative to disclose the status of the property; otherwise, it will affect the court to the debtor to make a decision of inadmissibility. Debtor Ke, who lives in Shenzhen and has participated in Shenzhen Social Security for three consecutive years, applied for personal bankruptcy reorganisation in 2021.[444] Ke claimed that he owed more than 100,000 RMB since 2018, and the debt interest rolled over seriously in the past five years. According to the debtor's debt inventory submitted by the debtor, as of his bankruptcy petition, the debtor and his spouse had 19 creditors, totalling 788,000 RMB in debt.

Concerning Ke's bankruptcy petition, the creditor, China Merchants Bank, submitted that there were records of investments in stocks and futures under the name of the Debtor's spouse and that from the beginning of 2020 to November 2021, approximately 300,000 RMB was transferred out of the stock account and190,000 RMB was transferred in, more than 500,000 RMB was transferred out of the futures trading account, 600,000 RMB was transferred in, and the last transfer of more than 1,000 RMB was made to the stock account on 21 January 2021, but that the Debtor failed to the petition to account for his

444 周群峰, '深圳试水个人破产，谁能借此摆脱债务' (2023) 中国新闻周刊 https://www.stcn.com/article/detail/956917.html accessed 22 August 2023
As the court did not accept this petition, no official document is on file.

or his spouse's investments. The debtor's spouse admitted opening stock and futures accounts in 2016 and 2020, respectively. After the court held a hearing Ke's petition, most creditors present at the hearing objected to the debtor's proposed reorganisation petition and draft reorganisation plan. Upon review, the court held that the debtor's failure to truthfully state the purpose and destination of the borrowings and the failure of both the debtor and his spouse to disclose important matters, such as financial investments proactively, had violated the principle of honesty and creditworthiness, and ultimately the application was not accepted by the court.

Secondly, according to s22 of the regulation, close relatives of the debtor's spouse and children living with the debtor, the administrator of the estate and other interested parties have the obligation to cooperate with the investigation[445]. They should cooperate with the people's court and the trustee in the investigation and assist the trustee in the property inventory, receivership and distribution. In Qiu Zhicong's personal reorganisation case, his spouse, Wu Zhicai, refused to cooperate with the trustee's property investigation, resulting in the administrator being unable to complete the liquidation of the debtor's property, which in turn prevented the formation of a draft reorganisation plan and its submission to a vote. The administrator applied to terminate the debtor's personal bankruptcy and reorganisation proceedings.[446] It can be seen that when a spouse enters into insolvency proceedings under the regulations, any violation of the obligations of the spouse, children, close relatives living together, the administrator of the estate, and other interested parties will affect the course of the debtor's insolvency proceedings.

Furthermore, according to s33, the debtor shall truthfully disclose property and interests in property in his/her name and truthfully declare property and interests in property in the name of his/her spouse, minor

[445] Article 22, *Regulation of Shenzhen Special Economic Zone on Individual Bankruptcy* (Shenzhen People's Congress, 2020)
[446] (2022) 粤 03 破 521 号 (个 52)

children, and other close relatives living together.[447] In the existing practice cases of personal bankruptcy reorganisation proceedings, the debtor's spouse's predictable labour remuneration is also used to execute the reorganisation agreement, for example, the Wu Weixing case and the Li Bing case.[448] In the Li Bing case, Li Bing's spouse continued to fulfil the mortgage contract for the undeclared secured claims. It can be seen that before Li Bing applied for personal bankruptcy reorganisation proceedings, his spouse had already fulfilled his obligations under the mortgage contract. Thus, the secured creditors did not declare their claims in the reorganisation proceedings, and the reorganisation agreement did not adjust the secured debts.

Finally, according to s89, before other ordinary creditors are fully satisfied, spouses, former spouses, close relatives living together and adult children cannot be satisfied as ordinary creditors.[449] In Yan Ting's bankruptcy reorganisation, the reorganisation plan adjusted the ranking of ordinary claims. Financial claims were satisfied first, followed by friends' and, finally, relatives' claims.[450] Since the Shenzhen Personal Bankruptcy Information Disclosure Platform does not publish specific details of the case, there is no way of knowing whether the relative creditors are spouses, ex-spouses, adult children or adult children. However, it is possible to conclude that in the practice of the Shenzhen personal bankruptcy regulations, relative claims, regardless of the proximity of the kinship, are not satisfied before other ordinary creditors.

According to s167, the debtor violates the provisions of this regulation, has (1) refused to cooperate with the investigation, refused to answer the enquiry, refused to submit the relevant information, (2) or to

[447] Article 33, *Regulation of Shenzhen Special Economic Zone on Individual Bankruptcy* (Shenzhen People's Congress, 2020)
[448] (2022) 粤 03 破 300 号 (个 14) and (2023) 粤 03 破 279 号 (个 60)
[449] Article 89, *Regulation of Shenzhen Special Economic Zone on Individual Bankruptcy* (Shenzhen People's Congress, 2020)
[450] (2021) 粤 03 破 409 号 (个 9) also see (2021) 粤 03 破 483 号 (个 17)

provide false, altered information, make false statements, make misleading statements; or (3) intentionally conceal, transfer, damage, wrongfully dispose of property or the property rights, or interests of the property or other undue reduction of the value of the property; or (4) fictitious debt or admitted that untrue debt; (5) concealment, destruction, forgery or alteration of financial documents, seals, correspondence, electronic documents and other materials; (6) refusal to implement the reorganisation plan or settlement agreement without justifiable reasons, to the detriment of the interests of creditors. By the law, the people's court shall admonish, summon, fine and detain.[451] And if it constitutes a crime, criminal liability shall be investigated according to law.[452]

In practice, there have been cases where the court has fined debtors for misrepresentation and other behaviours.[453] A debtor named Yan Ting, a host, invested in a business venture in 2015 and was burdened with 2.6 million RMB of debt that could not be discharged due to the failure of the project. In July 2021, Yan Ting (Yan) filed for personal bankruptcy, and on 30 August of the same year, the Shenzhen Intermediate People's Court（the Shenzhen Court) ruled to accept Yan's application for personal reorganisation procedure. When the trustee interviewed Yan, her self-reported income from commercial performances was about 30,000 RMB per year. After that, the trustee, through combing their bank card, Alipay, WeChat and other water records, found that Yan's real income in the past two years was higher than he stated. Yan had to admit that her average income from commercial performances in the past two years was 70,000 RMB. During the administrator's duties, it was also found that Yan did not take the initiative to report her income to the trustee. On 12 October 2021, the Shenzhen Court imposed a fine of RMB 5,000 on Yan for violating the Regulation.

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[451] Article 167, *Regulation of Shenzhen Special Economic Zone on Individual Bankruptcy* (Shenzhen People's Congress, 2020)
[452] ibid
[453] 周群峰, '深圳试水个人破产，谁能借此摆脱债务' (2023) 中国新闻周刊 https://www.stcn.com/article/detail/956917.html accessed 22 August 2023

Moreover, it is interesting to learn in Yan's case that the Shenzhen Court, in the practice of personal bankruptcy reorganisation cases, may still approve the reorganization plan even though the debtor is fined due to violating regulation provisions, such as making false statements.[454]

5.4.6 The First Approved Reorganization Case

On 16 July 2021, for the first time, the Shenzhen Intermediate People's Court approved a personal reorganization plan and decided to terminate a reorganization proceeding. On the debtor's application on 27 April, the court transferred the debtor's liquidation procedure to the reorganization procedure on 11 May. At the same time, a notice of creditor's meeting was sent to creditors. On 22 June, creditors voted on a draft reorganization plan in the creditor's meeting and the plan was accepted. The debtor applies the court to approve the accepted reorganization plan on 2 July. The court approved the reorganization plan 12 days later, and the reorganization proceeding was terminated. This is a typical story of a failed business venture.

The debtor started a business with his former colleagues in 2018, focusing on developing innovative patented Bluetooth headphones. After experiencing the redevelopment of the produce and starting an additional development project for the forehead temperature gun, the business eventually failed because of the lack of sales channels, funding, and marketing. In this case, there are 10 creditors with RMB 564216.19 claims. All the creditors are financial institutions. According to the reorganization plan, the principal amount of the claim will be 100% paid, and other claims, such as interest, will be adjusted to zero. General creditors will be paid proportionately to the principal amount they hold about the total principal amount of general bankruptcy claims. After deducting the minimum reasonable expenses of the family listed in the list of exempted properties, the repayment will last 36 months. It will be made by the

[454]（2021）粤 03 破 409 号（个 9)

debtor and his spouse's predictable income(debtor's fixed monthly income is RMB25000) and unanticipated income once a month. The trustee estimates that the payout rate of general claims is approximately 88.73%, much higher than that in the liquidation procedure (33.34%).

5.5 The Debt Settlement Plan Procedure: Compare with the Reorganisation Procedure

The debt settlement plan procedure is another alternative to liquidation. It is interesting to see that the debt settlement plan procedure was not written in the original version of the draft Shenzhen Individual Bankruptcy Regulation. Only liquidation and reorganisation procedures were provided in the draft of the Shenzhen Regulation. Adding the debt settlement plan procedure to the Shenzhen Regulation shows that the Shenzhen Individual Bankruptcy Regulation has the same procedures (liquidation, reorganisation, and debt settlement plan procedure) as the Enterprise Bankruptcy Law of the People's Republic of China. During these 15 years of implementing the Enterprise Bankruptcy Law of the People's Republic of China, the company debt settlement plan procedure case is rarely seen because of the overlap with the company reorganisation procedure and some difficulties in its application in practice. However, it could not be predicted that the personal bankruptcy debt settlement plan procedure would have the same performance as the company debt settlement plan procedure. Here, we will describe the personal bankruptcy composition procedure and discuss the differences in the reorganisation procedure.

5.5.1 The Procedure of Debt Settlement Plan

Unlike the reorganisation procedure, a creditor can file a petition for composition.[455] After the court accepts a petition for liquidation and before the debtor is declared bankrupt, the debtor and the creditor may file a petition for composition with the court. The court may decide to put the debtor in the

[455] Article 134, *Regulation of Shenzhen Special Economic Zone on Individual Bankruptcy* (Shenzhen People's Congress, 2020)

composition procedure if it is possible to reach a debt settlement plan.[456] According to Article 133, the debtor is allowed to file directly with the court for a debt settlement plan with a feasibility report for the debt settlement plan feasibility plan procedure.[457] A trustee is not essential in a debt settlement plan procedure. The court may ask a people's mediation committee, a specially invited mediator, a specially invited mediation organisation, the bankruptcy affairs management department, or any other similar organisation to arrange the debt settlement.[458]

When the court asks such an organisation to arrange the debt settlement, a trustee may not be appointed for the time being. The debtor may request the court approve the agreed-upon debt settlement plan within two months.[459] Most importantly, the law enables the debtor to ask an organisation mentioned above to arrange a debt settlement outside of court. If a debt settlement agreement can be reached between the debtor and the creditor, the debtor may request the court to approve the debt settlement plan directly.[460] Therefore, the court may not intervene until a debt settlement plan has been reached between creditors and the debtor, which may save litigation resources. A trustee may not intervene in a debt settlement plan procedure which emphasises the debtor's choice.

If reaching a debt settlement plan agreement is impossible, the debtor should only focus on debt negotiation without a complex procedure. The creditor can still vote on the plan and try to get more repayment. Thus, it benefits the court, the debtor, and the creditor. For the debt settlement plan to be approved, the debtor shall submit the materials provided in Article 137, which includes the debt

[456] ibid
[457] Article 133, *Regulation of Shenzhen Special Economic Zone on Individual Bankruptcy* (Shenzhen People's Congress, 2020)
[458] Article 134, *Regulation of Shenzhen Special Economic Zone on Individual Bankruptcy* (Shenzhen People's Congress, 2020)
[459] Article 135, *Regulation of Shenzhen Special Economic Zone on Individual Bankruptcy* (Shenzhen People's Congress, 2020)
[460] Article 136, *Regulation of Shenzhen Special Economic Zone on Individual Bankruptcy* (Shenzhen People's Congress, 2020)

settlement agreement, a description of the debt settlement plan, a list of creditors, a description of the debtor's assets and debts, and other necessary materials.[461] It also provides that a debt settlement agreement shall contain (1) the basic information, property, and income condition of the debtor; (2) a list of creditors and the number of claims; (3) a repayment plan; (4) a debt reduction plan; (5) the implementation period for the debt settlement agreement; (6) other matter as required by the court.[462]

The court shall announce the debt settlement agreement and a creditor or stakeholder shall file the objection with the court if he or she has an objection to the debt settlement agreement.[463] The court shall also examine the debt settlement agreement by holding a hearing. The debtor, the creditor, and the stakeholder who files the objection to the court shall be noticed three days in advance.[464] Where the court approves the debt settlement agreement, a written ruling shall be served on the debtor and creditors who participate in the debt settlement plan procedure within 5 days after the approval.[465] The debt settlement agreement shall be implemented on the debtor's own without the trustee's supervision. After implementing the debt settlement agreement, the debtor may request the court to discharge him or her from the outstanding debts.[466] Where the 2-month period of the debt settlement plan expires, or the court does not approve the debt settlement agreement, the court shall put the debtor into the liquidation procedure upon the creditor's application, as long as the court considers that the debtor is eligible for

[461] Article 137, *Regulation of Shenzhen Special Economic Zone on Individual Bankruptcy* (Shenzhen People's Congress, 2020)
[462] Article 138, *Regulation of Shenzhen Special Economic Zone on Individual Bankruptcy* (Shenzhen People's Congress, 2020)
[463] Article 140, *Regulation of Shenzhen Special Economic Zone on Individual Bankruptcy* (Shenzhen People's Congress, 2020)
[464] Article 141, *Regulation of Shenzhen Special Economic Zone on Individual Bankruptcy* (Shenzhen People's Congress, 2020)
[465] Article 142, *Regulation of Shenzhen Special Economic Zone on Individual Bankruptcy* (Shenzhen People's Congress, 2020)
[466] Ibid

bankruptcy.[467] During the other bankruptcy procedures, if the debtor and all creditors reach a settlement agreement, it may apply to the court to terminate the bankruptcy procedures.[468]

5.5.2 A Discussion of the Debt Settlement Procedure

Though there are similar points between the reorganisation procedure and the debt settlement plan, in particular, both aim to reach a debt repayment agreement, these two procedures are quite different. Firstly, the debt settlement plan does not require the debtor to have a predictable future income. Even the debtor has a future income, it does not require the debt settlement plan to contain the arrangement of the debtor's future income. That means the debtor can relieve the debt via the debt settlement plan without using his or her future income. However, both the liquidation and reorganisation procedures require the property distribution plan or reorganisation plan to contain information on how to distribute the debtor's future income.

The debt settlement plan procedure allows the debtor to deal with debt trouble via a one-off repayment. An ongoing debt settlement plan case disclosed on the website of Shenzhen's personal bankruptcy information disclosure shows the possibility of such a one-off repayment. It must be noted that all the bankruptcy cases (except those involving privacy) that occur in Shenzhen will be disclosed on the website of Shenzhen's bankruptcy information disclosure, which makes the information of the cases open to the public. The debtor became indebted as a result of the failure of the business. The assets owned by the debtor include a bank deposit of approximately 400 RMB, a vehicle with a purchase price of 53,000 RMB, household furniture and household electrical appliances, personal clothing and household goods, 2 individual commercial life insurance policies, and a claim of 15.500 RMA which was the deposit paid by the debtor for purchasing the vehicle (but there is no expectation to recover the claim in full

[467] Article 145, *Regulation of Shenzhen Special Economic Zone on Individual Bankruptcy* (Shenzhen People's Congress, 2020)
[468] Article 147, *Regulation of Shenzhen Special Economic Zone on Individual Bankruptcy* (Shenzhen People's Congress, 2020)

in the short term). The debtor currently works for a Shenzhen optician store and earns a monthly salary of 6000 RMB. The debtor has 15 creditors; only one is a natural person(debts 326,580 RMB), and the rest of the creditors are financial Institutions (755,300 RMB). According to the draft debt settlement plan, 90% of the outstanding debt was reduced, and the remaining 10% of all claims were paid with a loan of 108,000 RMB provided by the employer. The debtor's vehicle secures the loan and includes an advanced part of the debtor's future income.

The plan shows that once the court approves the debt settlement agreement, the repayment will be completed within 7 days, a concise term. The first creditor's meeting has been convened on 22 June 2021. We do not know whether the Creditor could agree upon the debt settlement plan. However, as the Shenzhen Regulation has just taken effect for only three months, it needs the successful cases to courage more indebted debtors to relieve themselves via a bankruptcy procedure. Thus, the court is unlikely to refuse to approve the debt settlement agreement in this case if the creditors could agree upon the plan. The debt settlement plan seems more flexible and simple than the reorganisation procedure. Still, it could be a concern that the repayment ratio of the debt settlement plan is possibly lower than that of the reorganisation. It can be assumed that the creditor may receive more in the reorganisation procedure if the debtor earns more in the next few years. Further, the success rate of the debt settlement plan is unknown. Where the debtor fails to get the agreement of creditors or the court's approval, he or she can get into the liquidation procedure, similar to the German consumer bankruptcy procedure. That means if the failure rate of the debt settlement plan is high, the Shenzhen liquidation procedure will become identical to the German consumer bankruptcy regime, which requires the debtor to show evidence of the failure of out-of-court debt settlement to commence the formal bankruptcy proceeding. According to the German consumer bankruptcy law, the debtor shall first attempt to negotiate with creditors to discharge debts.

It requires the debtor to submit a document certifying that he or she has failed to reach an agreement with his creditors to settle his debts based on a specific debt settlement plan during the last six months before the filing of the bankruptcy petition.[469] A competent person or institution shall issue such a document. Similarly, the Consumer Debt Settlement Regulation, which was implemented in Taiwan, China, provides a procedure of compulsory consultation before filing a bankruptcy petition.[470] The Consumer Debt Settlement Regulation entered into force in 2007 and mainly has two methods: reorganization and bankruptcy liquidation.[471] It provides that if the consumer owes money, such as credit card debts and mortgages, to the financial institution, the consumer shall negotiate with the creditor first.

Only when it fails to reach an agreement between the debtor and the creditor does the debtor file the bankruptcy petition with the court. Where there is no financial institution creditor, the debtor may file the bankruptcy petition directly with the court. As there is still no data on the implementation of the Shenzhen debt settlement procedure, it cannot be seen how the practice of the debt settlement procedure is performed. However, it could be expected that the efficiency and success rate of the debt settlement procedure may not be high through the first ongoing debt settlement procedure case. The first ongoing debt settlement procedure case commenced on 11 May, and the first creditor's meeting was convened on 22 June. However, the case has not been closed for more than three months. One of the reasons for the low speed of case proceedings is that the repayment rate is low, which makes it difficult for creditors to

[469] Jason Kilborn, 'The Innovative German Approach to Consumer Debt Relief: Revolutionary Changes in German Law, and Surprising Lessons for the United States' (2004) 24(2) *Northwestern Journal of International Law & Business* 257

[470] Article 151, Consumer Debt Settlement Regulation of Taiwan (消费者债务清理条例)

[471] The popularity of credit cards in Taiwan grew in the 1990s and 2000s. Capitalism encouraged consumption to stimulate economic growth, some cardholders were unable to control their desire to spend money or to pay for long periods, and the laxity of banks' consumer finance departments in assessing applicants' creditworthiness and inappropriate control of cardholders' repayment risks contributed to the difficulties of some people in paying off their credit card debts, resulting in their financial difficulties, which some people and the press jokingly referred to as "card slaves". In 2006, 700,000 people in Taiwan became card slaves, owing to an average of NT$1

accept the debt settlement plan. The Shenzhen court recognizes that the debt settlement procedure needs improvement; for example, the out-of-court debt settlement has not yet been carried out.

5.5.3 Case Study of Settlement Procedure: Zhang Yuansheng's Bankruptcy Settlement in the Top 10 Classic Bankruptcy Cases in China in 2021[472]

On 7 June 2021, Mr Zhang, aged 76, applied for a settlement procedure with the Shenzhen Intermediate People's Court. At that time, Mr Zhang was suffering from several underlying illnesses and was heavily indebted, making life difficult. In 1999, Mr Zhang guaranteed a business loan of RMB1.83 million to a bank as the legal person of a company in Shenzhen. As the company failed to repay the loan as scheduled after the bank filed a lawsuit. The court ruled that Zhang was jointly and severally liable for repayment of the loan's principal and interest. It is widespread for a company's legal person or shareholders to guarantee its loan and assume unlimited joint and several liability. During court enforcement, the only property under his name was auctioned off, and the debt was still not fully settled. After repeated enforcement by the court, his property was auctioned off against the debt, and he still failed to settle the debt fully.

Zhang Yansheng retired but still took the initiative to implement the court's requirement to report personal property monthly to its pension to adhere to debt repayment; the bank deducted 4817 yuan each month. Zhang only retained more than 2,000 yuan of basic living expenses. Mr Zhang's old age frequently causes basic illnesses, making life difficult. After a hearing, the Shenzhen Court ruled on 16 July to accept Zhang's settlement procedure application and appointed Shanghai Jintiancheng (Shenzhen) Law Firm as the bankruptcy administrator. In the case, the trustee fulfilled the obligations by carrying out various tasks, such as making notifications and public announcements, informing the debtor of the receivership

[472] Case available at Enterprise Bankruptcy and Reorganisation Research Association, '2021 年度全国十大破产经典案例' (2022) Enterprise Bankruptcy and Reorganisation Research Association http://www.ebra.org.cn/news/detail/6677_1.html accessed 3 Jan 2023

and investigations, reviewing the debtor's list of exempted property, accepting the declaration of claims and reviewing the claims, preparing for the meeting of the creditors, assisting the debtor in drafting the settlement agreement, and communicating with the creditors about the list of exempted property and the settlement agreement. The only creditor of this case, Ping An Bank, declared its claim to the administrator by the law, and the amount of the claim confirmed by the trustee’s viewing was more than 970,000 RMB.

To protect the creditor's rights and interests, the administrator's team investigated Zhang Yuansheng's personal situation, reasons for indebtedness, marital and family situation, property status, income status, property transaction status, and the implementation of successive debt settlements. The debtor’s status was strictly verified. Eventually, after several full communications with the creditor under the guidance of the court, the debtor gained the support and understanding of his creditor. The debtor and the creditor finally reached a settlement proposal. After Zhang Yuansheng fulfilled his obligation to pay approximately RMB 52,000, the remaining outstanding debt would be forgiven, and the implementation period of the settlement agreement would last for a month. On 8 October 2021, the Shenzhen Court ruled that the individual bankruptcy proceedings in this case should be concluded and that the trustee should supervise the implementation of the settlement agreement.

Zhang Rui, Presiding Judge of the Bankruptcy Court of Shenzhen Intermediate Court, commented that "Zhang belongs to the earliest batch of entrepreneurs who responded to the state's call to resign from their institutions and started a business, encouraging entrepreneurship and underwriting for entrepreneurs, which is where the temperature of the personal bankruptcy system lies. The case reflects the personal bankruptcy system's care and protection of the debtor's basic human rights and saves creditors the cost of meaningless recovery." This case is the first personal bankruptcy settlement case accepted by the Shenzhen Intermediate Court after the implementation of the Shenzhen Special Economic Zone Personal Bankruptcy Regulations, and it is also the first personal bankruptcy case concluded by a court within

China in which the debtor and the creditor settled. The significance of this case is evident, as the presiding judge commented. However, there are also special features in this case, so much so that it is not practically referable to the practice of personal bankruptcy settlement cases in general.

Firstly, Mr Zhang's age was outside the age range of debtors who would generally apply for personal bankruptcy proceedings. Mr Zhang was of advanced age. Secondly, 20 years ago, Mr Zhang auctioned off his only property to pay off his debts and insisted on using his pension. In this case, Mr Zhang must live long until 93 to pay off the remaining debt. However, according to China's National Health and Wellness Commission, the average life expectancy of the Chinese population is 78.2 years. Thirdly, it could be argued that the only creditor's concession to the settlement agreement was motivated by the pressure of the court and the administrator's eagerness to push for a settlement agreement. However, a concession of this magnitude on a bad debt would not have had much impact. Still, financial institutions cannot make concessions to give up 95% of their claims in every individual bankruptcy settlement case.

Four months after the Shenzhen Regulation took effect, the Shenzhen Intermediate People's Court received 615 bankruptcy petitions submitted through a comprehensive personal bankruptcy application online system called Shenpojian (深破茧) and interviewed more than 230 debtors. The court returned over 200 applications that did not comply with the relevant provisions of the regulation, for example, the debtor becomes indebted because of excessive spending, excessive speculation, gambling, or the debtors are not eligible to apply the regulation as they do not meet the requirement of participating the Shenzhen insurance continuously for three years. And some indebted individuals do not meet the requirement of being an 'honest but unfortunate debtor'. As China's first personal insolvency regulation, the Shenzhen Regulation has received much attention and millions of dollars. Such a card slaves crisis pushed the legislation of The Consumer Debt Settlement Regulation. Indebted individuals would like to try to get out of debt.

The court must identify what kind of debtors can apply for personal insolvency regimes. The Shenzhen Bankruptcy Court has reviewed 30 bankruptcy petitions in three batches and has formally accepted seven bankruptcy applications at the moment. Only one reorganization case has been concluded. This shows a cautious approach to the court. The latest reform of the Shenzhen Regulation also shows cautious ideas. However, we should also pay attention to the efficiency of the personal insolvency procedures, which will affect the cost of the personal insolvency procedures and the stress of the court. After all, the court could not keep handling the personal insolvency cases with few cases. It will have more bankruptcy petition cases filed by debtors, which means the court will face more cases. It may result in heavy stress to the court or low quality of cases.

5.6 Recent Reform of Shenzhen Personal Insolvency Regime: Mandatory Pre-application Counselling System

5.6.1 Introducing a Mandatory Pre-application Counselling Regime

At the early stage of introducing the Shenzhen Personal Bankruptcy Regulation, the public only knew that there was a system called personal insolvency that could be used when one could not pay one's debts, declaring oneself bankrupt and one's debts could be discharged. It was difficult for the public to gain an in-depth understanding of the system's applicability, the acceptance of the proceedings, the hearings, and the rights and obligations of the debtor. The news media mentioned an ironic example: Ms Lin, due to her heavy debts, tried to get information about the personal bankruptcy system through the Internet, but the info searched through social media platforms did not answer her needs. Afterwards, she called a legal aid hotline to enquire, and the lawyer who answered the phone was unclear and "almost read out the regulations as they were written". When Ms Lin sought online counselling from the law firm, the firm's online customer service not only did not give her the answers she wanted but also encouraged her to seek offline counselling at an hourly rate.

When Ms Lin indicated that she did not have the money for offline counselling, the customer service representative asked rhetorically, "Don't you even have a few thousand yuan?"[473] From a debtor's perspective, it is essential to provide debtors interested in applying personal insolvency procedures with an avenue of understanding, allowing those deep in the mire of debts to understand how to grab the life-saving straw, the new personal insolvency system. In summarising personal insolvency trends in 2022, R3 in UK mentioned that Early advice is key Debt worries can be overwhelming and frightening and can leave those concerned about what they owe feeling helpless.[474]

From the perspective of the trial authorities, in the first year of implementation of the Regulations, more than 80 per cent of debtors chose to apply for insolvency liquidation. Many debtors could not distinguish between the three procedures, with many of them having the capacity to pay but wanting to be exempted from their debts using the liquidation procedure, which was not in line with the legislative purpose of the Regulations and the expectations of the bankruptcy court. On 17 May 2022, the Shenzhen Bankruptcy Court issued the Implementing Opinions (the Opinions) on Strengthening the Personal Bankruptcy Application and the court's review process (《加强个人破产申请与审查工作的实施意见》 hereinafter referred to as the "Opinions").[475]

It is the first guiding document on the handling of personal bankruptcy cases issued after the implementation of the regulations to regulate the practice of personal insolvency applications and the court's review process of the applications. According to Article 3 of the Opinions, the debtors shall undergo counselling and interview provided by the bankruptcy administration department before

[473] 赵媛媛, '深圳实施个人破产两个月：有人当它救命稻草，有人负债 300 万不愿申请' (27 May 2021) New.qq.com, edited by 钟十五 https://new.qq.com/rain/a/20210527A03W0300 accessed 15 June 2022
[474] R3, 'Trends in Personal Insolvency' (12 November 2020) R3 https://www.r3.org.uk/press-policy-and-research/r3-blog/more/31738/page/1/trends-in-personal-insolvency/ accessed 6 June 2022
[475] 深圳市中级人民法院，加强个人破产申请与审查工作的实施意见(2022 年 5 月 17 日) https://www.sz.gov.cn/cn/xxgk/zfxxgj/zwdt/content/post_11169835.html accessed [May 07 2023]

applying for personal bankruptcy. During counselling, the debtors shall submit materials and complete the information collection form to apply for personal insolvency. After the counselling, the insolvency administration department will issue a certificate of completion of the interview and counselling. The debtors shall submit such a certificate together with the personal insolvency application. The word "shall" makes counselling mandatory before filing for personal insolvency.

The "Notice of the Shenzhen Bankruptcy Administration on the Conduct of Pre-application Counselling for Individual Insolvency"(《深圳市破产事务管理署关于开展个人破产申请前辅导的公告》, the Notice) issued by the Shenzhen Bankruptcy Administration (深圳破产事务管理署, the Bankruptcy Administration) on 23 May 2022. It sets out specific provisions on pre-application counselling.[476] The mandatory pre-application counselling system was implemented from 1 June 2022 onwards. Even though the Notice provides that face-to-face personal bankruptcy pre-application counselling is held on a regular weekly basis without charge and is voluntary for applicants to attend, it is worth noting that voluntary participation here is inconsistent with the mandatory requirements for pre-filing counselling made in the Opinion. According to the description of the Bankruptcy Administration, the pre-application counselling for personal bankruptcy is a comprehensive service integrating various functions, such as "publicity on the law, interview and investigation, and guidance on application".[477] However, no one should voluntarily book a personal bankruptcy pre-filing counselling appointment to learn personal insolvency law.

[476] Announcement of the Shenzhen Bankruptcy Administration on Pre-application Counselling for Individual Bankruptcy Applications. http://sf.sz.gov.cn/szsgrpcxxgkpt/xgzy/content/post_9813515.html

[477] Shenzhen Public Legal Service Centre, 'Personal Bankruptcy Pre-filing Counselling Service Formally Stationed in Shenzhen Public Legal Service Centre' (29 July 2021) Shenzhen Government http://sf.sz.gov.cn/szsgrpcxxgkpt/xgzy/content/post_11111405.html accessed 15 June 2022

The counselling has sessions of intensive lectures and interviews, and lasts for about two hours. Each counselling session lasts 30 to 40 minutes before the applicant is interviewed individually. The duration of the individual interview varies depending on the applicant's age, debt situation, etc., and usually ranges from 30 to 60 minutes. During the individual interview session, the debtor's basic information, such as family relationship, marital status, property status, income status, expenditure status, labour capacity, total debt, creditors, etc., will be highlighted. Interestingly, during the interview, the counsellors will guide and persuade debtors with labour capacity to choose the reorganization procedure and make repayment plans.[478]

After the pre-application counselling, the Municipal Bankruptcy Administration will share the information collection forms and interview records with the Shenzhen Bankruptcy Court to provide reference for reviewing individual insolvency petition and to enhance the efficiency of the cases. Moreover, debtors in the counselling process will also receive a guide called "Personal Bankruptcy Pre-application Counselling Reader", printed by the Bankruptcy Administration. Such a guidebook aims to help debtors and creditors fill in and submit personal insolvency applications in a standardised manner. In addition, regular Bankruptcy Administration staff and legal aid attorneys have formed a counselling service team to provide answers to questions about filing for personal insolvency procedures through telephone and on-site counselling. As of 13 July 2023, the Municipal Insolvency Administration has conducted approximately 7,700 counselling services.[479]

It is not difficult to find that after implementing the Regulations, the adjustments to personal bankruptcy have been made through documents issued by the Shenzhen Bankruptcy Court or the Shenzhen Bankruptcy Administration rather than through uniform legislative reforms. As mentioned earlier, there

[478] Shenzhen Development and Reform Commission, 'Shenzhen Provides Professional Guidance for "Rebirth from the Cocoon" as Part of the 2023 Business Environment Innovation Pilot—Over 1,800 People Receive Pre-filing Counselling for Personal Bankruptcy' (2023) Shenzhen Government http://fgw.sz.gov.cn/ztzl/qtztzl/szyshj/cxsd/content/mpost_10730520.html accessed 15 June 2024

[479] Ibid

are also some differences in wording between the documents issued by the trial organ and those issued by the administration, which tends to cause some public confusion.

5.6.2 A Question: Does Pre-filing Counselling Reduce the Burden of Review by the Bankruptcy court?

As of May 2023, the Shenzhen Bankruptcy Administration received 1,733 appointments for pre-application counselling for personal insolvency. There are 1,508 counselling sessions, issued pre-application counselling receipts and pushed counselling materials to the courts for 734 sessions. Further, it dissuaded 774 counselling recipients who did not meet the conditions of the personal bankruptcy application (accounting for more than 50% of all counselling sessions). From the data made public on the Shenzhen Personal Insolvency Information Disclosure Platform, from June 2022 to May 2023, the Shenzhen Bankruptcy Court accepted 105 personal bankruptcy applications, which is 14.3% of the 734 counselling materials pushed to the court by the Shenzhen Bankruptcy Administration, or less than 15%. Since there is no way to know how many debtors abandoned filing personal bankruptcy petitions with the court after receiving counselling, there is no way to know how many counselling materials pushed by the Bankruptcy Adminitstration were screened out by the court. However, judging from the percentage of the figures, it can be believed that the workload left to the bankruptcy courts for reviewing individual bankruptcy petitions remains high after the mandatory counselling process.[480]

5.6.3 More personal bankruptcy reorganisation cases than bankruptcy liquidation case

As mentioned above, of the 105 individual bankruptcy petitions filed with the bankruptcy court from June 2022 to May 2023, only three were for bankruptcy procedure, accounting for 2% of the total petitions. This includes one case in which an individual insolvency petition was dismissed by a court

[480] It is important to note here that according to s13, the people's court shall decide whether to accept the bankruptcy application within thirty days from the date of its receipt. If there are special circumstances that require an extension, it may be extended by fifteen days with the approval of the president of the court. Therefore, some of the individual bankruptcy petitions accepted by the bankruptcy court from June 2022 may not have undergone pre-filing counselling, i.e. the actual number of individual bankruptcy petitions accepted by the court from the introduction of the mandatory pre-filing counselling system (1 June 2022) to May 2023 may be less than 105.

decision and two cases in which the court accepted individual insolvency petitions after the debtor had agreed with the debtor during the proceedings to resolve the debt by their negotiation. Similarly, the number of applications for reorganisation and settlement proceedings following the introduction of the pre-filing counselling system increased from 27% before its introduction to 80% in FY2023. In contrast, the number of applications for individual bankruptcy liquidation fell from 73% to 20% in FY2023. These figures reflect staff's preference in pre-filing counselling for recommending that debtors be subject to individual insolvency reorganisation proceedings.

Chapter 6 The US Approach

6.1 The Development of Abolishing Debt Imprisonment

The legal development of the US bankruptcy law prior to the Bankruptcy Act of 1898 experienced a period of instability for nearly a century (the Bankruptcy Act of 1800, the Bankruptcy Act of 1841, the Bankruptcy Act 1867).

The instability of the early bankruptcy law in the US could be explained from different angles. For instance, there were bankruptcy advocates and opponents between two parties, Republicans and Democrats. Generally speaking, in the bankruptcy debates in the 19th century, the Republicans played a role as advocates; contrarily, the Democrats were opponents who resisted federal bankruptcy legislation. However, it is interesting to see that there were also different views among Republicans. Compared with Republicans in the commercial Northeast, Republicans from the South and West were less enthusiastic about bankruptcy legislation. Similarly, Daniel Webster, the former United States Secretary of State, supported building an expansive and permanent federal bankruptcy law, was from a commercial state. John Calhoun, who was from the agrarian south, viewed that it would be a serious mistake to have a federal bankruptcy law. A legislator's views on bankruptcy law are closely related

to the region he comes from.[481] Moreover, David A Skeel also argued that the preferences of legislators could not commend a stable majority, as some of them disagreed with federal law, while some only wanted voluntary bankruptcy. He also explained this early instability as a 'social choice'.[482] Therefore, in this period, and only in times of crisis, there will be the enactment of insolvency laws.[483] This has led to instability of the insolvency law.

During the early instability of the US bankruptcy law, three federal bankruptcy laws were born. It is easy to summarise a regulation among these three bankruptcy laws: they were made to meet the need for getting over the financial panics. The first American bankruptcy act was passed by one vote on April 4, 1800, and finally repealed three years later. A panic caused ruin widely and put thousands of debtors into jails, which spurred the establishment of the Bankruptcy Code of 1800. The poorest or most famous people in society can be imprisoned for debt. It could be said that the first US bankruptcy law, to some extent, was enacted to get Robert Morris, a prominent financier, out of the debtor's prison.[484]

However, debtors with good social connections, even if they owe a large sum of money, can still enjoy delicious 'good food and well-equipped living quarters, as well as books and other recreational facilities, sometimes including manicurists and prostitutes' in prison, whereas poor people who owe only a small debt can only wait for their deaths in prison.[485]

According to the Bankruptcy Code of 1800, district court judges were authorised to appoint nonjudicial commissioners to oversee and help administer bankruptcy proceedings. As the first bankruptcy code

[481] David A Skeel Jr, *Debt's Dominion: A History of Bankruptcy Law in America* (Princeton University Press 2001).
[482] David A Skeel Jr, 'The Genius of the 1898 Bankruptcy Act' (1999) University of Pennsylvania Carey Law School
[483] Ibid
[484] Charles Jordan Tabb, 'The History of the Bankruptcy Laws in the United States' (1995) 3 American Bankruptcy Institute Law Review 5
[485] Neil L Sobol, 'Charging the Poor: Criminal Justice Debt & Modern-Day Debtors' Prisons' (2016) 75 *Maryland Law Review* 486

copied a lot from the 1732 English Act, it was purely pro-creditor. Only creditors were able to file a merchant's involuntary bankruptcy and allege an act of bankruptcy.

During the bankruptcy procedure, creditors were able to elect an assignee. The assignee had the power to recover property fraudulently conveyed by the debtor and property of others with the debtor as the apparent owner. In the case of honestly surrendering the debtor's property and disclosing the debtor's affairs, the debtor could receive a further exemption except his necessary wearing apparel and bedding. The debtor would be imprisoned for one to ten years if there were a criminal offence of fraudulent bankruptcy. Debtors could be discharged if they got the consent of two-thirds of creditors by number and by value of claims. The US Constitution's provision that empowers Congress to establish a uniform bankruptcy law aims to rein in the pro-debtor excesses of state legislatures under the Articles of Confederation. It is difficult for creditors to collect judgements that include judgements jumping from one state to another.[486] Some states would try to discharge obligations owed by debtors at the expense of the creditors out of the state.[487] James Madison emphasized that Congress's power of 'establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where parties or their property may lie or removed into different states that the expediency of it seems not likely to be drawn into question'.[488]

Though the Bankruptcy Act of 1800 contained a 5-year sunset provision, it was repealed in 1803. There were mainly four main reasons: the inconvenience of travel to federal courts, the corruption caused by the extension of federal powers, the small dividends were paid to creditors in most of the cases that the

[486] David A Skeel Jr, *Debt's Dominion: A History of Bankruptcy Law in America* (Princeton University Press 2001)
[487] Ibid
[488] James Madison, *The Federalist No. 42* (1788) https://avalon.law.yale.edu/18th_century/fed42.asp lawreview.law.ucdavis.edu+4ncbankruptcyexpert.com+4avalon.law.yale.edu+4 accessed [3 April 2025]

debtors were already sent to the debtor's prison before the bankruptcy procedures were initiated, and the limitation that the bankruptcy code was only applicable to merchants. Also, some discharged merchants were high-rolling speculators who could start their businesses again after getting through bankruptcy. As the Bankruptcy Code was repealed, the state laws filled the legal void for the next three decades until the Bankruptcy Act 1841 was made. Prior to The 1841 Bankruptcy Act, in 1839, the U.S. prohibited federal courts from jailing debtors on civil debt at the federal level.[489] After that, a number of state governments followed the federal lead and banned debtor imprisonment. The 1841 Bankruptcy Act reforms allowed natural persons to discharge debts. However, The 1841 Bankruptcy Act lasted only three years. During these 3 years, many debtors were discharged as a result of the new bankruptcy law.

As mentioned above, the reason such a period of instability lasted for more than a decade was also due to the regional nature of the American economy in the 19th century.[490] For the most part, debtor-creditor relations were largely in the hands of state governments, and there was no need to resort to a national bankruptcy system.[491] But as the American economy gradually expanded from regional to national levels, the massive expansion of business organisations was seen by Skeel as the impetus that ultimately drove the Bankruptcy Act of 1898（Nelson Act）. The state-based debt collection system did not apply to the emerging national economy. Creditors needed to work toward a more streamlined debt collection process. The 1898 Bankruptcy Act, however, was a debtor-friendly bankruptcy law, which distinguished U.S. bankruptcy law from the rest of the world at the time, and the end of the Bankruptcy Act of 1898 ended a period of instability in U.S. bankruptcy law.[492]

[489] *An Act to Abolish Imprisonment for Debt in Certain Cases*, 1839, 5 Stat. 7.
[490] Todd J Zywicki, 'The Past, Present, and Future of Bankruptcy Law in America' (2003) 101 *Michigan Law Review* 2016
[491] Ibid
[492] Ibid

Bankruptcy filings by individuals rose from 25,040 in 1950 to 178,202 in 1970.[493] The Bankruptcy Act of 1898 was beginning to fall short of meeting the needs of the American economy and society at that time, and the reform process was set in motion. Even though the rise in personal bankruptcy cases first attracted the attention of creditors, who were always the group most eager for debtors to repay more money, it was the group of lawyers who led the reform. In the process of finalising the Bankruptcy Code in 1978, bankruptcy issues were gradually 'de-ideologised' and shaped into a matter that relied mainly on technical means to deal with, which seemed to be most suitable to be led by 'experts' – bankruptcy professionals.[494] This led to a 'rapid rise in professional status, market power, and the resulting financial rewards' for insolvency professionals after the 1978 Bankruptcy Code.[495] The 1978 Bankruptcy Code unified the bankruptcy regimes for individuals and businesses, consolidating them into Title 11 of the United States Code and replacing the previously fragmented and outdated bankruptcy legal system. The automatic stay was established to provide immediate bankruptcy protection to debtors. Once a bankruptcy petition is filed, any creditor recovery is suspended. The Bankruptcy Code of 1978 established different types of individual bankruptcy proceedings, including the individual bankruptcy liquidation procedure (chapter 7), the restructuring procedure applicable to individuals (chapter 11) and the wage earner debt adjustment procedure(chapter 13). The Bankruptcy Code of 1978 introduced the bankruptcy concept of fresh start, and the US personal bankruptcy law changed from punitive to restorative, emphasising both ensuring fair compensation for creditors and giving the debtor a fresh start. This has made US personal bankruptcy law more debtor-friendly. The Bankruptcy Code of 1978 laid the basic framework for US personal bankruptcy law.

[493] Ibid
[494] Ibid
[495] Yves Dezalay and Bryant G Garth, 'Professionals in Systemic Reform of Bankruptcy Law: The 1978 US Bankruptcy Code and the English Insolvency Act of 1986' (1996) 21(2) *Law & Social Inquiry* 387

Until the introduction of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005(BAPCPA), there were no major reforms to US personal bankruptcy law. BAPCPA introduced a means test to restrict the abuse of the Chapter 7 bankruptcy system by high-income individuals. If the debtor has enough income and has ability to repay, they must apply for Chapter 13 instead of liquidation bankruptcy. In addition, bankruptcy applicants are required to receive credit counselling before bankruptcy and complete a financial management course before the end of the proceedings. The scope of non-dischargeable debts was expanded to include taxes, student loans, child support, etc. BAPCPA also extended the minimum period between individual bankruptcy filings from 6 to 8 years and strengthened the fight against fraud and false declarations. These reforms will be discussed below.

6.2 Estate Exemption in US Bankruptcy Law

6.2.1 How to Make Bankruptcy Estate Exempted?

The provisions on exempt property are one of the more interesting parts of U.S. personal bankruptcy law. According to Section 522(b) of the Bankruptcy Code, an individual debtor can choose the exemption system most favourable to their circumstances.[496] The debtor has two options: using the federal bankruptcy exemptions provided under Section 522 of the Bankruptcy Code or using the state exemptions according to the law of the debtor's state of residence and other federal non-bankruptcy exemptions. Each debtor is entitled to full exemptions in a joint case and must file claims. Joint debtors must choose the same exemption system under Section 522(b).[497]

Exempt property is not automatically applied, and the debtor is responsible for claiming it. Section 522(l) of the Bankruptcy Code requires that the debtor submit a list of exempted property, recording information

[496] 11 USC § 522
[497] 11 USC § 522(b) (1978)

about the property claimed as exempt. The debtor must choose between federal bankruptcy exemptions or state law exemptions and describe the property, its current value, the exemption amount, and the legal basis for the exemption.[498] By Federal Rule of Bankruptcy Procedure 1009(a), the debtor may amend the exemption list before closing the case. The debtor must notify the trustee and any party affected by the amendment. The court will generally approve the debtor's amendment unless there is evidence of bad faith, asset concealment, or prejudice to creditors who relied on the original exemption schedule. The broad right of the debtor to amend their exemption schedule has been affirmed by the court, with an emphasis on the debtor's flexibility to correct omissions or errors in the list of exempt property during the bankruptcy process.[499]

Under Federal Rule of Bankruptcy Procedure 4003(a), in a voluntary bankruptcy case, the debtor must file a list of exemptions either within or within 14 days of the petition date. In an involuntary bankruptcy case, the debtor must file the list within 14 days after the entry of an order for relief.[500] According to s522(l) of the Bankruptcy Code, the debtor's dependents, including the spouse, may file a list of exempt property within 30 days after the expiration of the 14 days.[501] In a voluntary bankruptcy case, a debtor's exemption rights are determined based on the property held as of the petition date. Any changes after this date, such as changes in the debtor's circumstances, the property's condition, or state exemption laws, are not considered in the exemption analysis. In an involuntary bankruptcy case, there are two potential points in time for exercising exemption rights: the date of the bankruptcy filing and the date the order of relief is issued. In the In re Tanzi case, the court ultimately chose the bankruptcy filing date as the point for determining exemption rights, affirming that the debtor's exemption rights are based on the state of the debtor's property at the moment of the bankruptcy filing.

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498 11 USC § 522(b) (1978)
499 Stinson v Williamson (In re Williamson), 804 F.2d 1355 (5th Cir. 1986)
500 Federal Rules of Bankruptcy Procedure, Rule 4003(a)
501 11 USC § 522 (1978)

The court reasoned that using the filing date provides a more precise timeline for exercising exemption rights and avoids the complexity that could arise from changes in the property's status before the order of relief is issued.[502] The debtor may apply the exempt property rule to property acquired before the bankruptcy petition date. The court may also consider the date of the relief order as the timing for exercising exemption rights.[503] If a debtor wishes to apply state property exemption rules, they must meet the requirements of the Domiciliary Rules set under 522(b)(3) of the Bankruptcy Code. It outlines the exemption system a debtor can choose when filing for bankruptcy. According to the "730-day rule," if the debtor has lived in the same state for two years (730 days) before filing for bankruptcy, the debtor can use that state's exemption system or, if allowed, the federal exemption system.[504]

If the debtor hasn't had a fixed domicile during that period, the "180-day rule" applies, requiring the debtor to use the state's exemption system where they lived the longest during the 180 days before the 730 days.[505] If the debtor spent equal time in multiple states during the 180 days, they may not be eligible to use any state's exemption system and must use federal bankruptcy exemptions.[506] Additionally, under the "40-month rule," if the debtor has not owned their home for 1,215 days before filing for bankruptcy, the federal exemption will be capped at $189,050.[507] However, if the debtor used proceeds from the sale of a previous home to buy a new one in the same state, the ownership periods of both houses can be combined to meet the 1,215-day rule.[508] This reflects the U.S. Congress's commitment to applying state law exemptions under federal law, respecting the content of state laws regarding exemptions, but not

[502] *In re Tanzi*, 287 B.R. 557, 559 (Bankr D Conn 2002)
[503] *Jenkins v Hodes* 287 BR 561 (D Kan 2002)
[504] 11 USC § 522(b)(3)
[505] ibid
[506] ibid
[507] 11 USC § 522(p)(2)(B)
[508] ibid

granting states control over the applicability of those exemptions.[509] It ensures uniform applicability of exemptions across states without being influenced by individual state preferences.

6.2.2 Save Home under Federal Bankruptcy Exemptions

First, it is necessary to introduce what will happen under Chapter 7, namely the liquidation procedure provided in the US Bankruptcy Code. A debtor who files a Chapter 7 case will face selling all his or her property, including the family home, to pay the creditors. Thus, there is a question of whether a Chapter 7 debtor can save some of his or her property by applying the estate exemption, especially the family home. S522(d)(1) of the Bankruptcy Code allows a debtor to exempt up to $27,900 in value of their aggregate interest in real property or personal property used as a residence by the debtor or a dependent.[510] The term "residence" is interpreted broadly and applies to real and personal property used as a dwelling. It can also include non-traditional homes, such as houseboats, provided they are used as residences.[511] This exemption also applies to the debtor's interest in a cooperative that owns property used as a residence by the debtor or their dependent or in a burial plot for the debtor or their dependent. In re Maresca, the debtor could claim her non-primary residence as an exemption because her dependent son sometimes lives with his father on that property.[512]

Under federal bankruptcy law, the family home may be saved by applying the homestead exemption, which is the most essential exemption rule of federal bankruptcy exemption. To qualify for a homestead exemption, the debtor must "actually use" the property as a residence when filing for bankruptcy, and even if the debtor moves out after filing, the exemption can still apply.[513] However, the exemption may

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[509] Laura B. Bartell, 'The Peripatetic Debtor: Choice of Law and Choice of Exemptions' (2006) 22 Emory Bankruptcy Developments Journal 401

[510] originally $15,000, adjusted as of April 1, 2022

[511] *In re Herd* 176 BR 312, 314 (Bankr D Conn 1994)

[512] *Donovan v Maresca (In re Maresca)* 982 F 3d 859, 862 (2d Cir 2020)

[513] *In re Anderson* 988 F 3d 1210 (9th Cir 2021)

be denied if the property is not used as a residence. For example, a property where the debtor last lived more than a decade ago with no concrete plans to return would not qualify for the exemption.[514]

In a Chapter 7 case, the debtor can keep his or her home if the homestead exemption can cover all his or her home equity. Also, if there is a loan on the house, the debtor should make the payments on time to keep the house in case the homestead exemption applies. If the homestead exemption cannot cover all the home equity, the Chapter 7 trustee will sell the property and return the exemption to the debtor. According to s522(d)(5) of the Bankruptcy Code, any unused portion of the homestead exemption, up to $13,950, can be applied to exempt other property. Moreover, Sections 522(d)(5) set out the Wildcard Exemption) and 522(d)(6) sets out the Tools of Trade Exemption) of the Bankruptcy Code, allowing the debtor to exempt their "interest" in property and tools, rather than the property or tools themselves.

6.2.3 Some State Laws Regarding Property Exemptions：

Florida's bankruptcy property exemption system offers generous protection to debtors, especially concerning the exemption of the debtor's residence. According to Article X, Section 4 of the Florida Constitution[515], homesteads owned by individuals are exempt from forced sale through any court process, and no judgment, decree, or execution can constitute a lien on such property. The homestead refers to contiguous land and improvements not exceeding 160 acres if located outside a town. Without the owner's consent, it cannot be reduced due to later incorporation into a city. If located within a village, it is limited to half an acre of contiguous land, with the exemption only applying to the owner's or their family's residence.

An eligible debtor must meet a few requirements before claiming the unlimited homestead exemption in Florida. First, the property must be his or her primary residence, and the debtor needs to be a Florida resident. Additionally, the debtor must have owned a home in Florida for at least 40 months to qualify

[514] *In re Feliciano* 487 BR 47, 52 (Bankr D Mass 2013)
[515] Florida Constitution art X, s 4

for the unlimited exemption. On the contrary, in Virginia, the provisions are much more strict. According to Section 34-4 of the Virginia Code, a debtor can claim a homestead exemption of up to $5,000 for their primary residence.[516] If the debtor has minor children, an additional $500 exemption can be added for each child.[517] For debtors 65 years old or older or disabled, the exemption amount can increase by an extra $10,000.[518] To ensure the legality of the homestead exemption, the debtor must file a homestead deed after the bankruptcy petition, which must include a detailed description of the exempted property and its market value.[519] The homestead exemption applies only to the debtor's primary residence, including houses, mobile homes, or modular homes.[520] Additionally, when spouses file for bankruptcy jointly, each spouse can claim their homestead exemption, further increasing the total amount of exemption protection.

6.2.3 Other Exempt Properties

Under section s522(d)(3) of the Bankruptcy Code, a debtor can exempt household property from the bankruptcy estate up to $700 per item, with a total limit of $14,875.[521] These household items include furniture, household goods, clothing, appliances, books, pets, livestock, crops, and musical instruments. Household goods covers items essential for daily living, such as television, radio, crockery, and medical equipment.[522] However, it does not include luxury items like artwork, expensive entertainment equipment, antiques, jewellery valued over $800, or vehicles like boats and tractors.[523] However, section 522(d)(4) of the Bankruptcy Code sets out the rules for jewellery exemption. A debtor can exempt jewellery up to an aggregate value of $1,875 from the bankruptcy estate.[524] If the jewelry has been lost or destroyed, the insurance proceeds covering the loss can also be exempted, provided that the debtor

[516] Virginia Code § 34-4
[517] ibid
[518] ibid
[519] Virginia Code § 34-17
[520] Virginia Code § 34-6
[521] 11 USC § 522(d)(3)
[522] 11 USC § 522(f)(4)
[523] ibid
[524] 11 USC § 522(d)(d)

disclosed the insurance policy and claimed the proceeds. However, the exemption is still capped at the $1,875 limit.[525]

For vehicles, a debtor can exempt one motor vehicle from the bankruptcy estate up to $4,459 in value to protect the debtor's primary means of transportation, allow continued access to employment, and facilitate a fresh financial start.[526] However, recreational vehicles, airplanes, and boats do not qualify for this exemption, as established in cases like *In re Wilbur* and *In re Barbera*.[527]

For tool exemption, according to 522(d)(6) of the Bankruptcy Code, a debtor may exempt tools, books, or implements necessary for their trade or business up to $2,800 in value.[528] Courts often use a "use test" to determine whether an item qualifies as a tool of trade, requiring that the item be reasonably necessary for the debtor's trade or business. The item does not have to be indispensable, but it must serve a practical function in the business. Notably, tools can still qualify for exemption even if the debtor is temporarily out of the business, only working part-time, or planning to re-engage in the trade in the future.[529]

6.2 Chapter 7 Bankruptcy: the Liquidation Procedure Cannot be Abused

6.2.1 A MeansTtest: Filtering Debtors

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) was signed into law by President George W. Bush on April 20, 2005. Most provisions of the BAPCPA came into effect on October 17, 2005. BAPCPA represented a major overhaul of the U.S. bankruptcy system, introducing new requirements such as the means test, mandatory credit counselling, and stricter rules for Chapter 7 and Chapter 13 filings. Here, we will have a discussion of the means test set to filter the filling of a

[525] ibid
[526] 11 USC § 522(d)(2)
[527] *In re Wilbur* 206 BR 1002 and *In re Barbera,* 285 B.R. 355 (Bankr D RI 2002)
[528] 11 USC § 522(d)(6)
[529] See *In re Henry* 183 BR 748, 750 and *Thorp Credit Thrift Co v Pommerer* (*In re Pommerer*) 10 BR 935, 939, 940 (Bankr D Minn 1981)

Chapter 7 case. In other words, the test is designed to prevent higher-income individuals from abusing Chapter 7 bankruptcy, designed for those who cannot repay their debts.

The test begins by comparing the debtor's current monthly income (CMI) by calculating from Form 122A-1, which is the average income in the six months before the bankruptcy filing, to the median income for a household of the same size in the debtor's state. If the debtor's income is below the state median, he automatically qualifies for Chapter 7 without further analysis. If the debtor's CMI calculation includes the spouse's income information and the debtor is not filing jointly with their spouse, the debtor must subtract any portion of the spouse's income that is not used to pay for household expenses of the debtor or the debtor's dependents from the CMI to arrive at the adjusted income.

However, if the debtor's income is above the median, the means test proceeds to the second stage via Form 122A-2, including determining the debtor’s adjusted income and calculating the debtor’s deductions from the income. The allowable expenses - such as housing, utilities, transportation and other necessary costs will be subtracted from the debtor's monthly income. These expenses are based on IRS standards and may not always reflect the debtor's actual cost of living. The remaining income, or disposable income, is analysed to determine whether the debtor has enough to repay a portion of their debts under a Chapter 13 repayment plan.

Further, in line 39 of Form 122A-2, the debtor calculates their monthly disposable income for 60 months by subtracting the total deductions from their adjusted CMI and multiplying the result by 60. In line 40, the debtor must choose one of the following three scenarios based on the calculation from line 39. If the total is less than $9,075, there is no presumption of abuse; if the total is more than $15,150, there is a presumption of abuse. Abuse is presumed if the debtor's current monthly income over 5 years, after

deducting certain legally allowed expenses and secured debt payments, is not less than the lesser of 25% of the debtor's non-priority unsecured debt or $9,075, whichever is greater, or is $15,150.[530]

If the disposable income exceeds a certain threshold, the debtor is presumed to have the means to repay his or her creditors, and the bankruptcy court may dismiss the Chapter 7 case or convert it to Chapter 13. On the other hand, if the disposable income is too low, the debtor can proceed under Chapter 7 and have their qualifying debts discharged. The means test effectively ensures that only those who are truly unable to repay their debts can benefit from Chapter 7 bankruptcy. However, critics argue that this rigid system may infringe on individuals' due process rights, depriving them of the opportunity to achieve a "fresh start" through Chapter 7 bankruptcy.[531] Also, the mandatory Pre-filling credit counselling requirement under BAPCPA has raised concerns about access to the court system, as individuals unable to complete the counselling, particularly those in extreme financial hardship, may be prevented from filing for bankruptcy.[532] Critics have also argued that the debate over consumer bankruptcy reform should focus on the form that the income test takes, rather than on whether bankruptcy includes mean tests.[533] 11 U.S.C.§ 109(h) provides that individuals must undergo credit counselling from an approved nonprofit budget and credit counselling agencies within 180 days before filing for bankruptcy under any chapter. Different agencies charge varying fees, typically from $10 to $50. The counselling must be completed before filing, and there are exceptions in cases of emergencies or where the U.S. trustee has determined that no adequate counselling agencies are available.[534] Pre-filing credit counselling serves several essential purposes. First, it educates debtors about alternatives to bankruptcy, such as debt management plans, by offering guidance and resources. Second, the counselling also assesses the debtor's financial

[530] Charles J Tabb, *Bankruptcy Law: Principles, Policies, and Practice* (5th edn, 2023 Supplement)
[531] Erwin Chemerinsky, 'Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005' (2005) 79 American Bankruptcy Law Journal 571-602
[532] ibid
[533] Richard M Hynes, 'Why (Consumer) Bankruptcy?' (2004) 56 *Alabama Law Review* 121
[534] 11 USC § 109(h)

situation, exploring potential solutions to manage or resolve debt without filing for bankruptcy. Third, it provides a required certificate upon completion, ensuring that the debtor complies with the necessary steps for filing bankruptcy.[535] Prior to the 2005 reforms, credit counselling was not a requirement for filing for personal bankruptcy. Credit counselling began in the 1960s as a private form of debt management to address consumer debt distress. The number of personal bankruptcy filings increased as banks aggressively lent to consumers, who were experiencing rising default rates. Banks then funded the launch of credit counselling networks within the United States.[536] The goal was to encourage and facilitate the renegotiation of credit terms for consumers in debt distress and to steer them away from formal bankruptcy proceedings. Such credit counselling often evolves from mere counselling to renegotiation between the consumer and the bank, with the desired outcome of renegotiation often being the conclusion of a Debt Management Plan (DMP). The creditor makes concessions and is willing to reduce interest or late fees and extend the repayment period. Initially, the creditor, i.e. the bank, will often pay the counselling agency a fair share of the debtor's repayments in order to facilitate the DMP, but this in fact results in the counsellor trying to facilitate the DMP for the sake of the fair share. at this point, the DMP may not be the best way for the debtor to settle the debt. after the 2005 reform, credit counselling became a mandatory requirement for filing for the The $10 to $50 fee for counselling does not support the operating costs of these credit counselling agencies. And only about 3 per cent of debtors are able to move to voluntary counselling before bankruptcy filing. So in effect, is the purpose of pre-filing credit counselling merely to demonstrate that informational counselling is not sufficient to resolve a debtor's debt distress?

6.2.2 How does a Chapter 7 Case Processes

A Chapter 7 bankruptcy case begins when the debtor files a petition with the bankruptcy court in the jurisdiction where the individual resides or where the business is based. Additionally, the debtor has the

[535] Bankruptcy Code 11 USC § 109(3)(A)
[536] Jason J Kilborn, *Comparative Consumer Bankruptcy* (Carolina Academic Press 2007

right to convert the Chapter 7 case to Chapter 11, 12, or 13 if eligible and if the case hasn't been previously converted.[537] Along with the petition, the debtor must file various documents, such as a list of assets and liabilities, income and expenses, financial affairs, and ongoing contracts or leases.[538] For individual debtors, there are additional requirements, including providing a tax return, credit counseling certificate, and employer payment evidence.[539]

The filing fees total $335, but individuals may request to pay these fees in instalments or, if eligible, waive them if their income is below 150% of the poverty level.[540] On the day of the petition, an automatic stay will apply, temporarily halting creditors' collection actions.[541] It includes collection actions, lawsuits, foreclosure actions, garnishment and levies on bank accounts, and property repossession.[542]

Upon the filing of a Chapter 7 petition, the US Trustee will appoint a case trustee to administer the case and liquidate the debtor's non-exempt assets.[543] That is the central role for the case trustee plays in a Chapter 7 case. The case trustee will schedule a meeting of creditors between 21 and 40 days after the case is filed, where the trustee, creditors, and the debtor discuss the financial situation.[544] The trustee will put the debtor under oath at the meeting, and the trustee and the creditors can ask questions.[545] The debtor must attend the meeting and answer questions about the debtor's financial affairs and property.[546] Within 10 days of the meeting of creditors, the US trustee will report to the court if the case should be presumed to be a bankruptcy abuse via the means test. A Chapter 7 case may be dismissed under the 11 U.S.C.§ 707(b)(1) where a debtor's debt is primarily consumer debt " incurred by an individual primarily

[537] 11 USC § 706(a)
[538] Federal Rules of Bankruptcy Procedure r 1007(b)
[539] ibid
[540] 28 USC § 1930
[541] 11 USC § 362
[542] ibid
[543] 11 USC §§ 701, 704
[544] 11 USC § 341, Federal Rules of Bankruptcy Procedure r 2003(a)
[545] 11 USC §343
[546] ibid

for a personal, family, or household purpose"[547] The cause of the debt is critical for the court to determine whether the debt is consumer debt.[548] A student loan could be considered a business debt because it is mainly an investment.[549] The same applies to mortgages.[550] When consumer debt exceeds 50%, it is primarily consumer debt.[551]

A Chapter 7 bankruptcy is often a 'no asset' case when the debtor's exempt property is excluded or when there is a valid lien on the debtor's property. The trustee is obliged to report to the court. In a 'no asset' case, non-secured creditors will not receive any distribution. Of course, creditors do not need to declare their claims either. In a Chapter 7 bankruptcy, the trustee has "avoiding powers" to recover certain assets or transactions for the benefit of creditors.[552] These powers include undo preferential transfers made to creditors within 90 days before the bankruptcy filing, undo improperly perfected security interests, and pursuing non-bankruptcy claims such as fraudulent conveyance or bulk transfer remedies under state law.[553]

6.2.3 Discharge from Bankruptcy

Prior to 2005, the chapter 7 system in the United States, which allowed a debtor to make a quick fresh start, did not require the debtor to discharge the debt with future income as a condition of exemption, or even require insolvency as a condition for the application of the procedure, and was described as being full of American character.[554] Due to the setup of MEAN TEST, the U.S. personal bankruptcy law is said to be the most complicated personal bankruptcy system in the world now.[555] However, most of the

[547] 11 U.S.C.§101(8)
[548] *Lapke v. Mutual of Omaha Bank (In re Lapke)*, 428 B.R. 839, 843 (8th Cir. BAP 2010)
[549] *Palmer v. Laying*, 559 B.R. 746 (D. Colo. 2016)
[550] *In re Price*, 353 F.3d 1135 (9th Cir. 2004)
[551] *In re Hlavin*, 394 B.R. 441, 447 (Bankr. S.D. Ohio 2008)
[552] 11 U.S.C. § 548
[553] Ibid
[554] Monica Prasad, *The Land of Too Much: American Abundance and the Paradox of Poverty* (Harvard University Press 2012)
[555] Jason J Kilborn, *Comparative Consumer Bankruptcy* (Carolina Academic Press 2007)

creditors are still willing to continue to apply for chapter 7,[556] which may be the charm of the very short bankruptcy period in the United States for the debtors who are eager to get rid of their difficulties. Generally, a Chapter 7 debtor may be discharged 4 to 6 months after filing. It's shorter than the UK's one year exemption. In more than 99 % of Chapter 7 cases, excluding those dismissed or converted, individual debtors receive a discharge.[557] Typically, unless a party in interest files a complaint objecting to the discharge or a motion to extend the time to object, the bankruptcy court will issue a discharge order early.[558] Discharging from Chapter 7 means the debtor is no longer legally obligated to pay the discharged debts. Any judgment related to personal liability for these debts is void, and under, creditors are permanently prohibited from taking action to collect the discharged debt from the debtor personally or from any property the debtor acquires after the bankruptcy petition date.[559]

However, the discharge eliminates personal liability, it does not automatically remove liens on the debtor's property. For instance, if there is a judgment lien on the debtor's property, the lien remains valid and enforceable against that property.[560] The debtor must take additional steps to remove or avoid the lien. The U.S. Supreme Court clarified that while a discharge eliminates personal liability, liens on specific property require separate legal action to be removed.[561]

6.3 Chapter 11: Apply to Individual Debtors

6.3.1 Introduction of Chapter 11

A Chapter 11 case filed under the US bankruptcy is also a reorganisation bankruptcy that enables a debtor to release himself or herself from his or her complex debts. There are four main differences between the Chapter 11 procedure and the Chapter 13 procedure. Firstly, nearly all individuals, businesses,

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[556] Ibid
[557] *Chapter 7 - Bankruptcy Basics* (US Courts) https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-7-bankruptcy-basics accessed 28 December 2023
[558] Federal Rules of Bankruptcy Procedure r 4004(c)
[559] 11 U.S.C. §524(a)
[560] *In re Kalabat* 592 BR 134, 143-44 (Bankr ED Mich 2018)
[561] *Estate of Lellock v. Prudential Ins*. Co. of Am., 811 F.2d 186,188-89 (3d Cir. 1987)

corporations, and partnerships can file for Chapter 11 bankruptcy without a specified debt-level limit and required income.[562] On the contrary, as mentioned above, specific debt limitations require the debtors to have stable income under Chapter 13. Therefore, only debtors who meet the requirements could file a Chapter 13 case.[563] Secondly, a Chapter 11 case does not usually involve a trustee or examiner, which means debtors under Chapter 11 have the rights and powers of trustee and are required to perform all functions and duties of the trustee, except the duty of investigation.[564] The debtor has the right to manage his or her business and properties and to file a bankruptcy case. He or she has the right to account for property, examine and object to claims, file informational reports, and employ attorneys, accountants, or other professional persons to assist the debtor if the court has granted permission.[565]

However, if evidence can prove 'fraud, dishonesty, incompetence, or gross mismanagement of the debtor's affairs by current management', the court shall appoint the trustee and then the trustee will take charge of the case. In other words, the debtor will lose the management of his or her case. It also provides that the number of holders of debtor's securities and the amount of debtor's assets or liabilities does not matter about the appointment of a Chapter 11 trustee if the trustee is 'in interest creditors, any equity security holders, and other interests of the estate'.[566]

If no trustee is appointed, 'on the request of a party of the interest or the United States trustees, and after notice and a hearing', an examiner shall be appointed before the court confirms the plan.[567] The examiner must investigate if the debtor is appropriate.[568] However, a Chapter 13 case does not place the debtor in

[562] 11 USC §109(c) (this section also provides who cannot be a debtor under Chapter 11)
[563] 11 U.S.C. § 109(e)
[564] 11 U.S.C. §1106, 1107
[565] *Chapter 11 - Bankruptcy Basics* (US Courts) https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics accessed 3 December 2023
[566] 11 USC § 1104(a)
[567] 11 USC § 1104(c)
[568] ibid

possession. The trustee shall be appointed when the Chapter 13 case is filed, and only the trustee appointed by the court has such rights and duties during the case. Thirdly, there is no limit to the duration of a Chapter 11 plan, while a Chapter 13 bankruptcy plan should be completed within three to five years.[569] Finally, a reorganisation plan could be prepackaged under Chapter 11, called pre-packaged reorganisation, and it would be more effective in saving the debtors from their complex debt problems.[570] Here, we will continue the discussion of Chapter 11 through the ongoing Chapter 11 bankruptcy case of Chinese Entrepreneur Yueting Jia (YT). The case will show how a Chapter 11 case is processed.

6.3.2 The Background of YT's Chapter 11 bankruptcy case

This case features YT, a Chinese Entrepreneur ranked No.1 CEO in the 2014 Forbes China list. As the founder of the first internet-based TV streaming service LeEco in China, YT quickly built a global technology company and expanded the business to LeshiZhiXin, Le Vision Pictures, Le Sports, LeMobile, LeTV, Leshi Internet Information and Technology Corp., Beijing('LIITCB') and other Subsidiaries. In 2010, LIITCB successfully went public in the Growth Enterprise Market (or GEM) of the Shenzhen Stock Exchange. However, YT's business that has entered into several fields has never generated positive cash flows due to the need for substantial investment in R&D. The reason is that from 2014 to 2017, YT continually bought other companies' shares via bank loans so that the businesses seem to thrive on the surface. In Jan 2015, Lefeng Mobile Technology (Beijing) Co., Ltd(Lefeng) was registered in Beijing, then Lefeng borrowed HK $2.47 billion from the China Merchants Bank Honking Branch by cross-border financial guarantee 10 months later in November. LeTV, based in mainland China, is the guarantor of the loan. The HK $2.47 billion was used to acquire 18% shares of Coolpad Group Limited(Coolpad), a Chinese smartphone company which is listed on HKEX. After acquiring 18% shares of Coolpad, Lefeng subsequently purchased 11% shares of Coolpad and then became the controlling shareholder of Coolpad.

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[569] 11 USC § 1322
[570] 11 USC §§1102, 1121, 1126

The HK $2.47 billion loan foreshadowed the big financial challenge of LeEco in 2017. Without making a profit, YT's business owed more and more money to hundreds of creditors; most importantly, YT undertook joint liabilities. In 2017, the capital chain of Lefeng Mobile was finally broken. Due to an unpaid debt, China Merchants Bank sued YT, YT's spouse Wei Gan and his companies and asked for property preservation in 2017, which make LeEco and YT to get into a severe financial problem. According to the court's decision, RMB 1236584434.07 has been frozen under the name of the respondents Lefeng, LETV, YT and Wei Gan.[571] In 2018, Zhejiang Merchants Bank applied to the court and asked to freeze YT's and his companies' property, total of 2.06 million yuan. The court made a decision support Zhejiang Merchants Bank.[572] A series of Creditor actions against YT and his companies made nearly all his property in mainland China. Moreover, YT and some of his companies have been placed on a national dishonest debtor list after failing to comply with a court order. Here, we will not get more details.[573] Though this Chapter 11 bankruptcy case was filed in the US, most of the creditors are from China. What pushed this Chapter 11 case to be commenced is that one of YT's creditors (Lan Cai Ltd.) filed the petition to the US court and asked to execute a tribunal decision made in China.[574] In order to prevent the execution, YT filed for Chapter 11 bankruptcy and sought the protection of automatic stay. In the meantime, through the Chapter 11 bankruptcy, YT would like to use his assets in the USA to make repayments to his creditors, who are owed as much as $3.6 billion.

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[571] *Shanghai First Intermediate People's Court* (2017) 沪民初 19 号 Before this property preservation, there are several property preservation applied by other creditors there many properties of YT and his companies has been frozen.

[572] *Beijing Fourth Intermediate People's Court* (2018) 京 04 财保 33 号

[573] for details of the frozen deposits and assets of YT, see Form 1, Form2, Form3

[574] In December 2018, Lan Cai Ltd, which had been screwed by its investment in LeTV Sports, took a domestic arbitration (the Beijing Arbitration Commission demanded in January 2018 that Jia Yueting repay his debts) and successfully asked a California court to freeze all of Jia Yueting's shares in FF and his four luxury villas, which are worth a total of $1.5 billion. That same month, To-WinCapital also filed for an enforcement order in the Eastern Caribbean Supreme Court, seeking recognition of the Chinese court's arbitration order. Then in April 2019, the California court ruled on the case, ordering YT to repay $12.41 million debts. (Court documents show that on Aug. 21, Lazy Money obtained the support from the California court to require YT to appear in court in Los Angeles on Sept. 11, at which time his personal assets will have to be examined by the court as a debtor).

On November 21, 2019, Lan Cai Ltd filed a motion to dismiss YT's bankruptcy reorganisation case.[575] In its filing, Lan Cai Ltd. stated that if YT's bankruptcy reorganisation cannot be dismissed, it would request to transfer the case from the Delaware court to the California court. One of the reasons cited by Lan Cai Ltd. included that YT's creditors were primarily located in China. Filing personal bankruptcy in the U.S. would involve, among other things, language difficulties. However, the Delaware Bankruptcy Court formally approved YT's bankruptcy Chapter 11 case to proceed in the U.S. District Court for the Central District of California. To avoid undermining the common interests of all creditors, the court also denied the motion of Lan Cai Ltd and a minimal number of creditor parties.

6.3.3 YT's Properties in the USA, his Complex Debts and the Pre-packaged Reorganisation Plan

Generally, a Chapter 11 bankruptcy case is more complex and more expensive than the other two models of individual bankruptcy because it usually involves a large amount of debt and many creditors. That is why, in many cases, more companies would be the debtors under Chapter 11 than individuals. However, a Chapter 11 bankruptcy case is suitable for YT, and it offers a new direction for Chinese scholars and lawmakers to research the establishment of a Chinese personal insolvency regime.

According to YT's disclosure statement, the debts could be classified into three classes: (1) Priority Non-Tax Claims, (2) U.S. Secured Claims, and (3) Debt Claims. Class 3 is regarded as impaired creditors, which will not be paid entirely or in which some legal, equitable, or contractual right is altered. There are 79 unsecured non-priority creditors, and the top 10 of YT's impaired creditors are banks, investment companies and securities companies, which includes $15.533 million. According to the US bankruptcy law, in a Chapter 11 case, if there are classes of impaired claims, the court cannot confirm the reorganisation plan unless one impaired class of claims accepts the plan.[576] However, as written in the

[575] 11 USC § 1112, give the right to parties in interest to file a motion to dismiss or convert a chapter 11 case to chapter 7.
[576] 11 USC § 1129(b)

disclosure statement, the plan will satisfy § 1129(a)(8) of the US Bankruptcy Code. Thus, it will not seek the confirmation of the plan under § 1129(b) of "crammed down."[577]

Except for the frozen properties in Mainland China, the rest of YT's assets are not so complex. The pre-packaged reorganisation plan filed to the court shows that a creditor trust would be set up to hold YT's overseas properties as trust assets. The trust assets include (1) 147,048,823 Class B ordinary shares of Smart King Ltd (Smart King), representing 10% of Smart King's equity; (2)100% of the preferred units of Pacific Technology Ltd (Pacific Technology), which entitle YT to a priority distribution of up to $815.7 million from Pacific Technology's 30.8% of Smart King's equity interest, after the return of capital to the management, also a special distribution of 10% of the remaining amounts from Pacific Technology's 30.8% of Smart King's equity interest, and after that a distribution based on the 20% percentage interest of the units of Pacific Technology.'[578] Through the reorganisation plan, an exchange will occur between the creditor's claims and YT's economic right after the Faraday (FF) company finishes the OPI.579 In other words, the creditors who accepted the Chapter 11 plan have to accompany the growth of FF, and it is still unclear if they can get the money back from FF. YT states that as he is related to FF, dealing with his debt problems via Chapter 11 bankruptcy with his creditor is not only in the best interest of the creditors but also benefits the further of FF, which could bring more financing.

After the commencement of the Chapter 11 case in October 2019, the vote for the prepackaged plan started. Suppose the plan is confirmed if 90% of creditors accept it. However, it only gets the support of

[577] Cramdowns were historically conducted in the context of Chapter 13 personal bankruptcies. Then spread to Chapter 11 corporate bankruptcies as borrowers sought to reduce their debt burdens later. The restrictions was extended on loans secured by primary residences to Chapter 11 with the Bankruptcy Reform Act of 1994.
[578] data from Yueting Jia's pre-packaged plan
[579] The introduction of FF in YT's plan: 'FF is a pre-revenue development stage global technology company headquartered in Los Angeles, California, with additional development activities and operations in the PRC, that designs and manufactures next-generation, zero-emission smart electric vehicles and mobility ecosystem with a view to carving out a dual-market strategy and having manufacturing capabilities and operations in both the U.S. and the PRC, the two largest electric vehicle markets. Smart King is FF's parent company that indirectly own FF.

$4.6 million claims, representing only 23%. Thus, YT terminated the vote; the more effective prepackaged bankruptcy will no longer be able to help YT release himself quickly. In this way, YT entered Chapter 11 bankruptcy formally, which will only involve a formal reorganisation plan instead of a pre-pack plan. The Chapter 11 plan has been amended three times but is unchanged; YT's shares and interests in FF will be placed in the creditors' trust to repay the debt. In addition, there are some key terms. To receive support from creditors, the plan will no longer require releasing the Chinese debt guarantee until an agreed percentage of the debt is paid. Approved creditors will have the right to continue to hold claims in China and to dispose of all of Jia Yueting's assets that have been frozen or pledged, or hypothecated. Accordingly, YT may also obtain an undertaking from creditors that they will not assert any new cause of action in any jurisdiction outside the United States directly to hold YT individually liable or derivatively on behalf of JYT's creditors (including YT's separate and joint claims) for four years after the effective date of the plan.

Further, ‘on the later of (a) the Effective Date; and (b) 90 days after the Debt Claim is approved’, the creditor shall notify and request the Chinese court to remove YT from the list of dishonest debtors, also, to cancel the restrictions on his travel and high spending. The creditors may not initiate new a restriction during the standstill period. Finally, YT will be automatically discharged in the US since the plan's effective date. As for the debts in China, YT’s liability will be waived until the creditors are paid out of the trust up to 40% of the approved claim distribution or the creditors are paid out of the trust and otherwise up to 100% of the approved claim distribution.

On February 27, 2020, YT submitted a list of core terms of the bankruptcy reorganisation plan agreed upon by both YT and the unsecured official debt committee to the Central District of California Court. Interestingly, Lan Cai Ltd. re-filed a motion to dismiss YT's bankruptcy case, claiming approximately

$11 million in claims, but the court did not pass such a motion.[580] On March 19, 2020, the U.S. Bankruptcy Court for the Central District of California formally approved a Chapter 11 asset disclosure statement and the application for a debtor-in-possession loan. That means the creditors could vote on the plan.

6.3.4 The Creditors' Committee and Voting on the Plan

On October 25, 2019, the U.S. Trustee appointed the Official Committee of Unsecured Creditors (the "Creditors' Committee") in this chapter 11 case pursuant to section 1102(a)(1) of the Bankruptcy Code. The Creditors' Committee consists of the following members: (i) Ping An Bank., Ltd. Beijing Branch; (ii) China Minsheng Trust Co., Ltd; (iii) Shanghai Leyu Chuangye Investment Management Center LP; (iv) Jiangyin Hailan Investment Holding Co., Ltd; and (v) Shanghai Qichengyueming Investment Partnership Enterprise. According to the voice recording of online creditors' committee lawyer communication before the voting deadline, the creditors' committee lawyer said that the due diligence shows that YT's holdings in FF are his most valuable asset and the one most likely to be paid to the creditors.[581]

Therefore, with the development of FF, chapter 11 bankruptcy is the best way to achieve a win-win and maximisation of benefits between YT and creditors. Without the majority agreement of creditors, it will lead to two consequences. One will be that all creditors would be able to file lawsuits against YT worldwide. Or the case will turn to chapter 7. YT's existing assets (the shares in FF) will be sold and then distribute to the creditors. However, the lawyer said that chapter 7 doesn't seem to fit in this case. Not only will the creditors not receive more returns, but FF's business will also be affected. Also, Chapter 7 would generally start from zero, and all the Chapter 11 bankruptcy costs would have been wasted. Therefore, that will not be a win-win situation for everyone. Due diligence also confirmed the

[580] The court thinks there is 'nil or de minimise' evidence that could support Lan Cai Ltd.'s allegation that YT's bankruptcy case was not commenced with good faith.
[581] The voice recording could be available at: http://dm.epiq11.com/YT1

transparency of YT's disclosure statement.[582] For instance, it confirms that there is no trust that is set up for YT's wife, Wei Gan and his children. That means no trust would obstruct the repayment to creditors, which is one of the issues that the creditors are most concerned about. It is worth mentioning that the disclosure statement states that On 13 January 2020, Wei Gan submitted evidence of claim against YT for US$569,147,060.26 and alleged that $8,747,060.26 of this amount was a family support obligation under section 507(a)(1)(A) of the Bankruptcy Code.

The documents of her divorce petition in support of her claim are attached. She again asserted the allegations and claims contained in that petition. In this case, there is another interesting point to look at. As the procedure of YT's Chapter 11 bankruptcy case was processed during the COVID-19 period, there was a concern that the financing of FF and the sale of FF cars would be affected by COVID-19. The lawyers reassured the creditors by emphasising the process of the FF's financing and its potential high-end consumers that would not lose the money to purchase an expensive FF vehicle due to the effect of COVID-19—and explained that risks are inherent to the reorganisation plan and are not caused by the epidemic. On March 31 2020, YT's Chapter 11 bankruptcy case opened the creditors' voting process. As motioned above, creditors who were entitled to vote do not include priority non-tax debt claims, Chinese secured debt claims, and U.S. secured debt claims, as these claims will have an estimated recovery percentage of 100% and will not be impaired, which means they are automatically deemed to have accepted the plan. These classes of creditors are regarded as accepting the plan. The plan gained over 80% of the creditors' votes, and the creditors finally approved the plan.

6.3.5 The Approval of YT's plan.

On May 21, 2020, the U.S. Bankruptcy Court for the Central District of California held a hearing on YT's Chapter 11 reorganisation case. After seven months of filings, negotiations, voting, and court

[582] ibid

confirmation, the court finally confirmed and approved the highly publicized personal bankruptcy reorganization case of Faraday Future (FF) founder and CPUO YT. The plan took effect in early June 2020.

After the plan became effective in June, YT transferred all of his current personal holdings in FF to the creditors' trust. He no longer owns any share of FF but will continue to participate in FF's operations as FF Global CPUO (Chief Product and User Ecology Officer) and Global Partner. The trust will employ an independent trustee for everyday management and maintenance. The first trustee will be the chief lawyer of the creditors' committee. In addition, the creditors' committee will invite five creditors and establish a trust management committee. The approved plan provides the way and time to allow the creditors to dispose of the trust's assets. The trust directly holds FF equity. The creditor trustee can only begin to dispose of the FF equity after the FF IPO, except for bankruptcy liquidation or trust expiration. The plan also provides for the proportion of the FF equity in the trust to be sold annually after the IPO. As for the day-to-day management of FF will be handed over to FF Global CEO Carsten Breitfeld. However, though the plan became effective, it does not mean YT will shake off the debt to rest easy. To a certain extent, whether the creditors can eventually get paid is related to the success of FF.

In conclusion, the Jia Yueting Chapter 11 case demonstrates how US Chapter 11 can be applied to individual debtors, even a Chinese national who has not naturalised. However, most importantly, this case shows that the lack of personal bankruptcy legislation does not necessarily prevent a debtor with a large amount of property overseas from reorganising their debts through the individual bankruptcy laws of other countries or, more bluntly, avoiding some of their debts. Due to the procedural application of cross-border bankruptcy, it can be said that debtors in China are helpless. In China, the debtor is at most branded as a ‘laolai’ (dishonest debtor), and the debtor remains unscathed. Ironically, since the debtor

applied for bankruptcy and restructuring in the United States in the following case, he has never set foot on Chinese soil again.

6.4 Conclusion

The development of the U.S. bankruptcy system, particularly its move toward abolishing debt imprisonment and introducing modern bankruptcy laws, reflects a complex evolution shaped by political, economic, and social influences. Early U.S. bankruptcy laws, such as the Bankruptcy Acts of 1800, 1841, and 1867, were characterized by instability and a lack of consensus between political factions. The eventual abolition of debt imprisonment in 1839 and the introduction of more permanent and comprehensive bankruptcy legislation culminated in the Bankruptcy Act of 1898, which laid the foundation for the modern U.S. bankruptcy system.

Bankruptcy property exemptions figure prominently in US personal bankruptcy law. It allows debtors to retain some exempt property, especially the home, in Chapter 7 liquidation cases. Section 522 of the Bankruptcy Code allows debtors to choose between the federal exemption system and the state exemption system. However, the introduction of BAPCPA has made it less easy for debtors to enter Chapter 7 cases, as there is a means test system in place to prevent high-income debtors from abusing the process and avoiding debts that could otherwise be repaid.

Chapter 11 bankruptcy reorganization allows for the application of individuals with complex financial situations. Chapter 11, the case of Chinese businessman Jia Yueting (YT), provides a straightforward look at the use of the entire process. It also provides an observation angle of a Chinese person conducting a complex personal bankruptcy lawsuit in the United States. Despite the debtor's heavy debt in China, he used the US bankruptcy system to restructure his debt. Unfortunately, many creditors in China still have no way to recover their debts due to the absence of a personal bankruptcy system. The limitations of the personal bankruptcy system can be seen without recognising cross-border personal bankruptcy judgments

between countries. The US Chapter 7 and Chapter 13 personal bankruptcy systems are also instructive for other jurisdictions, such as China. US personal bankruptcy law has strict entry criteria, such as the means test, mandatory pre-application debt counselling, and a lenient and friendly exempt property system. However, the debtor can only apply for the exempt property system if he can successfully enter the Chapter 7 process.

Chapter 7 Conclusion from a Comparative Perspective

7.1 Some Discussions from Comparative Perspective

7.1.1 Legislative Style

There are currently two prevailing approaches to insolvency legislation worldwide. One is unitaryism, where both individual and corporate insolvency procedures are regulated by the same insolvency code. The other is separationism, where individual insolvency procedures are regulated separately by a single law, as in France, where the Commercial Code regulates the insolvency of corporate entities and 'natural persons engaged in independent professional activities' are regulated in Book VI of the Commercial Code1 (Des Entreprises en Difficulties), while the relief of individual debt arising from over-indebtedness is provided for in the Consumer Code. The insolvency legislation of the two countries discussed above clearly did not choose the separationist approach. In the UK, corporate and personal insolvency are regulated in the Insolvency Act 1986. The statutory insolvency procedures applicable to individuals are Bankruptcy, IVA and DRO. In the United States, both corporate and personal insolvency are regulated in the United States Bankruptcy Code. Among them, Chapter 7, Liquidation and Chapter 11, Reorganization, are applicable to both corporate and personal insolvency. Chapter 13 also provides for debt liquidation procedures for debtors with a fixed income. Other countries that have also chosen the unitary system to set bankruptcy rules include Germany, Japan and other civil law countries. Since China has not yet enacted a personal bankruptcy law applicable nationwide, it is impossible to directly compare

it with the personal bankruptcy legislation of the United Kingdom and the United States. However, it can be seen that the Shenzhen Personal Bankruptcy Regulations are special administrative region legislation enacted by the Shenzhen People's Congress, which is only applicable to Shenzhen City. It is a standalone personal bankruptcy law, and adopting a unitary legislative system is an inevitable choice.

The Chinese academic community is debating which legislative approach should be chosen for future personal bankruptcy legislation in China. Pro-separatism scholars argue that special bankruptcy rules for individual debtors can better accommodate the needs of different subjects.[583] And the adoption of monism may be more in line with the current situation in China. First, from the perspective of culture and people's attitudes towards personal bankruptcy, it is more acceptable to the public to incorporate personal bankruptcy legislation into the existing enterprise bankruptcy law when revising it. Second, adopting a unitary approach to bankruptcy legislation is a global trend. China is enacting its first personal bankruptcy legislation and following the worldwide trend of incorporating personal bankruptcy rules and corporate bankruptcy rules into the same code, uniformly stipulating the same issues for personal bankruptcy and corporate bankruptcy, and then regulating personal bankruptcy procedures through the addition of chapters, will make the law easier to implement.

7.1.2 Mandatory or Non-mandatory Pre-bankruptcy Debt Counselling

When analysing Shenzhen's personal bankruptcy legislation, the US personal bankruptcy law and the UK personal bankruptcy law, it is not difficult to find a common point, namely debt counselling. The pre-application counselling system is the latest reform of Shenzhen's bankruptcy system. The Shenzhen Bankruptcy Administration has also officially opened a new pre-application counselling centre with one centralised lecture room and four individual interview rooms. The interview rooms are laid out in a ‘single person, single room’ compartmentalised layout to provide the public with a quiet consultation

[583] Wang Xinxin, 'Legislative Model and Path of Personal Bankruptcy Law' in *People's Judicature* (2020) No. 10

space and ensure the efficiency and privacy of the interview. An online appointment management system has also been developed to allow debtors to make online appointments via mobile phones.[584]

Under the provisions of the US personal bankruptcy law, proof of having received debt counselling is required for applications for chapter 7, chapter 11 or chapter 13. A study showed that debtors were very satisfied with the counselling experience. In addition, their financial knowledge, attitudes and behavioural intentions improved significantly due to the counselling. The effectiveness of counselling depends mainly on the debtor's prior knowledge, behaviour and socio-economic status, and the circumstances that led to their current financial problems. There is little evidence that the counselling requirement is a burden or an administrative barrier.[585] However, other studies have found that the literature provides confusing information about the effectiveness of financial counselling. In terms of the procedure's application, among the many purposes of mandatory pre-filing credit counselling, the primary purpose is to enable debtors to understand what personal bankruptcy procedures are more appropriate for their current situation and make the right choice. Of course, one of the essential objectives of BAPCPA in introducing pre-application credit counselling is to prevent the abuse of personal bankruptcy, especially the abuse of Chapter 7.

In Shenzhen's pre-application counselling for personal bankruptcy, another important purpose is to review the debtor's debt situation in advance and divert debtors who are eligible for different personal bankruptcy procedures to reduce the burden on the court. In the UK's Breathing Space scheme, mandatory debt advice is eye-catching. In order to obtain a breathing space moratorium, debtors must obtain debt advice from a professional debt advisor and know the best debt solution for themselves. However, such

[584]深圳市破产事务管理署, '一文看懂||个人破产申请前辅导制度实施两周年' https://sf.sz.gov.cn/szsgrpcxxgkpt/xgzy/content/post_11350174.html accessed 9 August 2024

[585] Networks Financial Institute, 'Starting a New Chapter: The Role of Credit Counseling in Helping Debtors Recover from Bankruptcy' (Networks Financial Institute Working Paper 2010-WP-06, 21 November 2010)

debt advice is not mandatory for applying for any bankruptcy in the UK. Mandatory debt advice is a compulsory requirement that allows debtors to obtain a breathing space moratorium. During the breathing space moratorium, debtors are exempt from creditor enforcement actions and can consider debt resolution relatively relaxedly.

If China were to establish an individual bankruptcy system in the future, the practice of personal bankruptcy in Shenzhen would be a valuable experience. At this stage, the authorities appear to be relatively satisfied with the practice of the pre-application mandatory counselling system in Shenzhen's bankruptcy. However, verifying this system's merits will take a more extended practice period. The US's once extremely debtor-friendly individual bankruptcy environment became more harsh for debtors with the entry into force of the BAPCPA in 2005. Any personal bankruptcy proceeding application is subject to a credit counselling prerequisite, similar to Shenzhen's pre-application mandatory counselling system. China has a huge population, and the number of indebted individuals is also huge. When a nationwide personal bankruptcy law comes into effect, a mandatory pre-application debt counselling system is necessary before the majority of the public can fully understand the personal bankruptcy system and the courts can easily handle various situations.

Therefore, regarding whether to set up a mandatory pre-application debt counselling system in the future establishment of China's bankruptcy system, the experience of the United States may be more relevant. However, some scholars believe that the introduction of a mandatory pre-application debt counselling system would also lead to difficulties in accepting personal bankruptcy cases in China, which would not be in line with the original intention of introducing an individual bankruptcy system, which is to provide debtors with the opportunity to restructure their debts. Alternatively, the UK's Breathing Space Scheme is worth considering, as it does not aim to enter formal personal bankruptcy proceedings but rather to give debtors enough time and space to receive debt counselling before deciding whether to enter a formal

personal bankruptcy procedure. However, if debt counselling is provided only by the government department without the support of other professional debt counsellors in society, it will put a lot of pressure on the government department, and debtors will also find it difficult to obtain timely debt counselling.

7.1.3 Automatic Discharge or Discharge upon Application

The discharge system is one of the most essential parts of personal bankruptcy legislation. By being discharged from old debts, debtors can escape their debt predicament and be given a chance to start again. In addition to the stigma of bankruptcy in traditional Chinese culture, the main reason is that the discharge system allows debtors to be no longer responsible for repaying debts under certain conditions. The conventional concepts mentioned above, such as ‘it is natural and reasonable to repay debts’ and ‘the father's debt is the son's responsibility to repay’, are contradictory to bankruptcy discharge. Interestingly, even the discharging in personal bankruptcy reorganization is considered ‘not paying debts with the consent of creditors’. As seen from the above discussion, it is no surprise that Shenzhen's bankruptcy regulations have chosen the system of exoneration upon application.

Article 101, paragraph 2 provides: ‘The people's court shall, based on the debtor's application and the administrator's report, decide whether to exempt the debtor from outstanding debts and at the same time decide to lift restrictions on the debtor's actions.’ In addition, the Shenzhen personal bankruptcy regulations also set up a three-year bankruptcy probation period, and an application for discharge can only be made to the court after the three-year probation period has expired. In November 2021, the court declared the first Shenzhen personal bankruptcy liquidation case bankrupt, and according to the law, the bankruptcy is still within the probation period. In addition, according to limited data, the debtors who applied for Shenzhen personal bankruptcy liquidation cases did not enter the liquidation process but were rejected during the court review stage, or the process was terminated due to a repayment agreement with the creditor. Therefore, the first Shenzhen personal bankruptcy liquidation case is also the only Shenzhen

personal bankruptcy liquidation case. The Shenzhen personal bankruptcy regulations and the practice embody the concept of 'can pay, will pay'.[586]

Unlike Shenzhen's system of post-application discharge, the United States and the United Kingdom currently adopt an automatic discharge system. Debtors in the United States will usually be automatically discharged from their debts unless someone objects to the discharge.[587] The Insolvency Act 1976 of the United Kingdom introduced Article 7, which provides for the automatic discharge of the bankrupt after a probation period of 3 years. This replaced the long-standing system of exoneration upon application. The Enterprises Act 2002 reduced the 3 years to 1 year, significantly accelerating the bankruptcy process. This reflects the liberalization of personal bankruptcy law in the UK.[588] In the US personal bankruptcy law, the debtor usually automatically receives a discharge within 4 to 6 months after filing a Chapter 7 case. The current Shenzhen personal bankruptcy discharge system is similar to the UK's discharge system before the Insolvency Act 1976. There is reason to believe that the legislature will not risk establishing China's bankruptcy system in the future and will choose a bankruptcy discharge system similar to the current Shenzhen system, which grants debtors a discharge upon application after a relatively long observation period.

7.1.4 Out-of-court Personal Insolvency Procedures

It is not difficult to find in the discussion of the three different personal bankruptcy systems in Shenzhen, the United States and the United Kingdom that the United States does not have an out-of-court personal bankruptcy procedure. The United Kingdom has a mature and popular out-of-court statutory personal debt restructuring procedure, namely IVA. The insolvency practitioner acts as the IVA nominee and

[586] Shenzhen Personal Bankruptcy Information Platform, 'Data Source' https://sf.sz.gov.cn/szsgrpcxxgkpt/index.html accessed 7 August 2024

[587] United States Courts, 'Discharge in Bankruptcy - Bankruptcy Basics' https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/discharge-bankruptcy-bankruptcy-basics accessed 8 August 2023

[588] Adrian Walters and Donna W McKenzie Skene, 'Consumer Bankruptcy Law Reform in Scotland, England and Wales' (2006) https://ssrn.com/abstract=914522 accessed 6 April 2025

controls the entire IVA case. IVA and CVA in corporate bankruptcy proceedings have become very mature products, and IVA and CVA have also developed into an industry. The latest 2021 IVA Protocol is a voluntary agreement that provides a standard framework for handling consumer IVA, applicable to insolvency practitioners and creditors.

If an IVA agreement is proposed and reached, the insolvency practitioner and creditors agree to abide by the relevant procedures and agreement documents. Creditors with sufficient income are suitable for resolving debt crises through IVA by reaching repayment agreements with creditors and repaying creditors by the repayment agreements. IVA usually lasts five years. In Shenzhen's bankruptcy system, personal bankruptcy reorganization proceedings are conducted in court. Only in the personal bankruptcy reconciliation procedure is it stipulated that the debtor may settle with all creditors outside the court through organisations such as the People's Mediation Committee, specially invited mediators, specially invited mediators, or the bankruptcy affairs management department. After reaching a settlement agreement, the debtor may request the court to recognise the settlement agreement.

Therefore, the Shenzhen personal bankruptcy reconciliation system is not entirely an out-of-court settlement procedure but only allows the debtor to reach a settlement agreement outside the court. In a settlement case, the court generally entrusts a mediator to mediate between the debtor and the creditors. Most importantly, the settlement agreement needs to be reviewed and approved by the court after a hearing. However, the Shenzhen personal bankruptcy settlement procedure seems to be incomplete. For example, there are no provisions on whether the creditors ‘meeting should vote on the settlement, and if there is a creditors’ meeting, how the settlement agreement is voted on. The personal bankruptcy settlement system aligns with China's traditional ‘valuing harmony’ culture. In the future Chinese personal bankruptcy legislation, it is feasible to make good use of out-of-court settlements and pay attention to their excellent connection with in-court debt clearance procedures. However, it is important

to note that both the marketisation of IVA and the debt counselling industry in the US have faced the risk of debtors being blindly drawn into debt repayment plans that were not intended to be suitable due to counsellors disregarding debtors for the benefit of their creditors or for their own benefit.

7.2 Conclusion

Before answering the research questions, the following empirical examination of perceptions of the personal bankruptcy system in Chinese society is worth referring to. It is a small-scale questionnaire survey with a total of 571 respondents, including ten occupational groups.[589] They are legal scholars, judges, prosecutors, judicial administrators, lawyers (excluding lawyers who have acted as administrators), accountants (excluding accountants who have acted as administrators), administrators, corporate lawyers, law students and other professionals. Lawyers, administrators and law students are overrepresented, while accountants, prosecutors and corporate lawyers are underrepresented.

Firstly, regarding the views on the traditional Chinese concept of debt, 10.33% of the respondents agreed that 'it is only right to repay debts and the debtor has to settle the debt no matter what', and 27.50% of the respondents agreed that 'the debtor should make every effort to repay the debt, and where there are genuine difficulties, the society may grant some relief'. Another 60 % of the respondents agreed that honest and unfortunate debtors can solve their debt problems through personal bankruptcy proceedings. The majority of the respondents felt that honest and unfortunate debtors deserve sympathy, while 8.9% of the respondents gave other answers to the question of sympathy for debtors, such as the possibility that the scales of the personal bankruptcy law may be tilted in favour of the debtor to the detriment of the creditor, who is more deserving of sympathy.

Secondly, on the question of the necessity of establishing a personal bankruptcy system in China, 78.11 % of the interviewees believe that it is necessary for China to establish a personal bankruptcy system, while

[589] 汤维建, 胡守鑫, *个人破产制度构建的难点与对策研究* (法律出版社 2022)

19.11 % of the interviewees are against the establishment of a personal bankruptcy system in China. Meanwhile, there are still a few interviewees who do not have a clear attitude towards this.

Thirdly, on the question of the potential risks of establishing a personal bankruptcy system in China, the majority of the respondents showed the concern that debtors would take advantage of the personal bankruptcy law to evade their debts, as well as the fact that the penalties for bankruptcy fraud and other behaviours under Chinese law were not strong enough to effectively prevent abuse of the personal bankruptcy process. Moreover, some interviewees believe that the courts may find it difficult to cope with the pressure of a large number of personal bankruptcy cases. Only 7.88 % of the respondents believe that the introduction of the personal bankruptcy system will not incur the risks mentioned above and so on. Some interviewees also believe that with the development of the system, the above and other risks will be solved.

Fourthly, the majority of respondents recognised the legal remedies available to honest and unfortunate debtors in personal bankruptcy proceedings. Some interviewees also recognise that personal insolvency proceedings also serve to mitigate social and systemic financial risks and safeguard the public interest of society. Moreover, many interviewees agree that personal bankruptcy proceedings can safeguard the interests of creditors. Respondents who are optimistic about the personal bankruptcy law also believe that the personal bankruptcy system is conducive to the cultivation of entrepreneurship. On the contrary, 86 people believe that the personal bankruptcy law is a tool for old scoundrels to legally evade debts. And some interviewees believe that the personal bankruptcy system is not trustworthy, and has the risk of making the society collectively poor or discouraging the enthusiasm of private lending and borrowing, and so on.

Fifthly, the majority of the respondents agree that the businessman is an eligible debtor under the personal bankruptcy law. More than half of the interviewees believe that ordinary consumers should also be the

subject of personal bankruptcy law. In addition, the interviewees also frequently mentioned sick people with financial pressure, families suffering from force majeure such as natural disasters and so on.

Sixthly, in the multiple choice question about which interests should be protected by the personal insolvency law, 79 % of the interviewees believed that the purpose of the personal insolvency law should be to safeguard the interests of creditors, 69 % believed that the personal insolvency law should also help honest and unfortunate debtors to get rid of their debt crisis, and 66.5% believed that the public interests of the society should be protected by the personal insolvency law as well. However, some interviewees believe that personal bankruptcy protects the interests of all parties in a balanced manner, and that unfairness under a particular procedure is also fairness.

Seventh, regarding exemptions in the personal bankruptcy system, more than 60% of the interviewees believed that debtors with working capacity should not be exempted by declaring bankruptcy, and conversely, nearly 40% of the interviewees held the opposite view.

Seventh, regarding the personal bankruptcy settlement procedure, only 4.55 % of the respondents do not accept the personal bankruptcy settlement system.

Eighth, 67% of the respondents believe that the personal bankruptcy liquidation system, the reorganisation system and the settlement system should run in parallel. And 39 % of the respondents believe that personal bankruptcy settlement or reorganisation system should take priority.

Overall, the results of the questionnaire survey show that among the relevant professional groups, China's millennia-old traditional concepts about debt are no longer dominant, but the society still holds a conservative attitude towards debt forgiveness. Respondents' acceptance of the personal bankruptcy system is high, but the number of respondents accepting the bankruptcy and liquidation system, or accepting the exemption of debt through the bankruptcy and liquidation system, is just over 50 %. In

other words, the acceptance of accepting exemptions from liability in bankruptcy is not high among the respondents. In contrast, the system of bankruptcy reorganisation or bankruptcy settlement, as opposed to the bankruptcy exemption, gained the support of the majority of the respondents. In other words, an honest and unfortunate debtor who reaches a repayment agreement with his creditors through legal procedures and makes repayments is more in line with the expectations of the relevant professional groups of the personal bankruptcy law in China nowadays. The relevant professional groups in China have different concerns about the potential risks of introducing a personal bankruptcy law.

At the end of the thesis, the answer to the research question posed in the introduction has become much clearer. In my opinion, the direction of China's personal insolvency law will be the eventual establishment of a complete insolvency law that makes up for the lack of a personal insolvency law and is no longer half an insolvency law. The pilot of personal insolvency regulation in Shenzhen and the practice of substituted personal insolvency law in some parts of China are the embodiment of the need for personal insolvency law. Regarding China's relatively backward bankruptcy culture, China's ancient legal system despised civil law, resulting in the settlement of debts at that time usually through penalties, or changing from monetary debts to personal debts, or civil mediation and other non-civil law methods. And because Chinese society is deeply influenced by Confucianism, it has become a tradition that personal debts are repaid by the whole family, as in the case of a father's debt being repaid by his son. Such traditional thinking is still affecting the current Chinese society. However, in fact, thinking advances with the times, and ancient traditions will be gradually withdrawn with the development of society.

In the Qing Dynasty, China had experienced a failure of bankruptcy law transplantation, which also provides lessons for future generations. The transplantation of laws cannot be done simply by moving a law from one jurisdiction to another. The transplantation of laws must be adapted to the local soil, in line

with the interests of local parties, and achieve a certain balance. The development of the legal history of personal insolvency in England can be seen in the study. The UK has a history of debtors being guilty and imprisoned, and had a harsh attitude towards debtors. The development of personal insolvency law in the UK has shown a trend of continuous liberalisation, from allowing traders to go bankrupt, to extending the subject of bankruptcy to all natural persons, to reducing the bankruptcy period to one year, to the introduction of the DRO to provide a more suitable choice of personal insolvency regime for low income debtors with no income, to the abolition of DRO fees, to the introduction of the breathing space scheme, which provides a breathing space for the To the abolition of DRO fees, to the introduction of the breathing space scheme for debtors to provide breathing space, so that debtors have the opportunity to get good debt counselling, the development of the liberalisation of personal bankruptcy law in the United Kingdom has a clear vein. The United States, on the other hand, from the initial influence of the United Kingdom to the later provision of 'fresh start' for debtors with a loose bankruptcy exemption system, to the gradual tightening of the attitude towards debtor exemptions from 2005, prohibiting the abuse of chapter 7.

The history of personal insolvency law in both the United Kingdom and the United States reflects the need for personal insolvency law to continue to evolve with the times, and no personal insolvency is achieved overnight and then stay unchaged. The United States initially learnt from the British personal insolvency law, and later, after the game and economic and social development needs, but no longer follow the footsteps of the development of the British personal insolvency law, the first to take the lead in adopting a more lenient personal bankruptcy system. It can be seen that the learning between the laws of various countries ultimately return to the actual situation in their own countries. This is all the experience that China can learn from when it establishes its personal bankruptcy law in the future.

Chinese house debt, like developed countries in the world, such as the United Kingdom and the United States, is on a rising trend. And the improvement of business environment in China, personal insolvency

law can provide support. Many tragedies caused by debt have become a social concern. Moreover, the backlog of personal debt cases with no property to enforce has been one of the great pressures and authority risks borne by the courts for many years. Therefore, the establishment of personal insolvency law is conducive to the improvement of the national legal system, the development of the national economy, in line with the interests of all kinds of subjects in the economic market, and also conducive to social stability. The establishment of Chinese personal insolvency law may not be realised immediately; it will still take some time. However, the direction of China's policy on improving its bankruptcy law is clear. It can be said that policy-wise, the establishment of personal insolvency law is supported by the government, otherwise there would not have been the pilot of personal insolvency law in shenzhen. And the practice of Shenzhen also illustrates another problem, that is, nowadays Chinese society has the conditions to formulate a personal bankruptcy law. The present practice is all in preparation for the finalisation of the introduction of a national personal insolvency law. From one small reform after another to the final big one.

Finally, the setting up of a personal insolvency law in China must be done carefully. As we can see from the experience of Britain and the United States, the smooth establishment of China's personal bankruptcy law must rely on the setting up of mechanisms to prevent the abuse of the personal bankruptcy law and the improvement of supporting systems, such as the credit system, the court system, bankruptcy disqualification system, bankruptcy restriction system and so on. However, a bankruptcy system that allows individuals to obtain debt discharging through declaring bankrupt is one of the most fundamental characteristics of personal insolvency law. When establishing personal bankruptcy law, if legislators choose not to establish bankruptcy liquidation procedures in order to prevent abuse of bankruptcy, this would be overly cautious. I believe that legislators will not choose to do so.

Furthermore, the personal bankruptcy procedure that focuses on allowing debtors and creditors to reach repayment agreements and avoiding direct exemptions is the development trend of personal bankruptcy law at this stage. In the practice of Shenzhen, it can be seen that the court is controlling the application of personal bankruptcy liquidation procedure. However, I think that in the establishment of China's personal bankruptcy law in the future, even though the direct debt exemption of individuals will inevitably be controlled in practice, the conditions for exemption should still be set cautiously, and it is not advisable to set up a very short bankruptcy period as in developed countries. The development of China's personal bankruptcy law can take the path of gradual liberalisation, avoiding changes back and forth in later reforms.

When introducing the personal insolvency law regime, whether it is to learn from the personal insolvency law of the United Kingdom or the United States or the personal insolvency law system of other countries, it is necessary to adapt to the local conditions. The future Chinese personal bankruptcy law will be a personal insolvency system with Chinese characteristics. For example, provisions on dealing with bankruptcy property will need to be adapted to property systems with Chinese characteristics, such as the system of homestead. This is because Shenzhen has its own special position in China, with a high degree of social openness, a better business environment and rapid economic development.

Further, the practice of personal insolvency in Shenzhen is precious experience, but the fact that the Shenzhen personal insolvency ordinance can survive in the Shenzhen area does not mean that it can be directly applied to the whole country of China. This is because Shenzhen has its own special position in China, with a high degree of social openness, a better business environment and rapid economic development. China, however, is a vast country, with large differences in the rate of economic development of individual provinces and cities, and great disparities in income levels between places.

Therefore, a personal insolvency law applicable to the whole of China must be a personal insolvency law that enables localities to make numerical adjustments in practice in accordance with local economic conditions without changing the basic statutory procedures. In summary, the establishment of personal bankruptcy law in China must be based on the country's actual socio-economic conditions. China's future personal bankruptcy law must first ensure the effectiveness and operability of the law. International experience will provide inspiration for China. Gradual reform after the establishment of personal insolvency law is a reasonable path for the development of China's personal bankruptcy law. The establishment of personal bankruptcy law will promote the resolution of judicial issues related to the enforcement of debts in China, relieving personal debt crises, balancing the interests of debtors and creditors, and promoting the stable development of the social economy.

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