张海征 著

The establishment and effectiveness of the Chinese corporate rescue laws: from a comparative analysis among the UK, the US and China

破产重整制度的建立和有效性研究：以英国、美国和中国比较分析为视角

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序

破产制度萌芽于古罗马《十二铜表法》中的“债法”。随着商品经济的不断发展,地中海沿岸和西欧国家纷纷开始进行破产立法,以达到公平清理债权债务为目的,并兼顾社会公共利益。进入19世纪后,随着法人破产制度的建立,破产法的立法模式也渐从单一清算型向清算与和解并重的二元化结构转变。20世纪70年代爆发的石油危机,使西欧国家每年都有数万家企业陷入破产清算程序,原有的和解程序无论从立法思想上还是制度设计上都无法满足拯救困境企业的目的。企业破产引发的连锁反应,诸如职工失业和银行坏账的剧增等,使立法者必须思考如何在清算与和解程序之外设计一套制度,以企业复兴为目的,通过设立自动冻结等制度,使债务人在一定的保护期内不被债权人追讨,并由破产执业者主持或协助起草企业重整方案,交付债权人会议讨论和通过。重整结果约束各利益集团,以利企业重生。美国1978年《联邦破产法典》(2005年修订)第11章(“重整”)为世界各国破产重整立法提供了一个很好的范本,确立了以债务人为中心的重整模式。不久前的美国次贷危机使众多大企业陷入困境,如2009年通用汽车进入了破产保护,第11章为企业恢复生机发挥着重要作用。英国于上世纪70年代末成立了柯克委员会(Cork Committee),审查当时的破产立法和实践,为1986年“破产法案”提供了两个有代表性的程序:公司自愿安排程序(CVAs)和管理程序(administration)。进入21世纪后,英国重整程序也进行了一系列改革,建立了与美国相对应的以破产管理人为中心的重整模式。

和英、美国家存在数百年的破产立法和实践相比,中国破产制度历史较短,虽可追溯至清末的《破产律》,但该法尚未实施即被废除。新中国成立后,由于受计划经济体制的影响,每个企业的运转就像人体的一个细胞,而不是一个微观粒子,只能按照指令进行交易,而不能自由运行。该体制下的财产制度、企业运转模式以及银行提供贷款的方式使得破产法没有生存的空间。中国在体制转轨时期于1986年颁布了《中华人民共和国企业破产法(试行)》,以推动国有企业改革。但由于立法目标的错位以及制度设计的缺陷,1986年《中华人民共和国企业破产法(试行)》未能有效实施,且在特殊的历史条件下,更是让位于始于90年代中期的政策性破产制度。从上世纪90年代初期中国相关部门已认识到建立市场经济条件下的破产法制度对国家经济发展的巨大促进作用。历

经12年之久的努力，中国于2006年8月颁布了新的《中华人民共和国企业破产法》。该法的一大亮点，是在参照美国破产法的基础上引入了重整程序。这既是对中国破产立法理论上的完善，更是对实践需要的呼应。自新法于2007年6月1日正式实施以来，以河北沧州化学工业股份有限公司为代表的数十家上市公司的重整案件，得益于重整程序的保护，多数债务人通过调整股权结构寻找战略投资方以引入资金，通过债权人会议表决和法院裁定使重整方案得以有效实施，从而挽救了诸多濒临破产的上市公司，产生了巨大的经济和社会效益。

本书以破产重整制度为主题，比较分析了英国、美国和中国的制度。这一选题容易入手但不易展开。原因在于，将三个国家的制度和程序放在一起能够很快发现相同和不同之处，但发现相同点和不同点并非比较法研究的根本任务。关键在于如何探索三个国家在制度层面的根本差异，如政治、经济和文化等，并在此基础上解释程序上的差异。英国和美国同为老牌资本主义强国，市场经济发达，自由化程度高，社会保障制度完善，但由于两国立法者的指导思想不同，破产重整制度仍有着根本区别。英国自1986年以来虽经历多次改革且每次都参照美国的相关法律，但从来没有照搬过美国《联邦破产法典》第11章中的任何环节。本书首先通过借鉴英、美学者的观点，重点解释"重整"的概念、特征等根本性问题。在进入具体的实体和程序论述前，作者探究了三个国家的破产立法制度的根本差异，包括人的思想观念、企业的运转模式等，其中特别突出介绍了中国经济体制的转轨、国有企业改革、银行业改革和社保制度的不断完善。在论述实体和程序性内容时，作者结合立法背景阐述法律条文背后的含义，并结合英美法的判例加以适当的佐证。在全方位比较的基础上，指出了中国重整程序中存在的不足，并提出了借鉴英、美相关制度的理由。

本书有以下几个特点：首先，内容详实。突出对制度内在因素的探索，而非法条的简单堆砌。其次，数据全面。作者对数据的统计和援引均截至官方目前的最新发布。其三，援引诸多英、美著名案例，以各国破产实践佐证相关的理论。最后，用科学的研究方法论证了实用的研究主题。

本书虽然未能解决重整制度中的所有问题，但提出了一些值得思考的建议，对中国当前破产法司法解释的制定是有益的参考。相信该书的出版定会有助于促进中国破产重整制度的研究，同时为国际社会了解中国的相关法律及其实践提供了一个窗口。

作为作者的好友，我很高兴接受委托，仅识数语以为序，并向对破产和重整制度感兴趣的相关人士推荐此书。

石静霞

2010年8月于对外经济贸易大学法学院

Foreword

The enactment of a new *Enterprise Bankruptcy Law in 2006* was a notable achievement in the process of transition in the People's Republic of China from a planned economy to a socialist market economy. In common with many other jurisdictions that have reformed their insolvency laws in recent years the emphasis has been placed on the rehabilitation of struggling companies through the operation of corporate rescue laws. The level of state interference in insolvency proceedings has been reduced in favour of control by the courts and insolvency practitioners and new insolvency procedures have been developed.

Given the newness of the law there is still much progress to be made. The significantly restricted previous operation of bankruptcy laws means that there is a notable lack in China of experienced professionals with relevant expertise. However there are new ranks of intelligent and well educated judges and professionals who can drive the development of the new law forward. The contribution to be made in this process of development by Dr. Haizheng Zhang of Beijing Foreign Studies University is significant. He has already established himself in the UK, with a series of articles and a book, as one of the leading commentators on the new Chinese law. His previous published works have considered a full range of aspects of this new law.

In this new book he adopts comparative law methods and brings together his command of the new Chinese law with his knowledge and understanding of two mature insolvency law systems, those of the UK and the USA. Comparative law has been particularly important in the process of development of China's new bankruptcy law. The law draws upon the bankruptcy laws of several jurisdictions, and so comparative law was an essential component of its development. In this text Dr. Zhang lucidly explains the corporate rescue procedures of each jurisdiction. Of particular interest is Dr. Zhang's discussion of historical and contextual factors surrounding the operation of these laws: a reminder that laws and their operation are shaped by a variety of economic, political and social factors. Therefore, although each of these jurisdictions has a modern set of corporate rescue laws, we can identify features of these laws that have been shaped by the particular circumstances in each jurisdiction

and we have three differing systems as a result. In comparing these three systems Dr. Zhang's book stands as a notable new contribution to the literature on the new Chinese law and on corporate rescue laws in general.

Rebecca Parry
Professor of Law from Nottingham Trent University

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Part One Introduction

Corporate rescue has become increasingly a fashionable topic, which has long been a subject of global interest. The most notable formal corporate rescue regime was established by Chapter 11 of the US Bankruptcy Code in 1978, which has had far-reaching influence on the bankruptcy law reforms of other countries.① During the past thirty years, a series of reforms to domestic corporate bankruptcy② and rescue laws have been scheduled into the legislative agenda of many countries, and aimed at building up a well-tailored and efficacious corporate rescue system by way of summarizing the experiences and lessons from other countries and taking full consideration of their own unique domestic situations. In the present decade, a wide range of jurisdictions in different legal systems have considered the reformulation of their bankruptcy legal frameworks towards a rescue culture.③ Conceptually, corporate rescue is a well-functioning method which can provide a ground for financially distressed but potentially still viable companies to take a breath from the deadly enforcement of individual creditors, to negotiate with all the stakeholders and eventually to rehabilitate to its former healthy operation. Even where the attempt to rescue is not successful, the business of the insolvent company can be sold as a going concern, and this may enable the creditors' claims to be satisfied to a greater extent than would be possible in an immediate liquidation in which the assets of the debtor are usually disposed by a piecemeal sale for the purpose of a quick realization to creditors. The key understanding of the rescue notion is to take drastic and efficient measures when the debtor company falls into financial trouble or is likely to be

① For a broad discussion of the US Chapter 11, see Paul B. Lewis, "Corporate Rescue Law in the United States", in Katarzyna Gromek Broc and Rebecca Parry ed., *Corporate Rescue: An Overview of Recent Developments from Selected Countries* (The Hague: Kluwer Law International, 2006), p. 333.

② Chinese government authorities adopt the American legal terminology "bankruptcy", which is called "insolvency" in the UK. The term "bankruptcy" in England specifically refers to personal insolvency. This book will use the term "bankruptcy" to cover English corporate insolvency and Chinese enterprise bankruptcy. In addition, one thing should be borne in mind that, although the book will have always mentioned the terms "the UK" or "Britain", the analysis of insolvency laws applies only to England and Wales.

③ To understand the recent development of corporate rescue worldwide, see Katarzyna Gromek Broc and Rebecca Parry ed., *Corporate Rescue: An Overview of Recent Developments from Selected Countries* (The Hague: Kluwer Law International, 2006).

insolvent. In addition, it is indispensable to impose an automatic stay on creditors' claims for a breathing space in which new finance can be obtained, and a reorganization plan drafted under the external assistance of insolvency professionals and approved by a vote at a creditors' meeting and possibly by a court order. ①

Legally and procedurally, corporate rescue laws provide a worldwide welcome rescue-oriented approach to the companies in plight outside the traditional liquidation regime, and they are usually placed at the heart of the bankruptcy law system in different jurisdictions. Corporate rescue aims to reorganize the company which is in actual or impending insolvency and enable it to turn its business around in order to avoid insolvent liquidation. Not only could it maximize the wealth of economic value and save the unnecessary waste, but also it can contribute to the stability of the society and promote economic prosperity of a state. The Cork Report observed:

> *We believe that a concern for the livelihood and well-being of those dependent upon an enterprise which may well be the lifeblood of a whole town or even a region is a legitimate factor to which a modern law of insolvency must have regard. The chain reaction consequences upon any given failure can potentially be so disastrous to creditors, employees and the community that it must not be overlooked.* ②

In this regard, it is pressingly required to build a modern and well-tailored corporate rescue regime to avoid the detrimental consequences which may be caused by corporate failure. From the perspective of an individual successful rescue activity, the debtor company could continue to run its business as a going concern as before and keep its legal identity and market share. Meanwhile, all the stakeholders could benefit from the preservation of the company and its business, such as the maximum level of repayment to creditors, job retention for employees and investment reward to shareholders. The chained enterprises whose prosperity is closely tied with that of the

① United Nations Commission on International Trade Law (UNCITRAL), *Legislative Guide on Insolvency Law*, (2004), pp. 217 – 230.

② *Report of the Review Committee on Insolvency Law and Practice* (Cmnd 8558, 1982) ("Cork Report"), para. 204.

debtor could avoid a "domino effect". ① The preservation of jobs could undoubtedly not only stabilize the concerns of employees, which would be in favour of increasing the possibility of rescue success, but also avoid potential social chaos. In addition, from the perspective of the entire corporate sector of the state, an efficient and well-functioning rescue system could enhance the productivity and competitive capacity of domestic industrial and commercial enterprises. Non-performing assets could be cleared away from the corporate and banking sector through formal or informal arrangements, which will definitely strengthen the vigour of enterprises and eradicate the potential risks of financial turbulence. An important lesson can be drawn from East Asia Financial Crisis which happened at the end of 1997. Because of the weak bankruptcy and rescue law system, it was impossible for the corporate sector to rehabilitate in the face of a high volume of enterprise distress and long term economic recession. ② This was why some countries which had seriously been affected by the impacts of the crisis started reconsidering and improving their domestic corporate rescue regimes, especially through informal workouts. As the typical model of the informal rescue arrangements, the "London Approach" which was first created and promoted by the Bank of England in the mid-1970s has played a significant role in contributing to corporate recovery outside formal insolvency proceedings. ③

In order to reach these objectives, modern corporate rescue regimes incorporate two devices. First of all, formal corporate rescue proceedings could shield a financially struggling company from debt enforcement of individual creditors by providing an automatic stay , and reorganization will take place in the rescue legal framework under protection of the stay. ④ In a specified period of moratorium, the

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① This situation usually happens to small sized enterprises and suppliers which may fall into cash-flow problem or immediate insolvency by the bankruptcy of its closely related enterprises and trade suppliers. Especially in China, huge amount of triangular debts exists among SOEs. The bankruptcy of one enterprise would lead to bankruptcy of the others in the chain. See Ronald W. Harmer, "Insolvency Law and Reform in the People's Republic of China", *Fordham Law Review*, Vol. 64 (1996), pp. 2582 – 2583.

② Katarzyna Gromek Broc and Rebecca Parry ed., *Corporate Rescue: An Overview of Recent Developments from Selected Countries* (The Hague: Kluwer Law International, 2006), p. 4.

③ John Armour and Simon Deakin, "Norms in Private Insolvency: the 'London Approach' to the Resolution of Financial Distress", *Journal of Corporate Law Studies*, Vol. 1 (2001), p. 21. It is worth noting that some Asian countries, like Korea, Malaysia, Thailand and Indonesia, adopted the "London Approach" and improved their informal rescue arrangements. For more details, see M Pomerleano and W Shaw (eds.), *Corporate Restructuring: Lessons from Experience* (the World Bank, 2005), pp. 104 – 107.

④ United Nations Commission on International Trade Law (UNCITRAL), *Legislative Guide on Insolvency Law*, (2004), p. 28.

debtor is able to keep the assets safe from creditors, especially those with strong power like the banks and other financial creditors. The debtor could also assess its financial situation, evaluate its property and produce a disclosure statement which might be required by court. ① Most importantly, the moratorium could create a stable environment for the possible investors to consider providing new funds by investing or lending which is crucial for a successful rescue attempt, because they do not have to worry about the legal action of creditors during the moratorium. ②Under the protection of the automatic stay, the debtor can negotiate with creditors and produce a reorganization plan for the vote of all the creditors in different classes. Under the approval of every class of creditors and confirmation of court, the reorganization plan will bind the debtor and all the creditors. It may be argued that the automatic stay might seem illegal to impose restrictions on creditors, especially secured creditors, who are able to realize their debts at any time in other legal procedures as long as their legal actions follow contract terms. It should be noted, however, that the sacrifices of the interests of certain parties in rescue regimes are employed to pursue much higher goals and better consequences, including the satisfaction of the general interests of all the stakeholders, the maximum value of economic life of the community and social stability. ③More attention should be paid to the social goals of rescue theory which are more convincing, especially to China, currently in an emerging market economy, because social stability is not only the prerequisite of a successful rescue attempt, but also a significant factor which involves political risks to the executive party. ④ This is why the Chinese Communist Party has long been

① The World Bank, *Principles for Effective Insolvency and Creditor Rights Systems* (Revised Draft, 2005), p. 11.

② Katarzyna Gromek Broc and Rebecca Parry ed., *Corporate Rescue: An Overview of Recent Developments from Selected Countries*, p. 3.

③ Vanessa Finch, *Corporate Insolvency Law: Perspectives and Principles* (Cambridge: Cambridge University Press, 2002), p. 192.

④ Weiguo Wang, "Adopting Corporate Rescue Regimes in China: A Comparative Survey", *Australian Journal of Corporate Law*, Vol. 9 (1998), p. 234.

contending that social policy goals overwhelm everything. ①

Secondly, a well-functioning rescue framework should structure a fair and reasonable balance on bargaining powers of all the relevant interested groups, and this balance may contain three aspects. First, there should be a balance between the debtor and its creditors. Since formal rescue procedures provide the debtor with an automatic stay to freeze the claims of creditors, a remedy should be available for creditors to protect their interests. For example, secured creditors may apply to the court for resuming their rights of enforcement under reasonable cause. ② Ordinary unsecured creditors should be entitled to apply to the court for converting the debtor from reorganization to liquidation in the circumstances where the reorganization plan is not approved or the debtor fails to implement the reorganization plan. ③Second, corporate rescue laws, as a collective approach, should achieve a good balance between the secured creditors and unsecured creditors. Secured creditors, normally banks and financial creditors with strong power to realize their secured debts by simply selling collateral, will be restricted in formal rescue regimes, which purport to restore the debtor and achieve a better result for all the creditors. Therefore, corporate rescue laws enable every interested group to be involved in the rescue process to have a chance to discuss the restructuring-related issues and to vote on the approval of a reorganization plan. This may encourage the collectivity of a modern rescue culture and provide incentives to all the creditors who may continue to offer support for a rescue attempt. ④ Third, there should be a good balance between the controller in the corporate governance of a rescue regime and all the stakeholders in respect of the debtor. During reorganization, the existing management of the debtor may remain in control over the ailing company, or the existing management may be

① The former Chinese Communist Party leader Jiang Zemin launched a speech at the Fifth Plenum of the 14th Central Committee of the Communist Party in 1995, defining the state's mission for the next 15 years as "to grasp the opportunities, deepen the reforms, open up further, promote development and maintain stability". It contends economic reforms and meanwhile emphasizes social stability which is the foundation and precondition for the development of economy. This viewpoint also reflects the legislative initiative and policy aims that the Chinese Communist Party has consistently been advocating. Knowing this point will be very helpful to understand the underlying philosophies of Chinese bankruptcy and corporate rescue laws and policies. See Linda Wong, "Market Reform, Globalization and Social Justice in China", *Journal of Contemporary China*, Vol. 13 (2004), p. 157.

② United Nations Commission on International Trade Law (UNCITRAL), *Legislative Guide on Insolvency Law*, (2004), pp. 94 - 95.

③ Ibid, p. 232.

④ Sandra Frisby, "In Search of a Rescue Regime: the Enterprise Act 2002", *Modern Law Review*, Vol. 67(2004), pp. 249 - 251.

replaced by an outside insolvency professional, or the existing management may remain in control but subject to the supervision of an outside insolvency professional. No matter who is the controller (also called as "reorganizer"),[①] the controller should act for the interests of all the creditors and undertake his functions as quickly and reasonably as possible. His decisions are open to challenges from any interested party, who may apply to the court for rectifying the controller's conduct. Such mechanisms make the rescue system more transparent and accountable.[②]

It should be noted that the World Bank has been concerned with the efficiency and effectiveness of the bankruptcy law systems and the protection of creditors' rights from the domestic and international level since 1999, shortly after the East Asia financial crisis took place. The World Bank has set out a series of principles to consolidate the legal framework of corporate insolvency system. These principles set benchmarks to examine the effectiveness and adequacy of bankruptcy and corporate rescue systems in a wide range of jurisdictions categorized into different legal families. In terms of formal rescue proceedings, the principles designed by the World Bank stipulate that:

> *The system should promote quick and easy access to the proceedings, assure timely and efficient administration of the proceedings, afford sufficient protection for all those involved in the proceedings, provide a structure that encourage fair negotiation of a commercial plan, and provide for approval of the plan by an appropriate majority of creditors.*[③]

These principles are consistent with the legislative guidelines on insolvency laws set by UNCITRAL.[④] It should be noted, however, that these principles merely provide general recommendations for the structure of a reorganization regime which should be based on the comprehensive considerations of the unique political structure,

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① Bruce G. Carruthers and Terence C. Halliday, *Rescuing Business: The Making of Corporate bankruptcy Law in England and the United States* (Oxford: Clarendon Press Oxford, 1998), p. 154.

② DTI/Insolvency Service, *Productivity and Enterprise: Insolvency-A Second Chance*, (Cm 5234, 2001); Stephen Davies, ed., *Insolvency and the Enterprise Act 2002* (Bristol: Jordans, 2003), pp. 38 - 39.

③ The World Bank, *Principles for Effective Insolvency and Creditor Rights Systems* (Revised Draft, 2005), para. C 14.1; for a further explanation, see the following paras. C 14.2 - 14.6.

④ For more details, see United Nations Commission on International Trade Law (UNCITRAL), *Legislative Guide on Insolvency Law*, (2004), p. 209.

legal culture, economy and social issues of each country. The "one size fits all" approach is not wise and workable in this area of law for different jurisdictions. ①

Ⅰ. Research aims and the need for this analysis

In terms of insolvency law reforms, the UK government has long been concerned with the innovation and formulation of a modern and efficient corporate rescue system. Its first effort began in 1977 when the Cork Committee was organized under the appointment of the Secretary of State for Trade. ② Two entirely new procedures, respectively company voluntary arrangements (CVAs) and administration, were introduced by the Insolvency Act 1986 on the basis of recommendations given by the "Cork Report". The birth of CVAs and administration was hailed as the first arrival of corporate rescue culture in the UK insolvency legal framework. ③ For over twenty years since the Act of 1986, the focus of reforms has increasingly been on the avoidance of corporate failure and improvement of the rescue culture. For instance, a statutory moratorium has been introduced by the Insolvency Act 2000, which makes the CVAs more attractive to small eligible companies that require salvage. In addition, dramatic reforms have been brought about by the Enterprise Act 2002, the legislative tenet of which is to reformulate a more rescue-oriented and efficient administration regime that should reach the underlying aims of fairness, efficiency, accountability and collectivity by the abolition of administrative receivership. ④ As a pioneer in the promotion of the rescue culture in the western world, England has structured a relatively advanced corporate rescue system which is being referred to by other countries worldwide. ⑤

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① Katarzyna Gromek Broc and Rebecca Parry ed., *Corporate Rescue: An Overview of Recent Developments from Selected Countries*, p. 7.

② *Report of the Review Committee on Insolvency Law and Practice* (Cmnd 8558, 1982) ("Cork Report"), para. 1.

③ Muir Hunter, "The Nature and Functions of A Rescue Culture", *Journal of Business Law*, (1999), pp. 497 – 498.

④ Vanessa Finch, *Corporate Insolvency Law: Perspectives and Principles*, p. 294; Steve Leinster, "Policy Aims of the Enterprise Act", *Recovery*, (Autumn 2003), p. 28.

⑤ Such as South Africa, Italy, Australia, Hong Kong (China), New Zealand and so on. For more details, see the relevant chapters in Katarzyna Gromek Broc and Rebecca Parry ed., *Corporate Rescue: An Overview of Recent Developments from Selected Countries*.