

A Legislative Comparative Study of Personal Bankruptcy Abuse Prevention —an Honest but Unfortunate Debtor Definition Perspective

Jiaxue Xu¹ Liqin Zhang²

^{1,2} School of Law, Humanities and Sociology, Wuhan University of Technology, Wuhan, Hubei, China

¹ Corresponding author. Email: xujiaxue@whut.edu.cn

ABSTRACT

Overseas regions and Chinese local regions have already gained successful experience in preventing the abuse of personal bankruptcy and have acquired great results, which are of great significance for reference. In this paper, the overseas experience and the Chinese local standard of "honest but unfortunate" debtor and its impact are analyzed and compared to strengthen the Chinese meticulous laws and regulations of "threshold", "procedure", "enforcement" and "justice" for debtors, elaborate on the future legislative direction and response strategies to prevent abuse of personal bankruptcy, strictly prevent debtors from malicious bankruptcy, and reasonably balance the interests of all parties.

Keywords: Personal bankruptcy, Bankruptcy abuse, Legislative comparison, Being honest but unfortunate.

1. INTRODUCTION

The resolution of bankruptcy issues is a lengthy legislative process both in China and abroad. Against the background that China's social credit system needs to be improved, the public's personal bankruptcy integrity code needs to be observed and the current judicial practice is still redundant with many cases that need to be enforced and circulated, at present, improper debt arrangements such as escaping and revoking debts, concealment and transfer of property acts and false declaration of property and debts are not uncommon.

A reasonable balance between the interests of all parties of the debtor and the creditor is the requirement, and relief for the honest but unfortunate debtor is the goal. From the legislative design, judicial practice to supporting measures, Shenzhen has made a demonstration to meet the role of tolerance of bankrupt debtors and promoting their rebirth, so that it is possible to carry out social life and market activities, and has opened up an exit path for dealing with the current large number of cases that cannot be enforced, which requires to do a good job of identifying the "honest debtors" who need relief by including hearing and investigation.

The debtors to be protected are "honest but unfortunate". How to determine the boundaries of debtors and the criteria for their application is a problem that needs to be solved.

2. EMBODIMENT OF BEING "HONEST BUT UNFORTUNATE" IN PERSONAL BANKRUPTCY LAW

The reasons for the abuse of personal bankruptcy are self-evident. However, how to define "honest but unfortunate" and how to rely on the standard of "honest but unfortunate" to specify the provisions in practice are still rare, and the evaluation of the society still remains on the moral level. The Regulations of Shenzhen Special Economic Zone on Personal Bankruptcy only reflects the provisions of Article 3 on "honesty and credibility"¹ and "unfortunate"² to achieve the

1. "Honesty and credibility" means that the debtor who resides in the place and has been insured by Shenzhen social insurance for three consecutive years acts in good faith and doesn't act for the detriment of others during a certain period before filing for bankruptcy and during the bankruptcy proceedings.

purpose of local legislation, focusing on the screening of "doing one's best to pay debts". The legal standard of "honest but unfortunate" is unclear from place to place, and the corresponding "honesty and credibility" doesn't have a uniform standard of connotation and application. The absence of detailed provisions here will fundamentally undermine the expectation of preventing abuse of the personal bankruptcy system and affect the effective regulation of personal bankruptcy abuse by the law.

"Honest but unfortunate" is the keyword to describe the characteristics of debtors who meet the needs of personal bankruptcy, and this doesn't require too much legal definition, as it is in line with the public perception. The provision of "honesty and credibility" in the regulations or the principle of "honesty" in law is a principle requirement in civil and commercial activities, which is closely related to the core socialist values, requiring specific division of content and precise application in the personal bankruptcy system.

The authors believe that the definition and identification of "honest but unfortunate" can be discussed, and that there should be a clear "threshold" qualification for its restriction and exclusion. The "threshold" refers to the object of application and the definition of bankruptcy. By comparing the legislative experience of various countries, this paper starts from the object of application and the definition of bankruptcy, which are specifically related to the "honest but unfortunate" debtor, summarizes the specific characteristics of "honest" and "unfortunate" in personal bankruptcy legislation and draws on the experience of relevant countries in this regard, with a view to helping China in its legislative regulation of abuse.

3. LEGISLATIVE COMPARISON OF DEFINING "HONEST BUT UNFORTUNATE"

3.1 Object of Application

Centering on bankruptcy, the size of the scope of the object of application determines the size of the "bankruptcy ability" of the group to which

2. "Unfortunate" in Article 2 of the Regulations of Shenzhen Special Economic Zone on Personal Bankruptcy means that the debtor shall fall into bankruptcy due to loss of ability to pay debts or assets insufficient to pay all debts as a result of production and operation or living consumption.

"honest but unfortunate" applies. The scope of the object of application is actually the eligibility to be legally declared bankrupt. The setting of the object of application is a legislative choice of a country, and the role to whom it works is not inherent. The principle of good faith is also specific to the group of debtors in personal bankruptcy law in which it applies. The analysis of the scope of the object of application is the necessity for China to take more into account the social situation when legislating personal bankruptcy rather than copying the extraterritoriality to choose the objects. Only by planning the threshold of bankruptcy objects in a unified and hierarchical manner can the risk of abuse of the system be prevented.

Three models are chosen for the legislation: merchant bankruptcy, general bankruptcy and eclectic bankruptcy, which are characterized by commercial attributes, no distinction between merchants and non-merchants, and both unified entities and distinguished procedures. The boundaries of "honest but unfortunate" differ from one object to another, and the specific good faith principle embodied in the same object may also differ in its content, resulting in different levels of potential waste of personal bankruptcy resources depending on the choice.

The original action object of the Roman law system was the individual. After the emergence of statutory law, Italy and early England insisted on the object of application of merchants. France and Germany followed this example and developed it considerably, but France strictly distinguished between merchants and non-merchants application status, and applied universal enforcement proceedings and application of bankruptcy proceedings to each status. Today, in the world, for their legislation, Italy, Belgium, and Argentina continue to apply only to merchant bankruptcy ability and refuse to recognize ordinary natural persons. In order to resolve cases of insolvency, the actual implementation of civil cases is usually closely related to the system of participation in the distribution [1]. According to the personal bankruptcy system characterized by the guilt of bankruptcy in the Tang Dynasty recorded in the Travel Notes of China and India, the content of the relevant system has been available in China for a long time yet, with the regulation of the withdrawal from the market of the subject who is incapable of performance and the exemption of the state financial compensation. Among them, the effect of bankruptcy publicity for debtors, the obligation of judicial assistance for other market subjects, and

the disciplinary system of bankruptcy liability are all ways of mutually trustworthy legal undertaking by both parties under the state fiscal credit endorsement.

Germany breaks with the French merchant bankruptcy tradition and adopts general bankruptcy, and later England and France also move towards general bankruptcy. Australia, New Zealand and Ireland of the England legal system are also enforcing natural persons and companies separately according to different procedures [2]. Australia, on the other hand, also makes strict distinctions on ordinary natural persons, with specific treatment of minors, mental patients and deceased debtors [3]. This is out of a different regulation of the effects of bankruptcy for natural persons typified as an expression of equity.

The main purpose of including personal bankruptcy in the systems of Japan, Taiwan, Hong Kong, Malaysia, and India in China's neighborhood is to dispose of non-performing loans through judicial means, which is a reality to be considered in China. India is unique in that it regulates the bankruptcy of financial institutions separately and no longer excludes secured or unsecured financial claims, which is determined by the historical circumstances of India. Russia is also currently actively pursuing the possibility of filing for personal bankruptcy for any citizen with total debts exceeding 500,000 rubles and at least one debt that is 90 days or more overdue and insolvent. The number of people initiating bankruptcy proceedings remains high due to cultural practices and lenient loan terms. In South Korea, it aims to apply the reorganization law to all debtors, including individuals, but only natural persons are required to have an expected stable income [4]. In particular, the composition of the judges is different in the application of individual bankruptcy reorganization proceedings, and the sole judge can't apply to those with large business income liabilities including professionals [5].

In contrast, the debtors to which the U.S. general bankruptcy model applies include three types of debtors depending on the nature of the debt: consumption debtors, business debtors, and hybrid debtors. It is worthwhile to learn from the five types of mixed types of bankruptcy procedures³

3. Liquidation procedures, rectification procedures, debt adjustment procedures for individuals with regular income, debt adjustment procedures for agricultural workers with annual income, and debt adjustment procedures for municipal governments

depending on the object, which can more rigorously refine the object, which is conducive to the soundness of the threshold of its personal bankruptcy system. As for the eclectic bankruptcy model, it's typically represented by the Spanish Commercial Code, Portugal, Argentina, Brazil, Denmark, and Norway and so on. These are not mainly distributed in East Asia.

The three legislative models differ in their core objects and in their procedural design linkage, but the general trend of the times is towards the general bankruptcy, which focuses on the insolvency of all natural persons. The authors of this paper believe that with the continuous development of the market economy and the diversification of consumer status and means, the objects that can cover honest but unfortunate should keep pace with the times and can set certain conditions to externalize "honesty and credibility". In the scope of application, the Chinese "individual" more needs to include both natural individuals and occasional business behavior of people, a broad sense of the existence of natural individuals in society, such as those occur in individual contractors on a specific civil behavior or with business attributes or purely consumer behavior. In the embodiment of honesty and credibility, it is possible to set an individual limit, usually including credit requirements, personal requirements, and frequency requirements. This is determined by China's economic base and cultural tradition. Honesty should refer to the logic of justice, goodwill, and public order and good custom in personal bankruptcy law in line with the majority of people's civil behavior engaged in civil and commercial activities under the core socialist values.

3.2 Bankruptcy Defined

The definition of bankruptcy, in effect, describes the conditions for filing for bankruptcy, i.e., the "unfortunate" boundary issues. Different filing conditions require that the debtor to whom the petition applies be subject to varying conditions of bankruptcy, which can be cause, time, morality, credit, amount, and frequency limits and so on. The specific legal facts for entry into the proceedings are in fact a "procedural threshold" and that's a lot to learn as to how to set the "unfortunate". The tighter the conditions, the more difficult it is to enter personal bankruptcy, and the more lenient and broad it is, the less likely it is to prevent personal bankruptcy abuse. Compliance with the conditions for filing limited by different countries is the most

basic embodiment of honesty and credibility, and the fact of bankruptcy can only enter into the bankruptcy proceedings if it meets "unfortunate but honest".

Broadly speaking, the specific legal facts on which the bankruptcy proceedings are based are mainly used by countries in both enumerative and generalized manners to seek clear conditions. Depending on the legal system, the approach taken by the Anglo-American law and civil law systems is self-explanatory, which is an example of case law and statutory law. Different approaches have their advantages and disadvantages, and the balance between inclusiveness and professionalism, flexibility and clarity is to avoid abuse of the purpose of the personal bankruptcy system.

The enumerationism is that a bankruptcy petition can be filed as long as the debtor has the enumerated bankruptcy acts. Countries of the Anglo-American law system such as England, Australia, Canada and New Zealand provide for specific act that is highly compatible with bankruptcy laws that list several conditions that indicate the debtor's insolvency or affect the debtor's solvency to the detriment of creditors. This lacks flexibility in specific implementation, has a narrow coverage and tends to ignore new situations, but is highly professional, easy for the court to take evidence and identify, strongly operational and conducive to bankruptcy proceedings. Before 1978, the U.S. adopted enumerationism and intended to protect debtors and make it more difficult for creditors to file liquidation petitions, but the results were clear to the detriment of creditors after a very specific time and technical acts, and the difficulty of proof was not conducive to market development. In Australia, the conditions are reflected in 14 specific "bankruptcy acts" that are considered in a comprehensive manner to allow creditors to file for bankruptcy to avoid loss of pecuniary benefit. The restriction on the definition of bankruptcy ultimately is more to protect the interests of creditors, and the clear legal negation of some acts can contribute to the clarity of the boundaries of unfortunate bankruptcy.

Tracing back to modern times, civil law systems outlined the insolvency, cessation of payment and debt in excess as conditions of application, such as France before 1955 and Italy where cessation of payment was sufficient on the application conditions. In Japan, the bankruptcy code has generalized the objective state of insolvency or presumption of its cause, and weakened the

subjective behavior of the debtor. The Indian bankruptcy law has shifted from enumeration to generalization after the unification of legislation, and the inability to pay some or all of the debts due makes the scope of bankruptcy petitioners expand, which is different from the previous unprofessional and inefficient situation of mixing financial security creditors and debtors with multiple restrictions to enhance inclusiveness. South Korea also has a distinction in the amount limit of bankruptcy in the application of individual bankruptcy reorganization procedures. The same is true in Russia, Taiwan, China, and Hong Kong, where some need to be specifically enumerated under the general provisions combined is a choice in line with national conditions.

In China, the core of the personal bankruptcy system to satisfy the "unfortunate" condition is still the objective legal fact of insolvency, and the loss of solvency or insufficient assets to repay all or part are the conditions to be satisfied when the debtor files for bankruptcy, which is actually an extension of the preservation system. But how to give the judge greater discretionary power and at the same time facilitate the parties' burden of proof and identification should be considered. In the authors' opinion, the proof of "unfortunate" is the limit of the reason for the application condition that takes into account the interests of both parties and the reality of the situation. If the two parties are not insolvent in good faith at the time of bankruptcy application and can't pay off before the expiration date, and the difficulty of proving is not conducive to bankruptcy, it can't be counted as "unfortunate", but the purpose of causing damage to interests before, in the middle of and after the event. Justice and law enforcement are facing a proliferation of bankruptcy cases, and clear criteria are needed to identify truly "unfortunate" debtors, to use bankruptcy resources prudently, and to avoid debt evasion in bankruptcy.

4. LEGISLATIVE IMPLICATIONS

Reasonable and effective regulation of abuse of the personal bankruptcy system coincides with the goal of "honest but unfortunate" pursuits. The legislative design of the scope of application and causes of bankruptcy is generally the focus of preventing the abuse of personal bankruptcy. Combining the existing local practices and practical exploration in China, as well as the theory of compatible civil law rights and obligations system, it is necessary to fully externalize and quantify the

"principle of good faith", construct a system, and clarify the applicable standards and means. Improvements should be made in the following aspects:

4.1 Refinement of the Applicable Mechanism

The specific definition of it in practice can take Shenzhen Intermediate Court as an example. Shenzhen Intermediate Court establishes a set of separated identification mechanism to review, identify and separate, which, in fact, is to distinguish and select the applicable objects.

In response to the application of the universal bankruptcy system, with reference to the extraterritorial approach and the civil law system, in addition to natural persons with obvious commercial attributes, the target of application should also emphasize natural persons and leaders who are not primarily engaged in commercial acts as individuals and who have business responsibility for legal persons. It is appropriate to adopt a generalized approach here, relaxing the entry conditions and reducing the waste of market resources, i.e., those with civil rights capacity can assume civil obligations and become the subject of bankruptcy proceedings, and the "honesty" is more inclined to the invocation of civil law in principle. For natural persons with special status who are guilty of bankruptcy, beyond the separation, it can refer to the form of sanction provided by France, and it can also invoke the relevant provisions of the civil code to deal with them, but one has to make sure that the threshold of entry is collected as much as possible to avoid mistakes and omissions.

The treatment of established causes of bankruptcy should vary from case to case and from "doing one's best to pay a debt". The obligation to inform individuals of the restrictions on conduct in bankruptcy proceedings, the requirement to disclose information, and the legal consequences of abusively filing for debt evasion should be fulfilled, and written reviews, interviews and counseling, and hearings and investigations should be used to promote alternative dispute resolution, review and argue cases that enter bankruptcy proceedings, and refine the manner and means of handling cases [6]. Considering that the application conditions have already appeared in Shenzhen's regulations, the purpose of the regulation is to provide flexibility in limiting the eligibility to use the procedure, to outline the application threshold and to list the behaviors that touch the boundary of "honest but

unfortunate", and to provide judicial officials with more specific directions for the trial and implementation in the form of precedents, etc., so as not to put the bankruptcy threshold high and apply the bankruptcy proceedings that could not be chosen. At the same time, there is a need to develop flexible criteria for the boundaries of bankruptcy, such as the specific legal consequences of different exemptions resulting from the proportion of debts paid.

4.2 Institutionalization of Regulatory Means

The establishment of penalty and prosecuting systems for personal bankruptcy crimes is needed. The retroactive effect of bankruptcy fraud should be extended [7]. Criminal punishment for acts that may appear to maliciously damage interests should be more detailed and there should be further clear and sound conviction and sentencing standards, in order to link the government, prosecutors and courts to collaborate on handling cases, hunt and punish lawbreakers, improve the way of accountability for acts, and deter criminal intent.

The income review and measurement mechanism for bankruptcy declarations should be explored, and bankruptcy registration should be conducted through platforms related to individual credit ratings. It's needed to review and measure the debtor's income and consumption capacity over a period of time, and after measuring and comparing it with the average income and consumption capacity of the place of residence, to study and judge the size of debt exemption and the scope of exemption.

It's important to choose whether to have a pre or post procedure, and to improve the existing screening mechanism to provide strict and effective screening of individual bankruptcy petitions to prevent abusive litigation. For the corresponding settlement and reorganization procedures, it is necessary to set up initiation mechanisms with specificity to reduce the pressure of court trials, such as pre-petition counseling, out-of-court settlement, and professional intermediaries to diversify the resolution of debt disputes [8].

Efforts should be made to promote the improvement of the bankruptcy administration, and realize the online dynamic supervision of the administrator's performance by "stage self-assessment + dynamic assessment + comprehensive assessment", following the example of

"Shenzhen · Cocoon Breaking". The assessment results should be fed back in real time, so that improper performance can be corrected in a timely manner, the supervision of bankruptcy proceedings can be enhanced, and the normalized cooperation between administrative intervention and bankruptcy administration can be deepened.

4.3 Linkage and Disclosure of Supporting Measures

It's needed to deepen the disclosure of linked information of governments and courts, and promote the in-depth integration of science and technology and bankruptcy. There should be clear support at the policy and regulation level to standardize the development of bankruptcy reorganization and information disclosure with the help of Internet platforms with strong technology and flow advantages, and actively coordinate information disclosure and information protection. The ability to participate in cyberspace can be liberated by using enterprise software platforms such as live streaming of meetings to involve all parties in the proceedings; blockchain certificate keeping technology can be used to strengthen the information construction or one-stop construction of courts, governments and media platforms to improve transactional efficiency and costs in bankruptcy proceedings.

It's necessary to improve the system of loss and restoration of rights and strengthen credit sanctions. The time gap of information communication and information gap can be narrowed through the three-way deep integration of trial information, credit information, and transactional information to sound the social credit capacity of natural persons [9]. Restrictions on high consumption behaviors as well as qualifications for employment need to be strengthened with electronic information disclosure and feedback, while reapplication regarding credit needs to be treated extra cautiously, debtors should be educated and admonished, and personal bankruptcy abuse should be countered through credit sanctions.

5. CONCLUSION

The establishment and improvement of the personal bankruptcy system can't be achieved without the mechanism to prevent bankruptcy abuse, so effective regulation is particularly important. The process of establishing a personal bankruptcy system is also the process of regulating

bankruptcy abuses by taking into full consideration the application of keywords therein and the practice of defining standards. In the personal bankruptcy practice legislation, it is necessary to fully compare the extraterritorial experience, conduct legislative investigation, comprehensively consider the existing practical situation in China, and continuously strengthen the prevention of abuses of the personal bankruptcy system in terms of civil and criminal liability, administrative punishment, and credit sanctions.

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