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RESEARCH ARTICLE

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On prosecution of civil liabilities of debtor's senior managers in bankruptcy law

Abstract The Enterprise Bankruptcy Law has designed the regime for debtor's senior managers to bear civil liabilities, while the framework design concerning the prosecution mechanism of civil liabilities is still unclear. How to establish a prosecution mechanism of civil liabilities of debtor's senior managers in line with the purposes of the bankruptcy regime is a substantial issue during the implementation of Enterprise Bankruptcy Law. The realization of the civil liabilities regime of debtor's senior managers depends on the establishment and operation of a relatively well-developed prosecution mechanism of civil liabilities. The focus of the prosecution mechanism of civil liabilities is to determine the subject of prosecution of civil liabilities, the way to realize civil liabilities, and the special hearing proceedings and authorities of the court. Taking steps to clarify and improve the prosecution mechanism of civil liabilities focusing on the subjects of prosecution (debtor's senior managers) and authorities of the court, is the essence and systematic safeguard of realizing the civil liabilities regime of debtor's senior managers in the Enterprise Bankruptcy Law.

Keywords debtor's senior manager, prosecution mechanism of civil liabilities in bankruptcy, trustee in bankruptcy, court authority for verification of civil liabilities

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摘要 《企业破产法》设计了债务人高管人员承担民事责任的制度，但有关责任追究机构的框架设计尚不甚清晰。如何建立一个符合破产制度目的的债务人高管人员民事责任追究机制，是《企业破产法》在实施过程中所面临的一个现实问题。破产债务人高管人员的民事责任制度的实现有赖于一个较为完善的民事责任追究机制的确立和运行。民事责任追究机制的中心是确定民事责任的追究主体和实现方式以及法院的特殊审理程序与职权。逐步明确和完善以债务人高管人员民事责任追究主体和法院职权为核心的责任追究机制，是实现《企业破产法》所设计的债务人高管人员的民事责任制度的核心与制度保障。

关键词 债务人高管人员，破产民事责任追究机制，破产管理人，法院民事责任核定权

The Enterprise Bankruptcy Law (called the "Law") promulgated on August 27, 2006 by China has designed the regime for debtor's senior managers to bear civil liabilities, while the framework design concerning the prosecution mechanism of liabilities is still vague. How to establish a prosecution mechanism of civil liabilities of debtor's senior managers in line with the purposes of the bankruptcy regime is a real issue confronted during the implementation of Enterprise Bankruptcy Law.

The civil liabilities regime of bankruptcy under the Enterprise Bankruptcy Law consists of three parts, namely, the civil liabilities regime of directors, supervisors and senior managers of the insolvent enterprise (hereinafter referred to as the "debtor"), the civil liabilities regime of the directly responsible persons including debtor's legal representative, and the civil liabilities regime of trustees in bankruptcy (hereinafter referred to as the administrator).[1] The civil liabilities regime composed of the above-mentioned three parts may be interpreted as the broad-sense civil liabilities regime of bankruptcy, while the civil liabilities system consisting of Article 125 and Article 128 of the Enterprise Bankruptcy Law may be interpreted as the narrow-sense civil liabilities regime of bankruptcy. (Fu, 2007) This paper will discuss the prosecution mechanism of civil liabilities of directors, supervisors, senior managers, legal representatives and other directly responsible

[1] Article 125 of the Enterprise Bankruptcy Law provides: "A director, supervisor or senior officer who violates his duty of loyalty and duty of due diligence and thus leads to enterprise bankruptcy shall be subject to civil liabilities according to law." Article 128 provides: "Where a debtor has any act as prescribed in Articles 31, 32 or 33 to be detrimental to the interest of its creditors, the legal representative of the debtor and any other directly responsible persons shall be subject to the liabilities for compensation of damages according to law." Article 130 provides: "Where a trustee in bankruptcy fails to perform its functions and duties in due diligence or in loyalty according to the provisions of the Law, the People's court may impose upon it penalties according to law; and where any loss is incurred to a creditor, the debtor or a third party, the trustee in bankruptcy shall be subject to the liabilities for compensation of damages according to law."

persons (collectively referred to as the "debtor's senior managers") of insolvent enterprises in view of the narrow-sense civil liabilities regime of bankruptcy.

1 Civil liabilities regime in the Enterprise Bankruptcy Law

Enterprise senior managers are the broad-sense entrepreneurs and entrepreneur spirits are deemed as one of the important factors in promoting the economic prosperity of a country. (Samuelson, Nordhaus, 2004) However, to impose legal liabilities on enterprise senior managers is currently a common sense of market economies. Under the circumstance of separation of ownership and operation and management rights, in order to protect the interest of shareholders and creditors, laws provide that enterprise senior managers shall undertake the duty of loyalty and the duty of care, which is the balance of social interests and the saving of social cost. (Cao, 2005) Breach of the duty of loyalty or care that leads to bankruptcy of an enterprise is the biggest infringement of its senior managers on its shareholders, creditors and other stakeholders, for which its senior managers shall bear corresponding liabilities for liquidated damages.

The civil liability of debtor's senior managers in the Enterprise Bankruptcy Law is an individual civil liability, which is the consequence of debtor's senior managers' individual tort actions before the enterprise's bankruptcy. The purpose of the prosecution system of civil liabilities of debtor's senior managers by the Enterprise Bankruptcy Law is to increase debtor's estate as much as possible and protect creditors' interests, which also conforms to the idea of social justice. (Ichiro, 2005) In China, the prosecution of the civil liabilities on the part of debtor's senior managers is characteristic of Chinese national conditions, which is designated to prevent and curb malicious abuse of bankruptcy proceedings. Considering Chinese national circumstances, the Enterprise Bankruptcy Law provides for the civil liabilities of debtor's senior managers, which is of far-reaching significance in effectively protecting the interests of investors and creditors and preventing the loss of state-owned assets. Meanwhile, in close relationship with company law, the Enterprise Bankruptcy Law has the "bankruptcy legal rules of inhibitory effects", which will bring forth certain effects on promoting the establishment of modern enterprise system and the perfection of corporate governance structure.

2 Prosecution mechanism of civil liabilities of debtor's senior managers

As mentioned above, with expectation of fully protecting creditors' interests and

promoting appropriate corporate governance, legislators have designed the civil liabilities regime of senior managers of insolvent enterprises in the Enterprise Bankruptcy Law. Nevertheless, with respect to the prosecution mechanism of civil liabilities of insolvent enterprises, the Enterprise Bankruptcy Law fails to arrange a clear framework. There will be no way to implement the civil liabilities regime established in Article 125 and Article 128 of the Enterprise Bankruptcy Law since such regime only stays at a declaratory level, which will certainly impair the realization of the legislative purposes of "fairly liquidating credits and debts, protecting the lawful rights and interests of creditors and the debtor and maintaining the socialist market economic order" as prescribed by the Law.

An effective prosecution mechanism of civil liabilities shall cover the following core contents: Firstly, there shall be clear subjects under the prosecution of civil liabilities. The Enterprise Bankruptcy Law provides three bankruptcy procedures, namely bankruptcy liquidation procedures, reorganize-ation procedures and composition procedures. In such bankruptcy procedures, there are correspondingly three or four subjects such as trustees in bankruptcy, creditors' meeting, debtor and debtor's shareholders. Granting or accepting the qualification or right of any subject of them to prosecute the civil liabilities of debtor's senior managers is the core to establish the prosecution mechanism of civil liabilities of debtor's senior managers. Secondly, courts shall be granted with certain authorities to prosecute the civil liabilities of the senior managers of insolvent enterprises.[2] Thirdly, the Enterprise Bankruptcy Law shall adopt corresponding regulations of substantive law to determine the civil liabilities of debtor's senior managers.[3] (Han, 2003)

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[2] For instance, Section 105 of United States Bankruptcy Code provides: "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."

[3] Han Changyin holds that: "To establish a perfect personal liability system of an operator to enterprise bankruptcy may involve many legal issues, such as, is the choice of legislative modes made uniformly in bankruptcy law or dispersed among the laws of enterprise or companies or the criminal law? Whether personal liabilities shall adopt the disqualification and property liability or the criminal liability as the normal form of liabilities? How to determine the fault of the act of an operator, by direct proof or assumption of fault? Whether is it necessary to determine a subject to be specifically responsible for filing the prosecution procedures in practice or shall the court directly implement the prosecution of the personal liabilities of an operator by functions, or shall of double track system of both be adopted? Which judges in the court are responsible for the hearing of a case of personal liabilities on the operator, shall the civil judge hearing the bankruptcy case jointly rule on an operator's civil and criminal liabilities, or shall the criminal liabilities of an operator be handed over to a criminal judge, or shall a special bankruptcy court and bankruptcy judges be set up to hear all the possible liabilities of an operator together? All those issues need to be answered at the level of combining the theory and the operation of practice." See Han Changyin (2003).

In view of the contents of civil liabilities in Article 125 and Article 128 of the Enterprise Bankruptcy Law, the two articles are apparently different with respect to the nature of liabilities and legal basis, and thus the prosecution mechanisms therein shall be discussed separately.

2.1 Prosecution mechanism of civil liabilities of legal representatives in Article 128 of the Enterprise Bankruptcy Law

Civil liabilities in Article 128 of the Enterprise Bankruptcy Law is typical civil liabilities in bankruptcy law, which is set up on the basis of the jurisprudence of the cancellation right system in bankruptcy law and is the necessary result from exercise of cancellation rights, whose fundamental purpose is the restitution of debtor's property. The acts of the objects subject to the exercise of the cancellation right are the fraudulent and prejudiced acts occurred in the statutory period prescribed in bankruptcy law, which are originally intended for the benefits of one or some specific third persons. If a third person has not benefited from the above-mentioned acts, there is no cancellation right of bankruptcy (Han, 2007), and no civil liabilities will occur as specified in Article 128 of the Enterprise Bankruptcy Law.

Bankruptcy frauds have always been the objects severely struck by bankruptcy laws of nations. The Enterprise Bankruptcy Law of China establishes a more perfected system of cancellation rights and void acts than the previous legislations. Article 31 of the Law provides: "Within one year before the People's Court accepts the application for bankruptcy, the administrator is entitled to request the People's Court to rescind the following activities taken by the debtor concerning debtor's property and property rights: (1) Transferring property or property rights free of charge; (2) trading property at obviously unreasonable low prices; (3) providing property security for the debts that originally have no property security; (4) paying off in advance the debt undue; or (5) giving up credits." Article 32 of the Law provides: "Within six months before the People's Court accepts the application for bankruptcy and in any of the circumstances set forth in paragraph 1 of Article 2 of this Law, where the debtor still pays off debts to specific creditors, the administrator is entitled to request the People's Court to rescind the repayment unless the specific repayment benefits debtor's property." Article 33 of the Law provides: "Any of the following activities taken by the debtor concerning the property and property rights of the debtor shall be invalid whenever they occur: (1) Concealing or transferring property for avoidance of debts; or (2) fabricating debts or recognizing unreal debts." In accordance with such three articles of the Enterprise Bankruptcy Law, when exercising the cancellation rights, the administrator is entitled to recover debtor's property which will be attributed to

debtor's estate so as to correct debtor's fraudulent transfer and prejudiced liquidation,[4] hence realizing fair protection of the interests of the entire creditors.

Article 128 of the Enterprise Bankruptcy Law provides that if the debtor conducts any of the acts specified in Articles 31, 32 and 33 therein to the detriment of creditors' interests, debtor's legal representative and other directly responsible persons shall bear the liabilities for compensation by force of law. Such liabilities for compensation are indemnities, where the existence of damage is one of the elements of civil liabilities, the result of undertaking liabilities is the compensation of damages, and the scope of compensation is limited to the unrecoverable loss of property. (Fu, 2007) The premise for the legal representative and other directly responsible persons of the debtor to bear the liabilities of compensation is as follows: Firstly, there are acts of prejudiced transfer or fraudulent transfer in the statutory period prescribed by bankruptcy law in violation of the bankruptcy law; secondly, the administrator has revoked such acts by way of litigation,[5] hence determining the scope of indemnity liabilities to be borne by the legal representative and other directly responsible persons of the debtor.

The exercise of cancellation right is the precondition for determining and prosecuting the compensation liabilities of the legal representative and other directly responsible persons of the debtor, and thus, the clarification of the subjects to exercise the cancellation right naturally becomes the precondition for prosecution of the compensation liabilities of the legal representative and other directly responsible persons of the debtor. The main clauses of the Enterprise Bankruptcy Law relating to the cancellation rights clearly authorize the administrator to exercise the cancellation right. However, the exercise of the cancellation right does not automatically constitute the prosecution of the compensation liabilities of the legal representative and other directly responsible persons of the insolvent enterprise. For the administrator, the exercise of the cancellation rights is only a right of claim to the court, the administrator may not directly exercise the cancellation right, and in order to exercise the cancellation right, an action shall be filed with the court. (Shi, 2005) In the action of cancellation rights, the debtor is not the defendant, and only the opposing party or the transferee of prejudiced liquidation or

[4] The United States Bankruptcy Code summaries the above-mentioned acts as prejudiced liquidation and fraudulent transfers. Refer to Sections 547 and 548 of the United States Bankruptcy Code.

[5] In accordance with the provisions of Articles 31 and 32 of Chinese Enterprise Bankruptcy Law, the trustee in bankruptcy may only exercise the right of cancellation through the People's court, hence excluding the possibility of exercising the right of cancellation by the trustee in bankruptcy through settlement and other non-action way.

fraudulent transfer can act as defendant of the action. (Ishikawa, 2000) The legal representative and other directly responsible persons of the debtor who bear individual liabilities may not become the defendant of the proceedings either. To prosecute the compensation liability of the legal representative and other directly responsible persons of the debtor, the subjects of rights can only file a separate action based on the results of the action of cancellation rights.

The cancellation right in bankruptcy law and that in contract law have systematic differences even though they are of the same jurisprudence. As a preservation system of debts, the cancellation right system in contract is to preserve credit rights rather than guarantee the realization of credit rights. (Ma, 2005) The cancellation right system in bankruptcy law is to increase the debtor's estate, so as to help maintain creditors' interests. (Epstein, Nickles, White, 2003) The legal representative and other directly responsible persons of the debtor bear the liabilities of indemnity for the unrecoverable property loss to creditors and the debtor, and the scope of such indemnity liabilities may be determined upon judgment made in favor of the action of cancellation rights. If the administrator files a separate civil action against the legal representative and other directly responsible persons of the debtor, as far as economical effects and efficiency of the bankruptcy proceedings are concerned, only the cost of the bankruptcy proceedings will be increased, hence making the bankruptcy proceedings more complicated, which is not only a waste of the debtor estate but also a passive protection of the interests of creditors. If the court is authorized to verify the right of civil liabilities, the administrator may require the court to verify the indemnity liability to be borne by the legal representative and other directly responsible persons of the insolvent enterprise for the unrecoverable property loss to creditors simply based on the effective judgment of the lawsuit of cancellation rights. Nonetheless, the Enterprise Bankruptcy Law has not granted such verification rights to the court.[6]

The core of the prosecution mechanism of civil liabilities in Article 128 of the Enterprise Bankruptcy Law shall be as follows: While clearly granting the can- cellation rights to the administrator, the Enterprise Bankruptcy Law shall conditionally recognize the cancellation rights of the creditors' meeting and the

[6] The section "Liability prosecution of a legal person's senior managers" in Japanese bankruptcy law authorizes the court to assess the civil liabilities of the senior officer debtor's senior managers.

debtor (Blum, 2004),[7] and simultaneously authorize the court to verify the compensation liabilities of the legal representative and other directly responsible persons of the debtor based on the effective judgment of the lawsuit of cancellation rights.[8] Accordingly, the legal representative and other directly responsible persons of the debtor shall also have the corresponding rights of appeal.

2.2 Prosecution mechanism of civil liabilities of senior managers in Article 125 of the Enterprise Bankruptcy Law

The civil liabilities of debtor's senior managers specified in Article 125 of the Enterprise Bankruptcy Law are not the same as those specified in Article 128. They are typical civil liabilities in company law, completely relying on the relevant substantive provisions in company law. Company law is mainly substantive law while bankruptcy law is procedural law. (Jiang, 2005) Bankruptcy law prosecutes the civil liabilities of debtor's senior managers in accordance with provisions of company law, which is a co-ordination between bankruptcy law and company law as well as a supplement to the protection mechanism of creditor interests that is lacked in company law. In the strict sense, the protection of creditor interest in Chinese company law fails to be directly connected with the legal liabilities of senior managers, which is relatively caused by the entire awareness of legislators. Nonetheless, that does not prevent bankruptcy law from utilizing directors' obligation in company law to maximize creditor interests in view of maintaining the safety of the debtor estate. Without

[7] If the trustee in bankruptcy fails to exercise the right of cancellation, whether may the creditors' meeting replace the trustee in bankruptcy to exercise the right of cancellation? Or whether shall the trustee in bankruptcy required to exercise the right of cancellation only by the way of supervision? This is not only an issue of theory but also a practical problem confronted after the implementation of the Enterprise Bankruptcy Law. However, in view of the contents of the provision of Article 61 concerning the functions of the creditors' meeting of the bankruptcy law, the creditors' meeting has only the right to supervise the trustee in bankruptcy. Obviously, the Enterprise Bankruptcy Law does not authorize the creditors' meeting to exercise the right of cancellation. But in the reorganization procedures, a debtor, with the approval of the court, may manage its property and business affairs and exercise the functions of the trustee in bankruptcy at its own discretion. Consequently, in the reorganization procedures, a debtor shall also have the right to exercise the right of cancellation. From US legislation and judicial practices, both the trustee in bankruptcy and the business debtor are entitled to exercise the right of cancellation while neither an individual creditor nor the creditors' meeting is entitled to exercise the right of cancellation.

[8] The bankruptcy proceedings are different from ordinary civil proceedings, where the bankruptcy law itself may grant the court with some special rights. For example, Article 87 of the Enterprise Bankruptcy Law authorizes the court to compulsorily approve the reorganization plan of an insolvent enterprise.

the relevant provisions of company law, the identification of the civil liabilities in Article 125 of the Enterprise Bankruptcy Law will lose legal basis, and not only there is no way to prove the provisions on the causal relationship between the "violation of the duty of loyalty and the duty of care and the resulting insolvency of the employing enterprise", but also debtor's senior managers may not be requested to bear the relevant civil liabilities automatically.

Chinese company law has made a great progress by revision and amendment in 2005 and relatively perfected the civil liabilities system of directors, supervisors and senior managers. Article 148 of the Company Law provides: "Directors, supervisors and senior managers shall abide by laws, administrative regulations and the articles of association of the company and shall be subject to the duty of loyalty and the duty of care to the company." Article 150 of the same law provides: If a director, supervisor or senior manager has violated laws, administrative regulations or the articles of association of the company in performing his duties, which has caused losses to the company, he shall be liable for liquidated damages thereof. The above-mentioned provisions constitute the legal basis of Article 125 of the Enterprise Bankruptcy Law. Considering the present situation of corporate governance in China, legislators have naturally transplanted Article 125 in the Enterprise Bankruptcy Law. Nevertheless, the Company Law has no specific provisions in such respects as causes for exemption and scope of civil liabilities[9] of directors (Chihiro, 2004), supervisors and other senior managers, joint and several liabilities among senior managers[10] and principles of attribution

[9] Directors, supervisors and senior managers of enterprises often face the risk of shareholder derivative actions claiming for a huge amount of liquidated damages, and once such damages are recognized by the court, they will lose all their properties, which seems too cruel to them. Under the pressure of economic industry, the Commercial Code of Japan as revised in 2001, gave conditional restrictions on the amount of liquidated damage arising out of the violation or breach by the representative director and ordinary directors of statutes or the articles of association, with the maximum compensation limited to 6 times the remuneration of the representative director from the company, 4 times the remuneration of an ordinary director and 3 times the remuneration of an independent director. See Chihiro Nunoi (2004); and Yamaguchi Sachiyo (2003).

[10] In accordance with Articles 54, 55 and 119 of the Company Law, the board of supervisors and supervisors of the company without board of supervisors is obliged to supervise the acts of the directors and senior managers in executing corporate functions, make proposals on dismissing the directors and senior managers who violate laws, administrative regulations, articles of association or resolutions of the shareholders' meeting or the general meeting of shareholders and correct the acts of the directors and senior managers of damaging the corporate interests. Consequently, when the directors and senior managers have violated the duties of loyalty and care with damaged to the company, if the supervisors fail to perform the obligation of supervision, they shall bear the joint and several liabilities to the company. Similarly, if contra interpretation of Article 113 of the Company Law is made, if the resolution of the board of directors goes against laws, administrative regulations, articles of association or

of liabilities[11] (Gan, 2006), which has brought forth various difficulties for derivative actions and shareholder actions in the Company Law. The insufficiency of company law may also result in lack of clear specific legal support and guidance to the prosecution of civil liabilities specified in Article 125 of the Enterprise Bankruptcy Law. How bankruptcy law adopts the relevant provisions of company law as the basis to establish the legal ground of civil liabilities of debtor's senior managers is the foundation to build the civil law liability and its prosecution mechanism of the senior managers of the debtor enterprise as well as an important subject in perfecting the bankruptcy law in the future.

A well-developed prosecution mechanism of civil liabilities is the guarantee for realizing the civil liabilities system. The Company Law has preliminarily formed the compensation system for loss, including shareholder action and corporate action focused on shareholder's derivative action in an effort to provide the compensation for loss in corporate governance with judicial protection. The enterprise bankruptcy law shall also establish the prosecution system of civil liabilities of debtor's senior managers with administrator[12] actions as the core, and creditor actions, debtor action and admission of debtor's shareholder actions as supplement. While providing for the authorities of the trustee in bankruptcy and the creditors' meeting, the enterprise bankruptcy law has not cover the

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the resolution of the general meeting of shareholders, which causes the company to suffer severe loss, all the directors who support the resolution shall bear joint and several liabilities to the company. The purpose of such joint and several liability systems are to determine the subjects of liabilities and distribution of liabilities so as to avoid the situation where the competent person dodges liabilities while the incompetent person has to bear liabilities. However, the Company Law has not provided for such joint and several liabilities.

[11] Chinese Company Law does not specifically provide for the negligence principle of civil liabilities of the senior managers of the enterprise. Thus, we may only interpret the imputation principle of senior managers' liability prosecution within the framework of the company law as the principle of "fault assumption" according to the principle of tort in civil law. See Gan Peizhong (2006). The same is true for Japan, before the company law becomes independent from the commercial law in 2005, though the commercial law has been revised many times, there were no specific provisions on the principle of rules on the liabilities of enterprise senior managers except for theoretical and judicial interpretations thereof. The Company Law 2005 firstly provides for the principle of fault liabilities. See Makiko Shigeta (2006).

[12] Chinese Enterprise Bankruptcy Law does not specifically provide for the position of the trustee in bankruptcy. The bankruptcy laws of major countries have no similarly specific provisions either, except that indirect provisions have been made on the authorities of the trustees in bankruptcy. For instance, the Japanese insolvency law has given more than twenty articles on granting the trustees in bankruptcy with broad rights, including the authority to prosecute the civil liabilities of the directors, supervisors and senior managers of the insolvent enterprise. In the theory of bankruptcy law, there are various doctrines, such as the doctrine of position, the doctrine of agency of the debtor, the doctrine of the agency of directors, the doctrine of agency of the estate, the doctrine of receiver institution and the doctrine of bankrupt trustee. See Li Yongjun (2000). There are also similar doctrines in Japan, see Soda Chikahiko (2005).

prosecution of civil liabilities of debtor's senior managers. Furthermore, though the bankruptcy law also provides that the debtor in reorganization procedures may exercise the authorities of the trustee in bankruptcy, there is no provision on whether the debtor has the right to prosecute the civil liabilities of debtor's senior managers (Zou, 2007),[13] not to mention the rights of debtor's shareholders. Thus, it may be said that the bankruptcy law lacks a prosecution mechanism of civil liabilities specified in Article 125.

There is a trend of over expectation of the administrators in the academic circle, expecting to entrust the great mission of prosecution of civil liabilities of debtor's senior managers completely to the trustee in bankruptcy.[14] The bankruptcy law shall respectively consider positions and roles of the trustee in bankruptcy, the debtor and the creditors' meeting in different procedures on the premise of differentiating bankruptcy liquidation procedure, reorganization procedure and composition procedure,[15] and grant subject qualifications to the debtor, debtor's shareholders and the creditors' meeting for prosecution of the civil liabilities of debtor's senior managers on the premise of clarifying the authorities of the trustee in bankruptcy, hence building a clear liability prosecution mechanism centering on the administrator and supplemented by other subjects.

In the bankruptcy liquidation procedures, creditors replace debtor's shareholders, and the debtor's estate is no longer the property of debtor's shareholders but that of the creditors. (Zhang, 2003) As the representative of the collective interests of the creditors, the important functions of the administrator is to maximally restore the debtor's estate so as to help the creditors acquire maximum distribution. (Blum, 2004) Hence, the prosecution of the civil liabilities of debtor's senior managers is one of the necessary functions of the trustee in bankruptcy. In this aspect, the US courts have provided many useful

[13] Zou Hailin holds that the provisions in Article 73 of the Enterprise Bankruptcy Law weaken the position of the trustee in bankruptcy, "which, in fact, negates the centrism of the administrator."

[14] Prof. Li Shuguang holds that in the bankruptcy proceedings, it is the administrator that prosecutes the civil compensation liability while the creditors have no right to file a suit directly but only the right to propose for the trustee in bankruptcy to file the suit. See Li Shuguang (2006).

[15] According to the provisions of Articles 100 and 98 of the Enterprise Bankruptcy Law, in the composition procedures, once a composition agreement has been passed by the creditors' meeting and recognized by the court, it will become binding upon both the debtor and all the creditors, and at such time, the functions of the trustee in bankruptcy will end. If the composition agreement has not provided for the prosecution of the civil liabilities of the directors, supervisors and senior managers of the insolvent enterprise, Article 125 of the Enterprise Bankruptcy Law will not apply, and if corresponding provisions have been made and an arrangement has been made with the subjects to prosecute for the liabilities, such arrangement shall be realized.

precedents for the world. For instance, in Irving Trust Co. v. Deutsch, the plaintiff, as administrator of the insolvent company Acoustic Product, filed a lawsuit with court against the directors of the company and requested the court to rule that the defendant had usurped the corporate commercial opportunity and required the defendant to return the profits thereof. The courts of first and second instances supported the claim of the plaintiff. (Miao, 2007) This is a typical precedent where a corporate director has breached the duty of loyalty. Likewise, in the aspect of the trustee in bankruptcy prosecuting the compensation liability against the director of the insolvent enterprise for violation of the duty of care, Francis v. United Jersey Bank (Miao, 2007) is of more value of reference. In the hearing practice of Japanese bankruptcy case, as prescribed by the Japanese bankruptcy law amended in 2004, the right for prosecuting the civil liabilities of directors, supervisors and senior managers of the insolvent enterprise is exclusively granted to the trustee in bankruptcy.[16] However, the controversy has not become silent consequently over the derivative suits to be filed by the shareholders in the bankruptcy liquidation procedures.[17] (Ito, 2001) (Nakajima, 2001) The right for prosecuting the civil liabilities of debtor's senior managers in the bankruptcy liquidation procedures in the US and Japan has been granted to the administrator rather than the creditors' meeting or the debtor probably because they have high quality lawyer teams.

In the reorganization procedures, besides the administrator, debtor's shareholders have also the right to prosecute the civil liabilities of senior managers as specified in Article 125 of the Enterprise Bankruptcy Law. Debtor's estate is the aggregation of the interests of the creditors and the debtor, and the creditors and the debtors respectively acquire a kind of relatively balanced interest through the reorganization plan. This is a balance between the interest distribution among creditors and relief of financial burden for the debtor, an ideal condition pursued by bankruptcy law. (Blum, 2004) In fact, the interests of the debtor are in essence embodied as the interests of debtor's shareholders. So long as it has not been or cannot be proved that the debtor "is insolvent", the interests of the shareholders exist. (Epstein, Nickles, White, 2003) For the purpose of seeking for control of the debtor or looking into the reason for having the enterprise involved in a bankruptcy state, debtor's shareholders may file a

[16] Japanese Insolvency Law is the law of bankruptcy liquidation for enterprises, excluding the proceedings related to enterprise reorganization that are provided for in other laws, such as the Corporate Rehabilitation Law (only applied to joint stock companies) and the Civil Regeneration Law.

[17] There are both positive and negative doctrines. The negative doctrine holds that the shareholders no longer have the right to file derivative actions. See Ito Makoto (2001), 268. The positive doctrine holds that the shareholders have the right to keep filing derivative actions. See Nakajima Hiromasa (2001), 107.

derivative suit to prosecute the civil liabilities of senior managers for causing the bankruptcy of the enterprise by breach of the duty of loyalty and the duty of care during the reorganization procedures. Nevertheless, the Chinese bankruptcy law lacks a similar provision on the shareholders committee of the United States Bankruptcy Code[18] (Li, 2006) and does not leave any space for the play of debtor's shareholders. Hence, the rights of the shareholders are omitted. To file a derivative suit is one of the important rights of the shareholders, which also exists in the reorganization procedures. The rights of the shareholders, if still existing, are the rights of the shareholders forever, which may be restricted but cannot be deprived of. Now that Article 125 of the Enterprise Bankruptcy Law provides for the causal relationship between the breach of the duty of loyalty and the duty of care by the senior managers that leads to the bankruptcy of the enterprise and the civil liabilities to be borne by its senior managers, debtor's shareholders have the right to file a derivative suit to prosecute the civil liabilities of the senior managers.

The debtor and the creditors' meeting are also qualified to prosecute the civil liabilities of the senior managers. In accordance with Article 73 of the bankruptcy law, the debtor may exercise the functions of the administrator. In this regard, if expansive interpretation is adopted, the debtor has also the right to prosecute the civil liabilities of the (former) senior managers during the reorganization period. Since the administrator statutorily exists in the reorganization procedures, when the administrator fails or refuses to perform his/her duties, the right of the debtor and the creditors' meeting to prosecute civil liabilities of the former or present senior managers shall be admitted so as to form real supervision on the performance of the functions by the administrator in the operation mechanism of liability prosecution.

As in the reorganization procedures, the administrator, the debtor, debtor's shareholders and the creditors' meeting in the composition procedures shall have the right to prosecute the civil liabilities of the senior managers according to Article 125 of the Enterprise Bankruptcy Law. Such prosecution mechanism may be affected by the composition agreement.[19] Once the composition agreement is passed by the creditors' meeting and recognized by ruling of the court, the composition procedures will end. Unless the composition agreement specifically provides that the civil liabilities of the senior managers shall be prosecuted, the civil liabilities of senior managers shall be exempted by legal acts after the composition agreement takes effect.

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[18] Section 1102 of United States Bankruptcy Code, and see Li Fei (2006), 637.

[19] Article 99 of the Enterprise Bankruptcy Law provides that where the draft composition agreement is not passed at the creditors' meeting, or the draft composition agreement passed at the creditors' meeting has not passed the recognition of the People's Court, the People's Court shall decide to terminate the composition procedures and declare the debtor bankrupt.

Civil liabilities are of dual nature of enforceability and arbitrariness. The arbitrariness of civil liabilities indicates that the victims might not prosecute the liability of a responsible person. In the bankruptcy proceedings, if neither the administrator, the creditors' meeting, the debtor, nor debtor's shareholders have filed an action of civil liabilities against debtor's senior managers, the civil liabilities of debtor's senior managers will not be prosecuted. Article 125 of the Enterprise Bankruptcy Law provides that where directors, supervisors and senior managers are in breach of their duties of loyalty and duties of care leading to the bankruptcy of the enterprise, civil liabilities shall be borne by them according to law. "Civil liabilities borne according to law" indicates that prosecuting the civil liabilities of debtor's senior managers is an obligation of certain prosecuting subject. Apparently, neither the creditors' meeting nor debtor's shareholders shall undertake such obligation, and only the administrator and the debtor shall bear such obligation. Furthermore, the administrator shall bear the principal obligation while the debtor shall undertake an ancillary obligation. Thus, establishing the liability prosecution mechanism centering on the administrator and supplemented by the debtor, debtor's shareholders and the creditors' meeting is the core to realize the civil liabilities system in Article 125.

With respect to the prosecution of the civil liabilities of the senior managers of the insolvent enterprise, both French bankruptcy law and Japanese bankruptcy law have relatively clear provisions. For reference, French bankruptcy law provides comparatively extensive subjects of prosecution while Japanese bankruptcy law provides a simple and economical trial and ruling mechanism.

3 Foreign legislations on civil liabilities against senior managers of insolvent enterprise

3.1 Related provisions of French bankruptcy law

The full title of French bankruptcy law is the Judicial Arrangement and Liquidation Law of Distressed Enterprises, incorporated into Book VI of the Commercial Code upon significant amendments in 2001, and revised both in 2003 and 2005. With respect to the liability and liability prosecution forms of the senior managers of insolvent enterprises, there are relatively clear provisions in Chapter IV of Book VI of the French Commercial Code "Provisions Specific to Legal Persons and their Directors". (Li, 2006)

Article L. 624–3 of Book VI of the French Commercial Code provides that: "Where it appears during the course of an administrative order or winding-up proceedings of a legal person that there are insufficient assets, the court may decide, if management errors have contributed to this lack of assets, that all or

some of the debts of the legal person shall be borne, with or without joint and several liability, by all or some of its paid or unpaid de jure or de facto directors." Such provision is similar to that in Article 125 of Chinese Enterprise Bankruptcy Law, which emphasizes all or part of the compensation liability to be jointly or not jointly borne by the leaders of the enterprise when the enterprise goes bankrupt due to their management faults, and such liabilities shall be decided by the court. If the leaders of the enterprise fail to performance such liabilities, "the court may institute an administrative order or winding-up proceedings against directors who were ordered but failed to pay all or some of the liabilities of a legal person" (Article L. 624–4).

The provision in Article L. 624–5 is equivalent to that in Article 128 of Chinese Enterprise Bankruptcy Law, basically including the circumstances specified in Articles 31, 32 and 33 of Chinese Enterprise Bankruptcy Law. Article L. 624–5 provides: "In the event of administrative order or winding-up proceedings of a legal person, the court may institute an administrative order or winding-up proceedings against any paid or unpaid de jure or de facto directors charged with any of the following circumstances." The statute of limitations is 3 years under both circumstances. Article 624–6 of Book VI of the French Commercial Code provides: "In the cases for which provision is made in Articles L. 624–3 to L. 624–4, the court shall act ex officio or shall be petitioned by the administrator, the creditors' representative, the commissioner responsible for executing the plan or the procureur de la République."

3.2 Related provisions of Japanese insolvency law

Japanese insolvency law regime consists of four basic laws, namely, Insolvency Law formulated in 1923 and amended in 2004, Company Rehabilitation Law formulated in 1952 and amended in 2004, Civil Regeneration Law formulated in 1999 and amended in 2004 and Business Law formulated in 1890 and amended in 2005, which are commonly referred to as the "Four Insolvency Laws". With Insolvency Law, Company Rehabilitation Law and Civil Regeneration Law as typical, the liability prosecution system of legal persons' managers is established separately in the relevant chapters.[20] Here is to give comments by taking the Insolvency Law as example.

When Japan revised the Insolvency Law in 2004, the liability prosecution system of legal persons' managers was added in Section 3 of Chapter 6

[20] The so-called administrator is called "yakuyin" in Japanese, a general term of the persons who have the right to do business or give supervision in the organ of the legal person, mainly referring to the legal person's directors and supervisors. See Dictionary of Law Terms, Yuuhikaku, 2nd edition, 2002.

(Insolvent Estate). Thus, the Insolvency Law was corresponding to the Company Rehabilitation Law and the Civil Regeneration Law, and all the three laws have established the liability prosecution system of legal person's managers. The main contents of Section 3 of Chapter 6 of Japanese Insolvency Law are as follows:[21]

Firstly, providing for the preservation measures for the property of the insolvent enterprise managers. Article 177 provides that after the commencement of the bankruptcy proceedings, if required, the court may decide to take preservation measures with the property of the managers of the insolvent enterprise with respect to the right to claim for the liquidated damage arising out of the liabilities of the managers by function or at the application of the trustee in bankruptcy. Even at the time of applying for bankruptcy, if the debtor or temporary receiver files the above-mentioned application for preservation of property, the court may also take preservation measures as required in emergency. As for the preservation measures adopted by the court, the parties involved may file an appeal.

Secondly, establishing the system for verification of the liabilities of managers. Article 178 of Japanese Insolvency Law provides that the court may carry out the assessed judgment with respect to the right to claim for the liquidated damage arising out of the liabilities of the managers by function or at the application of the trustee in bankruptcy. The so-called assessed judgment means that the court adopts the unilateral form of inquiry rather than adverse argument against debtor's managers in the oral or written form. According the results of the assessed judgment, the court may make the ruling of assessed judgment to determine the existence, amount and payment of liquidated damages.

Thirdly, providing for the controversy procedures to be adopted by the parties involved for the ruling of the assessed judgment. Article 180 provides that if the parties involved object to the ruling of the assessed judgment by the court, the trustee in bankruptcy or debtor's managers shall make an appeal against the counterpart as defendant within one month upon delivery of the "ruling of assessed judgment". For such appeal, the court accepting the case shall conduct trials through usual civil proceedings. Article 181 provides that for the "ruling of assessed judgment", if the parties involved fail to appeal within the statutory period or an appeal has been rebutted, the "ruling of assessed judgment" shall have the same effect as the effective judgment of order payment.

The core of the assessment system of the right to claim for the liquidated damage established by Japanese Insolvency Law is as follows: The assessed judgment on the compensation liabilities by the court is made in the form of unilateral oral or written inquiry rather than usual civil proceedings; such

[21] For details, see Li Fei (2006), 790–792.

assessed judgment may be based on either the request of the trustee in bankruptcy or the judgment of the court itself; the trustee in bankruptcy who applies for the assessed judgment is obliged to give reasons for the application and factual groundings to the court. The basic purpose of establishing the "assessment system of the right to claim for the liquidated damages" is to build a more concise, economical and efficient prosecution mechanism of liabilities beyond the usual civil procedure system so as to make easier the liability prosecution of insolvent enterprise managers than before. (Komatsu, 2004)

4 Conclusion

As said by Richard Posner, "Law is an activity rather than a concept or a group of concepts". (Posner, 2002) The Enterprise Bankruptcy Law was promulgated in the context of "wading across the stream by feeling the way". As far as civil liabilities of debtor's senior managers are concerned, a group of concepts has been provided, but the enforcement of these provisions relies on the judicial practices of Chinese courts of various levels. To specify and perfect by steps the subject of the prosecution of civil liabilities of debtor's senior managers and the liability prosecution mechanism focused on court functions in practices is an institutional safeguard for realizing the civil liabilities regime of the debtor enterprise senior managers in bankruptcy law. In the practice of bankruptcy law in the future, if there appear vague subjects of liability prosecution, or a dramatic increase of actions, or the excessive cost of suits, or an excessively long time of suit, China may consider learning from the liability prosecution regime of legal persons' senior managers in French bankruptcy law and Japanese insolvency law to build the "liability prosecution system of debtor's senior managers" through judicial interpretation, administrative regulations and other forms, such as (1) to establish the central position of the administrator in the liability prosecution mechanism of debtor's senior managers and to take the prosecution of the civil liabilities of debtor's senior managers as one of the important functions to be performed by the administrator; (2) in the circumstance of no concurrence with the administrator, to admit that debtor's shareholders shall still have, in the bankruptcy proceedings, the right to prosecute the civil liabilities of debtor's senior managers by derivative actions; (3) on the premise of failure or refusal by the administrator to prosecute the civil liabilities of debtor's senior managers, to admit that the creditors' meeting and the debtor have the right to prosecute the civil liabilities of debtor's senior managers; (4) to establish the assessed judgment proceedings for prosecuting the civil liabilities of debtor's senior managers and grant the court corresponding assessment right; and (5) to provide for the appeal procedure for the ruling of the assessed judgment. In terms of

procedural law, while relying on civil procedure law, bankruptcy law is also independent of civil procedure law, and an efficient bankruptcy law procedure shall be built by use of civil proceedings.

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