

# **Personal insolvency in China: necessities, difficulties and possibilities**

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*Abstract: There has long been demand for personal insolvency laws in China, yet such laws have hitherto been unavailable, in part due to ideological resistance. In more recent years there has been a growth in borrowing by individuals and this has led to increased calls for honest but unfortunate debtors to be able to obtain a fresh start. Yet there is significant public mistrust of defaulting debtors and in particular there is a shadow cast by those termed the Lao Lai that has led many to question the desirability of such a reform. There has also been a need for progress to be made in the development of an infrastructure to support a personal insolvency system, such as a social security, property registration and credit information systems, and although progress has been made in these regards there is still a need for further development. However, there has been case law progress in one province enabling collective resolutions of claims against insolvent debtors and more recently the Covid-19 pandemic has accelerated progress towards the enactment of personal insolvency laws on a local level in Shenzhen. This article considers the need for personal insolvency laws in China, identifies the obstacles that have hitherto stood in the way of such laws and discusses the momentum which has been recently gained towards the enactment of personal insolvency laws.*

## **I. INTRODUCTION**

Significant attention has been drawn in recent years and particularly in recent months to the unavailability of personal insolvency procedures in China and need for reform in this area. Partly this increase in interest has been attracted by a sharp rise in individual indebtedness given the expansion of individual borrowing, through investments in real estate and borrowing via credit cards and lending apps. However, momentum has also come from the liabilities of individuals

in the business sector, as guarantee liabilities are a common problem, together with other potential liabilities for directors and shareholders of failed enterprises. Demand may intensify soon as lost incomes as a result of the COVID-19 pandemic may make present debt levels for some unsustainable.<sup>1</sup>

The introduction of personal insolvency laws has hitherto been resisted in view of ideology, mistrust of debtors, fears regarding the impact on lenders and the potential for abuse by the dishonest in view of weak property information and credit information systems. However significant progress has been made in building an infrastructure to support a personal insolvency system and most recently there has been notable progress towards the establishment of such a system in leading commercial regions, building on approaches and expertise gained from corporate insolvencies. Most notably in Shenzhen there has been the announcement of the first personal insolvency local legislation in China, which is due to come into force on 1 March 2021.<sup>2</sup>

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<sup>1</sup> Logan Wright & Allen Feng, *COVID19 and China's Household Debt Dilemma*, RHODIUM GROUP (May 12, 2020), <https://rhg.com/research/china-household-debt/>. China focused COVID-19 financial support on the business sector and support to workers was lower than in the UK and US, perhaps reflecting the greater levels of savings in China that could be used by workers to weather the impact: FT Editorial Board, *Learning from China's Unequal Recovery*, FINANCIAL TIMES (Aug. 23, 2020), <https://www.ft.com/content/2e6eff69-e9fc-4a89-8491-945456cf206c>. The greatest financial impact appears to have been on those with lower incomes: Sun Yu & Yuan Yang, *Why China's Economic Recovery from Coronavirus Is Widening the Wealth Gap*, FINANCIAL TIMES (Aug. 18, 2020), <https://www.ft.com/content/e0e2940a-17cb-40ed-8d27-3722c9349a5d>.

<sup>2</sup> Shēnzhèn Jīngjì Tèqū Gèrén Pòchǎn Tiáolì (深圳经济特区个人破产条例)[Shenzhen Special Economic Zone Personal Bankruptcy Regulations] (promulgated by the Standing Committee of the Shenzhen Municipal People's Congress, Aug. 26, 2020, due to become effective March 21, 2021) [hereinafter, the "Shenzhen Regulations"].

However, the enactment of a personal insolvency law nationally will not be straightforward in a society where credit plays a significant part in social capital and many still hold a view of bankruptcy as a vehicle for feckless shirkers to escape their debts. It is these views that are likely to be the biggest obstacle to enactment of such a law on a national level.

## II. Changing societies and ideologies

It is well known that personal insolvency laws have not historically been regarded as necessary in China, for reasons that the debts of a father would be passed on to the son and even to other family members and generations.<sup>3</sup> Culture can shift as societies change,<sup>4</sup> however, as seen in the case of the corporate insolvency laws in China. Corporate insolvency was regarded as ideologically inconsistent with the planned economy, and such laws were only introduced on a

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<sup>3</sup> Paula Aronowitz, *Chinese Succession Law: An Historical Survey*, 2 PORTIA L. J. 265, 282 (1967). This factor is noted as contributing to resistance to a personal bankruptcy system in Fu Yifu, *Gèrén pòchǎn zhìdù bùshì “lǎo lài” men de chūntiān* (付一夫：个人破产制度不是“老赖”们的春天) [The Personal Bankruptcy System Is Not the Spring of “Lao Lai”], SINA FINANCE (Oct. 25, 2019) (China), <http://finance.sina.com.cn/zt/china/2019-10-25/zt-iicezuev4778877.shtml>.

<sup>4</sup> The requirement for a son to inherit the debts of the father was subsequently limited to the amount of the inheritance: Paula Aronowitz, *supra* note 3, at 284-285.

trial basis in 1986<sup>5</sup> in relation to state owned enterprises<sup>6</sup> to support the development of the emerging socialist market economy. Due to the narrow scope of the 1986 law's application, including its inapplicability to private companies, and level of state involvement, which gave rise to tensions in external relations,<sup>7</sup> it was replaced by the Enterprise Bankruptcy Law (hereinafter "the 2006 law"), which expanded the scope of application to all the enterprises who are registered as legal persons as well as other organizations, such as partnerships, that are not legal-person enterprises.<sup>8</sup> Personal insolvency was however excluded in spite of its inclusion in early drafts.<sup>9</sup>

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<sup>5</sup> Zhōnghuá Rénmín Gònghéguó Qīyè Pòchǎn Fǎ (中华人民共和国企业破产法) [Enterprise Bankruptcy Law (For Trial Implementation)] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 2, 1986) [hereinafter, "the 1986 law"].

<sup>6</sup> Qīyè Pòchǎn Fǎ (企业破产法) [Enterprise Bankruptcy Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 27, 2006, effective June 1, 2007) [Enterprise Bankruptcy Law] (promulgated 2006, effective 2007), art. 2, 2007.

<sup>7</sup> See also Rebecca Parry & Haizheng Zhang, *China's New Corporate Rescue Laws: Perspectives and Principles* 8 J. CORP. L. STUD. 113 (2008) for a discussion of the internal and external pressures which finally led to the enactment of the 2006 Law and the reasons for the resistance prior to that time.

<sup>8</sup> [Enterprise Bankruptcy Law] 2006, art. 135. See also Chuyi Wei, *Proposals to Establish a Partnership Bankruptcy Regime in China: With Lessons from the UK and USA*, 23 INT'L. INSOLV. REV. 122 (2014).

<sup>9</sup> PKU Law, *Dìzhèn Néng Fǒu Cuīshēng Gèrén Pòchǎn Fǎ? Zhuānjiā: Gèrén Fòchǎn Fǎ Hěn Nán Yīcì'érjiù* (地震能否催生个人破产法? 专家: 个人破产法很难一蹴而就) [Can the Earthquake Spawn a Personal Bankruptcy Law], *Běidà Fǎbǎo* 北大法宝 [PEKING U. MAGIC] (Jun. 5, 2008) (China), [http://www.pkulaw.cn/fulltext\\_form.aspx?Db=news&Gid=7d65260168b35c9fbdfb&keyword=%E4%B8%AA%E4%BA%BA%E7%A0%B4%E4%BA%A7&EncodingName=&Search\\_Mode=&Search\\_IsTitle=0](http://www.pkulaw.cn/fulltext_form.aspx?Db=news&Gid=7d65260168b35c9fbdfb&keyword=%E4%B8%AA%E4%BA%BA%E7%A0%B4%E4%BA%A7&EncodingName=&Search_Mode=&Search_IsTitle=0) (last visited Aug. 24, 2020).

It can be seen from the above that both the 1986 and the 2006 laws limit the subject of bankruptcy to entities which are legal persons and with an extension to other unincorporated collective enterprise organizations. However, although therefore insolvent companies, both private and state-owned, and partnerships are catered for, excluded are natural persons, including entrepreneurs, in contrast to their equivalents in Taiwan and Hong Kong, China, for example. Nowadays, personal insolvency law has seen a ‘global proliferation’<sup>10</sup> perhaps influenced by the globalization of credit, although social, cultural and political differences have meant that there is by no means a uniformity of approach, with differences in factors such as requirements for repayment plans and debt counselling as conditions of a fresh start.<sup>11</sup>

In fact, there has long been significant lobbying for a personal insolvency system in the PRC, both during legislative processes and during academic discussions. Since 1994, there have been several attempts to reform the Chinese bankruptcy legislation and many drafts have been presented to the *Quánguó Rénmín Dàibiǎo Dàhuì Cájīng Shìwù Wěiyuánhui* (全国人民代表大会财经事务委员会) [National People’s Congress Financial and Economic Affairs Committee], for reasons such as protecting creditors’ interests, encouraging debtor integrity and also reflecting the rise of credit borrowing by individuals but these were not adopted for various reasons. To the knowledge of the authors, noted Chinese scholars like Weijian Tang have proposed many times

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<sup>10</sup> Iain Ramsay, *Towards an International Paradigm of Personal Insolvency Law? A Critical View*, 17 QUT L. REV. 15, 16 (2017).

<sup>11</sup> Jason. J. Kilborn, Chair, Working Group on the Treatment of the Insolvency of Natural Persons, *Report on the Treatment of the Insolvency of Natural Persons*, Report Number ACS6818, WORLD BANK (2013).

the establishment of China's personal insolvency system<sup>12</sup> and more recently support for such a system has been growing in official channels.

Significantly, the Supreme People's Court of China, *Zuìgāo Rénmín Fǎyuàn*, which often plays a key role in the development of the law, has issued the Fifth Five Year Reform Outline<sup>13</sup> in which it is proposed to promote the establishment of a personal insolvency system. Pioneering debt settlement decisions in the Zhejiang cities of Taizhou and Wenzhou, discussed further below, may be regarded as building upon this, as well as being a notable progression of approach. Going further, Shenzhen, one of the developed cities in Guangdong Province and having high levels of entrepreneurship, is leading the way in the development of personal insolvency legislation, having taken initial steps in this regard in 2019<sup>14</sup> and having more recently promulgated personal

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<sup>12</sup> Tang Weijian (汤维建), *Guanyu Jianli Woguo Geren Pochan Zhidu de Gouxiang* (关于构建我国个人破产制度的构想) [Conception of Establishing China's Personal Insolvency System], 4 *ZHONGGUO ZHENG FA DA XUE XUE BAO* (中国政法大学学报) [Journal of China University of Political Science and Law] 41 (1995) (China).

<sup>13</sup> *Zui Gao Renmin Fayuan Guanyu Shenhua Renmin Fayuan Sifa Tizhi Zonghe Peitao Gaige de Yijian-Renmin Fayuan di Wuge Wunian Gaige Gangyao (2019-2023)* (最高人民法院关于深化人民法院司法体制综合配套改革的意见-人民法院第五个五年改革纲要 (2019-2023)) [Opinions of the Supreme People's Court on Deepening the Comprehensive Reform of the Judicial System of the People's Court - The Fifth Five-Year Reform Outline of the People's Court (2019-2023)], promulgated by Sup. People's Ct. (China). One of the aims of the plan is to build a comprehensive personal insolvency system.

<sup>14</sup> On October 28, 2019, Luo Wenzhi, director of the Standing Committee of Shenzhen Municipal People's Congress, hosted a symposium on *Standing and Improving the People's Congress System*. He proposed to further advance the first trial, exploring the possibilities of reforms, and promoting special legislation involving major reform matters such as personal insolvency regulations to improve the business environment.

insolvency laws that will come into force in 2021.<sup>15</sup> Notably Shenzhen was one of the main pioneers of corporate insolvency laws and it stands to perform the same role in relation to personal insolvency laws. The new Shenzhen law is a law which will be limited to local debtors: it prevents forum shopping, since debtors are only eligible if they have paid social insurance in Shenzhen for at least three years.<sup>16</sup> The Taizhou and Wenzhou approaches are also regionally confined. Therefore, the majority of over-burdened debtors in China will have a longer wait for relief.

### III. THE NEED FOR A PERSONAL INSOLVENCY SYSTEM

A need for a personal insolvency system now arises because individuals have opportunities and incentives to incur credit on a far greater scale than in the past. As a result of a policy of mass entrepreneurship and innovation,<sup>17</sup> in which individuals participate in market economy activities more and more frequently, individuals have gradually come to occupy an increasingly important position, participating in the market and sharing risks. There has also been a significant increase

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<sup>15</sup> [Shenzhen Regulations], *supra* note 2, art. 173.

<sup>16</sup> [Shenzhen Regulations], *supra* note 2, art. 2. The restriction to those who have paid social insurance, rather than those who have been registered as Shenzhen citizens, reflects the fact that Shenzhen has a high migrant worker population, many of whom are not registered as Shenzhen citizens.

<sup>17</sup> It was devised by Li Keqiang in the Summer Davos Forum in September 2014.

in the availability of credit for individuals, with greater access to finance for housing and other means of obtaining credit, such as fintech.<sup>18</sup>

Due to factors such as a loss of income, a lack of judgment, or an unexpected catastrophic event, such as an earthquake,<sup>19</sup> or pandemic<sup>20</sup> individuals are highly vulnerable to insolvency and may find themselves unable to pay their debts as they fall due through no fault of their own. Many types of people experience such financial distress, including business-related debtors, such as owner-directors of MSMEs<sup>21</sup> as well as over-indebted consumers. Due to an absence of personal insolvency laws enabling a fresh start such debtors presently have to bear the burden for their lifetime, particularly significant for young debtors.<sup>22</sup> Insolvency will act as a fetter on enterprise

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<sup>18</sup> Wei Wang & David Dollar, *What's Happening with China's Fintech Industry?*, BROOKINGS INST. ORDER FROM CHAOS BLOG (Feb. 8, 2018), <https://www.brookings.edu/blog/order-from-chaos/2018/02/08/whats-happening-with-chinas-fintech-industry/>.

<sup>19</sup> After the earthquake in Wenchuan, 2008, a lot of people lost all of their property, as a result of which they couldn't pay their debts. In response, The China Banking Regulatory Commission (CBRC) issued an urgent notice applying where a debtor had suffered huge losses due to the earthquake and where they could not obtain insurance compensation, or they had debts that could not be repaid after insurance compensation and guarantee recovery. Under the notice, these unpaid debts should be identified as bad debts and be written off in time. However, the writing off of these bad debts should not be regarded as equivalent to the discharge of the debts in a personal insolvency system, since writing the debts off was only to be done by internal processing in the bank system. If the debtors came by property to pay the debts, the bank would still be entitled to ask them to pay off the debts. In contrast, in a personal bankruptcy process the debtor's debts are discharged forever, and the debtors need not repay them if their fresh start leads to a change in fortunes. PKU Law, *supra* note 9.

<sup>20</sup> Wright & Feng, *supra* note 1.

<sup>21</sup> Rosalind Mason et al., *Special Issue: Personal Insolvency- A Fresh Start*, 17 QUT L. REV. i (2017).

<sup>22</sup> Tuula Linna, *Consumer Insolvency: The Linkage Between the Fresh Start, Collective Proceedings, and the Access to Debt Adjustment*, 38 J CONSUM. POL'Y 357, 359 (2015).



and entrepreneurship, and undermine harmonious family life, among other limiting effects.<sup>23</sup> The need for a personal insolvency system is inescapable.

## A. Completing the bankruptcy system in China

The next sections will identify in more detail the benefits that a bankruptcy law would bring to Chinese society.

### i) Discharge of business-related liabilities

Recent decades have seen a rise in entrepreneurship, as private businesses have increased in economic significance<sup>24</sup> indeed they are regarded as playing a major role in the development of the Chinese market-based economy.<sup>25</sup> Entrepreneurship naturally entails risk taking and in some instances of course will lead to failure through no fault of the entrepreneur, as the COVID-19 pandemic is likely to demonstrate. As well as a loss of investment failed entrepreneurs may suffer liabilities as a result of a guarantee being called in, or as a result of company law, as in the Wenzhou case or frauds, as in the Taizhou case, discussed below.<sup>26</sup> Personal liabilities may stem

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<sup>23</sup> Sarah Dai, *Worse Than Doing Time: Life on the Wrong Side of China's Social Credit System*, INKSTONE (Mar. 26 2019), <https://www.inkstonenews.com/china/chinas-13-million-discredited-individuals-face-discrimination-thanks-social-credit-system/article/3003319>.

<sup>24</sup> Edward Tse, *The Rise of Entrepreneurship in China*, FORBES (Apr. 5, 2016, 5:32am), <https://www.forbes.com/sites/tseedward/2016/04/05/the-rise-of-entrepreneurship-in-china/#6f57464d3efc>.

<sup>25</sup> Weiyang Zhang, *The Future of Private and State-Owned Enterprises in China*, in *THE OXFORD COMPANION TO THE ECONOMICS OF CHINA* 285 (Shenggen Fan et al. eds, 2014).

<sup>26</sup> *A Way Out: China Is Getting Tough on Those Who Fail to Pay Their Debts*, THE ECONOMIST CHINA (May. 30, 2019), <https://www.economist.com/china/2019/05/30/china-is-getting-tough-on-those-who-fail-to-pay-their-debts>

from involvement in enterprise for example, through the system of lifting the corporate veil, which under Chinese company law, can apply where any shareholder of a company evades the payment of its debts by abusing the independent status of legal person or the shareholder's limited liabilities, and where this seriously injures the interests of any creditor. Such a person can be ordered to bear several and joint liabilities for the debts of the company.<sup>27</sup> Another example is if the shareholder of a one-person limited liability company is unable to prove that the property of the one-person limited liability company is independent from his own property, he shall bear joint liabilities for the debts of the company.<sup>28</sup> There can, therefore, be very real impacts on the solvency of individuals in cases where companies fail. In circumstances where a director or shareholder is facing personal liabilities which they can't pay in full this may harm the wider economy through a loss of entrepreneurial activity, for example. A personal insolvency system can enable honest but unfortunate entrepreneurs to make a fresh start and this presents a compelling case for the introduction of such laws.<sup>29</sup>

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<sup>27</sup> Gongsì Fa (公司法) [Company Law], art 20(3). See also Tan Cheng-Han et al., *Piercing the Corporate Veil: Historical, Theoretical and Comparative Perspectives*, 16 BERKELEY BUS. L. J. 140, 186-203 (2019).

<sup>28</sup> Gongsì Fa (公司法) [Company Law], art 63.

<sup>29</sup> Wei Fan & Michelle J. White, *Personal Bankruptcy and the Level of Entrepreneurial Activity*, 46 J. L. & ECON. 543 (2003); J. Armour, & D. Cumming, *Bankruptcy Law and Entrepreneurship*, 10 AM. L. & ECON. REV. 303 (2008); Seung-Hyun Lee et al., *How do Bankruptcy Laws Affect Entrepreneurship Development Around the World?* 26 J. BUS. VENTURING 505 (2011).

## ii). Addressing the increasing personal credit risk

Personal insolvency systems have often drawn a distinction between traders and non-traders, with some jurisdictions only limiting bankruptcy to the former.<sup>30</sup> The official discussions of a personal insolvency law, including the Shenzhen regulations,<sup>31</sup> discussed below, do not maintain this distinction however there are still high levels of mistrust of consumer debtors,<sup>32</sup> whereas there is some recognition that honest entrepreneurs can suffer misfortune and that it is in the interest of the economy for them to be offered the chance to start again. In the past, China has been notable for having high rates of saving, partly as a result of a common emphasis about the importance of living within ones means and consuming in moderation, although the ideological reasons for these high rates are complex.<sup>33</sup> However, with the development of the credit

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<sup>30</sup> *UNCITRAL Legislative Guide on Insolvency Law* (United Nations 2005), 38-40. An early example in the UK is 13 Elizabeth c 7.

<sup>31</sup> Standing Comm. Shenzhen Municipal People's Cong., *Shēnzhèn Jīngjì Tèqū Gèrén Pòchǎn Tiáolì Gōngkāi Zhēngqiú Yìjiàn* (深圳经济特区个人破产条例公开征求意见) [Shenzhen Special Economic Zone Personal Bankruptcy Regulations for Public Comment], SHENZHEN PEOPLE'S CONG. NEWS (Jun. 3, 2020) (China), [http://www.szrd.gov.cn/szrd\\_dttx/szrd\\_dttx\\_rddt/yw/202006/t20200603\\_19246984.htm](http://www.szrd.gov.cn/szrd_dttx/szrd_dttx_rddt/yw/202006/t20200603_19246984.htm) (last visited Aug. 25 2020).

<sup>32</sup> Reference to the controversy regarding consumer debtors in the Shenzhen legislative process is noted in Xu Shengfeng et al, *Wǒguó Shǒubù Gèrén Pòchǎn Fǎ Chūttái, Shēndù Jiědú "Shēnzhèn Jīngjì Tèqū Gèrén Pòchǎn Tiáolì"* (我国首部个人破产法出台, 深度解读《深圳经济特区个人破产条例》) [Promulgation of my country's first personal insolvency law, an in-depth interpretation of the "Shenzhen Special Economic Zone Personal Bankruptcy Regulations"] (China), <http://www.zhonglun.com/Content/2020/09-01/1706185541.html> (last visited Sept. 7, 2020).

<sup>33</sup> Aart Kraay, *Household Saving in China*, 14 *WORLD BANK ECON. REV.* 545 (2000). Guonan Ma & Wang Yi, *How Much Do We Know about China's High Saving Rate?* in *THE EVOLVING ROLE OF CHINA IN THE GLOBAL ECONOMY* 147

economy, Chinese people's spending habits are changing. It has been argued that as long as there is high consumer spending and loans, there will be some who are over-indebted, and a personal insolvency system will be needed.<sup>34</sup> For example, in the US a rise in credit card debt has been identified as a primary causal factor of increasing consumer bankruptcy filings.<sup>35</sup> Increasing access to consumer credit internationally<sup>36</sup> has led to cases of increased financial vulnerability as some individuals incur excessive debt and this has prompted legislators in a number of countries to revise their existing personal insolvency laws to accommodate the increased need by individuals for financial relief from over-indebtedness.<sup>37</sup>

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(Cheung Yin-Wong & Jakob De Haan eds., 2013); Shang-Jin Wei, *The Mystery of Chinese Savings*, VOX EU (Feb. 6, 2010), <http://www.voxeu.org/index.php?q=node/4568>.

<sup>34</sup> PKU Law, *supra* note 9. This article, over 10 years old, discusses whether the serious Sichuan earthquake should prompt the introduction of a personal insolvency law in China, and many scholars gave the answer 'yes'. Some scholars also pointed out that not only the earthquake, but also the advance in consumption and loans necessitated a personal insolvency law.

<sup>35</sup> Robert J. Landry, III, *Credit Card Debt and Consumer Bankruptcy: Can We Nudge Our Way Out?*, 27 AM. BANKR. INST. L. REV. 139 (2019).

<sup>36</sup> See e.g., *International Monetary Fund, Household Debt, Loans and Debt Securities, Percentage of GDP*, IMF DATA MAPPER, [https://www.imf.org/external/datamapper/HH\\_LS@GDD/CAN/GBR/USA/DEU/ITA/FRA/JPN/CHN](https://www.imf.org/external/datamapper/HH_LS@GDD/CAN/GBR/USA/DEU/ITA/FRA/JPN/CHN) (last visited Aug. 25, 2020).

<sup>37</sup> Rafael Efrat, *Global Trends in Personal Insolvency*, 76 AM. BANKR. L. J. 81 (2002); Jason J. Kilborn, *Reflections of the World Bank's Report on the Treatment of the Insolvency of Natural Persons in the Newest Consumer Bankruptcy Laws: Colombia, Italy, Ireland*, 27 PACE INT'L L. REV. 306 (2015); Jason J. Kilborn, *Treating the New European Disease of Consumer Debt in a Post-Communist State: The Groundbreaking New Russian Personal Insolvency Law*, 41 BROOK. J. INT'L L. 655 (2016).

The increase in availability of personal consumer credit in China began in the mid-1980s, much later than in many other countries, but it has increased rapidly in recent years. Initially personal credit became available through mortgages after the People's Bank of China promulgated the Measures for the Administration of Personal Housing Loans and the Guiding Opinions on the Implementation of Personal Consumer Credit.<sup>38</sup> Subsequent efforts to promote consumer credit developed to bolster the economy following the Asian financial crisis<sup>39</sup> and since that time credit availability has developed significantly, owing to higher incomes and diversity of sources leading to availability of credit as well as greater levels of financial inclusion. There is no doubt that credit consumption is a very effective measure to expand domestic demand and plays a very important driving role in stimulating economic growth, including recently as household borrowing has been encouraged to compensate for slower economic growth elsewhere.<sup>40</sup>

So far, China's personal consumer credit market has had its own marked pattern of development. According to a forecast released by the China Business Research Institute, data shows that in the

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<sup>38</sup> See Zhongguo Renmin Yinhang (中国人民银行) [People's Bank of China, Legal Affairs Department], *Notice on Issuing the "Guiding Opinions on the Implementation of Personal Consumer Credit"*, (last visited Nov. 5, 2019) (China); <http://www.pbc.gov.cn/tiaofasi/144941/144959/2817917/index.html>; Zhongguo Renmin Yinhang (中国人民银行) People's Bank of China, Legal Affairs Department, *Notice on Issuing the "Measures for the Administration of Personal Housing Loans"*, (China) <http://www.pbc.gov.cn/tiaofasi/144941/144959/2817884/index.html> (last visited Nov. 5, 2019).

<sup>39</sup> Huifen Yin, *Consumer Credit and Over-indebtedness in China*, 27 Int'l Insolv. Rev. 58 (2018).

<sup>40</sup> Wright & Feng, *supra* note 1.

years from 2013 to 2017, China's consumer finance market developed rapidly and the growth rate of consumer credit balance, excluding housing loans, has remained above 20%, while the compound annual growth rate has reached 24.7%. Especially notably in 2017, the balance of consumer credit reached 960 billion yuan, a year-on-year increase of 62.2%, in an explosive growth trend.<sup>41</sup> Although housing loans account for much of the household debt, data from the People's Bank of China shows that short-term consumer loans increased from 125.3 billion yuan in 2004 to 8.23 trillion yuan in September 2018, an increase of nearly 66 times, and the medium- and long-term consumer loans have increased 15 times during the same period,<sup>42</sup> accordingly the consumer credit risk is getting higher and higher.<sup>43</sup> By the end of 2018 China's total level of household debt stood at 60.4% of GDP, with total debts roughly equivalent to total incomes.<sup>44</sup>

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<sup>41</sup> See China Commercial Industry Research Institute, *2018 Nián Zhōngguó Xiāofèi Xīndài Shìchǎng Guīmó Yùcè: Shìchǎng Guīmó Jiāng Túpò 13 Wàn Yì* (2018 年中国消费信贷市场规模预测：市场规模将突破 13 万亿) [2018-2023 China Consumer Finance Industry Market Prospects and Investment Strategy Research Report], (Jul. 13, 2018), (China) <http://www.askci.com/news/chanye/20180713/0951281125915.shtml> (last visited Aug. 25 2020).

<sup>42</sup> See People's Bank of China, *Financial Statistics*, GENERAL OFFICE OF THE STATE COUNCIL ON PROMOTING COMPREHENSIVE STATISTICAL WORK IN THE FINANCIAL INDUSTRY, <http://www.pbc.gov.cn/diaochatongjisi/116219/index.html> (last visited Mar. 27, 2020).

<sup>43</sup> Quan Zhongguang, *Quán Zhōngguāng: Shìchǎng Jīngjì Jiùshì Chéngxìn Jīngjì* (权忠光：市场经济就是诚信经济) [*The Market Economy is the Honest Economy*], SINA FINANCE (Oct. 12, 2012), (China) <http://finance.sina.com.cn/hy/20121012/153613353646.shtml> (last visited Aug. 25, 2020).

<sup>44</sup> Amanda Lee, *China's Rising Household Debt a 'Major Concern' as Government Tries to Boost Consumption Amid Trade War*, SOUTH CHINA MORNING POST (Dec. 4, 2019), citing statistics from the People's Bank of China.

The use of credit, including through innovative platforms,<sup>45</sup> has become increasingly common<sup>46</sup> and this prompts reflection on measures to relieve those without the ability to repay their debts. It should be added that the firm grip of the governments in China over the credit industry has resulted in some individuals having little access to excess debt.<sup>47</sup>

Personal insolvency laws enable a rebalancing between borrowers and lenders, with both offensive and defensive aspects. Bankruptcy can be seen as providing a defensive position for debtors to enable them to achieve a fresh start in cases where they can't repay their debts, often in return for some repayment requirements and disqualifications, as well as an offensive method for creditors as part of their debt collection artillery,<sup>48</sup> resulting in a collective and orderly scheme for the repayment of debts. It is arguably necessary in a society with widespread credit availability and consumption by individuals to establish a personal insolvency system<sup>49</sup> to

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<sup>45</sup> E.g., Gladys Pak Lei Chong, *Cashless China: Securitization of Everyday Life through Alipay's Social Credit System—Sesame Credit*, 12 CHINESE J. OF COMM. 290 (2019).

<sup>46</sup> Notably among wealthier individuals, whereas those on lower incomes typically still rely on informal financial networks or family loans.

<sup>47</sup> Baizhu Chen et al., *An Overview of China's Financial Markets: Progress, Problems and Prospects in Financial Market Reform*, in CHINA, PROGRESS, PROBLEMS AND PROSPECTS 1, 11. (Baizhu Chen et al. eds, 2000) (describing the lingering elements of the planned economy in China, including a highly regulated banking industry).

<sup>48</sup> Tuula Linna, *supra* note 22.

<sup>49</sup> Wang Xiaoxing (王晓星), *Lun Zhongguo Xiaofei Xindai Cunzai de Wenti Jiqi Falv Duice* (论中国消费信贷存在的问题及其法律对策) [On the Problems Existing in China's Credit Consumption and Their Legal Countermeasures], 5 ZHONGGUO SHICHANG (中国市场) [Chinese Market] 60 (2018)

support credit consumption, enabling cases of overindebtedness to be resolved as well as encouraging the healthy and rapid development of the credit market within the growth of the economy as a whole. These laws should also result in mitigation of the social impact of indebtedness. Some overburdened debtors have chosen an extreme way to avoid debt, such as absconding from creditors and sadly there have also been cases of suicide.<sup>50</sup> There have also been regular examples of violence being used to extort debt repayments.

iii). improving the efficiency of the judicial debt enforcement

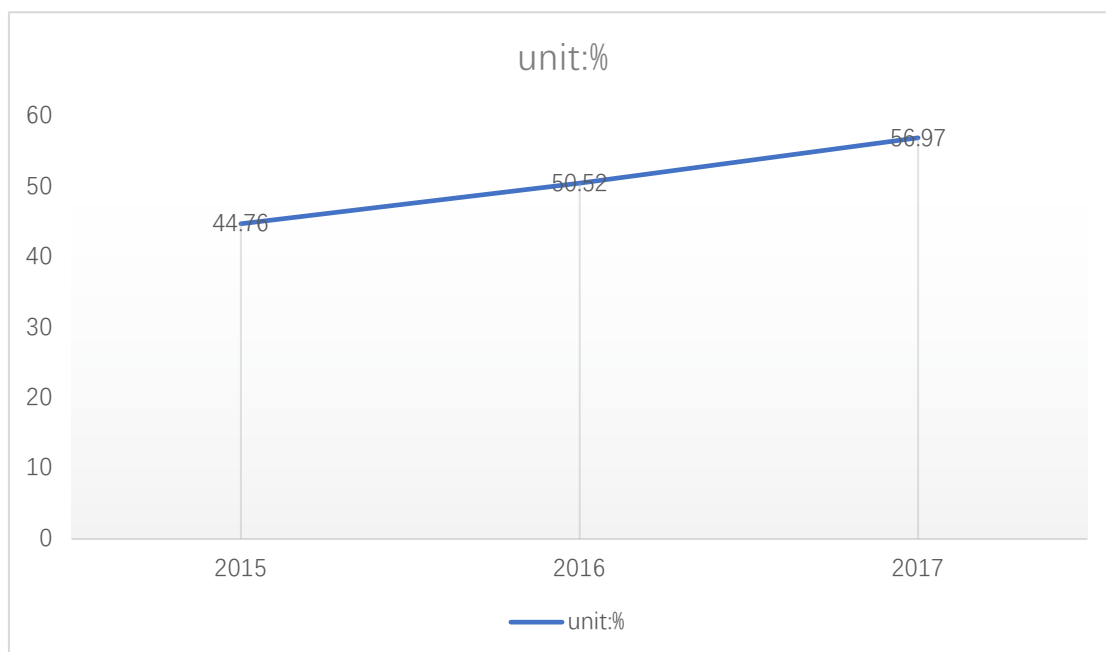
China's existing systems to help creditors claim repayment, other than the innovative Taizhou and Wenzhou approaches, are individualized debt collection measures, such as civil litigation procedures, after which the court may formulate some judgment documents to determine the rights and obligations between the parties. However, this system suffers from some weaknesses that a bankruptcy regime could help to address. Under the terms of such judgments the parties should perform those obligations, however in reality few will perform them voluntarily, which

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<sup>50</sup> For example, many college students have felt compelled to commit suicide out of shame and regret that they will not be able to repay the consumer credit they had incurred in China. See Wu Yang Du Jiang, *Dàxuéshēng Shēn Xiàn Duōtóu Jièdài Hòu Zìshā, Cuīshōu Rén Kǒnghè Jiāshǔ* (大学生深陷多头借贷后自杀, 催收人恐吓家属) [*College Student Commits Suicide After Being Trapped by Long-term Borrowing and Intimidation of Family by Debt Collectors*], P2PEYE.COM (Mar. 4, 2018 10:53am) (China), <https://news.p2peye.com/article-509504-1.html> (last visited Aug. 25, 2020).



can be seen from the following chart which shows the automatic fulfillment rate of effective judgment documents during the most recent three years for which data is available.<sup>51</sup>



It can be seen from this chart that in spite of steady improvement in recovery rates the automatic fulfillment rate of effective judgment documents remains very low at only around 45-57 percent.

If a debtor refuses to comply with an order, the creditor may seek other judicial relief, such as through the civil enforcement procedure,<sup>52</sup> which will take a lot of time and money. In a case in

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<sup>51</sup> On January 22, 2018, the World Executive Conference was held in Shanghai. At the meeting, the Supreme Court published relevant data on the enforcement rates of Chinese courts by the end of 2018. See Jin Hao, (最高法:全国法院3年执行到位金额达4.4万亿元) *Supreme Law: National Courts have Enforced a Total of 4.4 Trillion Yuan in Three Years*, GUANGMING DAILY (Jan. 21, 2019) (China), <http://news.cctv.com/2019/01/21/ARTIsZHTb2HG5uIoBLTBkIVr190121.shtml> (last visited Aug. 25, 2020), reporting increasing enforcement levels.

<sup>52</sup> See *Zhongguo Minshi Susong Fa* (中国民事诉讼法) [The Civil Procedure Law] (rev'd 2017), art. 236

which the defendant has property against which the judgment can be enforced, the enforcement shall be concluded within six months from the date when it is put on record, and the time limit for enforcement shall be extended because of certain special circumstances.<sup>53</sup> And in some cases, the court will issue a ruling not to enforce the award rendered by a legally established arbitral institution or the other debt instrument with enforceability legally granted by a notary office.<sup>54</sup> More importantly, the result of the enforcement procedure may be that the debtors can't repay all of their remaining debts after the creditor has enforced against all their properties. Moreover, if after the judgment the creditor discovers that the debtor against whom recovery is sought has any other property, the creditor may, at any time, apply to the people's court for enforcement, which may not only waste judicial resources, but also be costly for the creditors.

Difficulty in enforcement is one of the major problems in China's judicial practice, which has been stressed by Zhou Qiang, President of the Supreme People's Court, at the National Court of Basic Resolution on the Implementation of Difficult Work Promotion. He contends that a problem-oriented approach should be adopted as a means to resolve the enforcement backlog,

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(1) The parties must comply with an effective civil judgment or ruling. If a party refuses to comply, the opposing party may apply to the people's court for enforcement, and the judges may also transfer the case to the enforcement personnel for enforcement.

(2) The parties must comply with a consent judgment and other legal instruments enforced by a people's court. If a party refuses to comply, the opposing party may apply to the people's court for enforcement.

<sup>53</sup> See Provisions of the Supreme People's Court on Some Time Limits for Handling Enforcement Cases by the People's Courts, art. 1 (promulgated by the Sup. People's Ct, effective Jan. 1, 2007) (China).

<sup>54</sup> See [The Civil Procedure Law] (rev'd 2017), *supra* note 52, Art. 155; Art. 237; Art. 238.

with improvements in information and case-handling infrastructure.<sup>55</sup> According to statistics, from 2016 to 2018, the national courts accepted a total of 20.42 million execution cases, enforced in 19.39 million of these, and facilitated recoveries of the total amount of 4.4 trillion yuan. The effect of strengthening enforcement has brought pleasingly improved results.<sup>56</sup> However, we should also observe that almost half of the cases can't be executed and there is also another side of these cases, that about 5% of the cases that entered the enforcement procedures are asking the people's courts to enforce the arbitral awards and notarized creditor's rights documents, but about 43% belonged to the "executive failure" cases where no property was available for the execution.<sup>57</sup> So, when the debtors have no property to repay the debt, it is futile to apply the

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<sup>55</sup> China Court Network, *Zhōuqiáng Zài Quánguó Fǎyuàn Jīběn Jiějué Zhíxíng Nán Gōngzuò Tuījìn Huì Shàng Qiángdiào Jiānchí Yǐ Wèntí Wéi Dǎoxiàng Jiānjué Dǎ Yíng Jīběn Jiějué Zhíxíng Nán Zhè Chǎng Yíngzhàng* (周强在全国法院基本解决执行难工作推进会上强调坚持以问题为导向坚决打赢基本解决执行难这场硬仗) [*A Problem Solving Approach to Address Difficulties of Enforcement*], [Supreme Court News page], [www.CHINACOURT.ORG](http://www.chinacourt.org) (Jul. 5, 2017, 9:42pm) (China), <https://www.chinacourt.org/article/detail/2017/07/id/2913016.shtml> (last visited Aug. 25, 2020).

<sup>56</sup> *Nǚlì Jiāo Chū Wúkuì Yú Shídài De Yōuxiù Dájǔàn—2016 Nián Yílái Quánguó Fǎyuàn Juéshèng “Jīběn Jiějué Zhíxíng Nán” Gōngzuò Zòngshù* (努力交出无愧于时代的优秀答卷—2016年以来全国法院决胜“基本解决执行难”工作综述) [*Summary of Achievements in Respect of Debt Enforcement Difficulties*], OFFICIAL WEBSITE OF THE SUPREME PEOPLE'S COURT (Jan. 20 2019) (China), <http://www.court.gov.cn/zixun-xiangqing-140011.html> (last visited Aug. 25, 2020).

<sup>57</sup> See Zhou Qiang (周强), *Zuìgāo Rénmín Fǎyuàn Guānyú Rénmín Fǎyuàn Jiějué “Zhíxíng Nán” Gōngzuò Qíngkuàng De Bàogào* (最高人民法院关于人民法院解决“执行难”工作情况的报告) [*Report of the Supreme People's Court on the Work of the People's Court to Solve the “Difficulties in Implementation”*], Standing Comm. 13<sup>th</sup> Nat'l People's Cong., 6<sup>th</sup> Meeting, Oct. 24, 2018 (China), <http://www.court.gov.cn/zixun-xiangqing-124841.html>

enforcement procedure and a personal insolvency system is a more appropriate way to handle such cases, strengthening the artillery for creditors and providing a collective and principled basis for relief.

The personal insolvency system can ensure that the claims of each creditor are being fairly and equitably repaid in cases where the value of claims exceeds the value of the debtor's estate. The outcome in a bankruptcy is therefore likely to be different from any private settlement that the debtor might have agreed to, as such a settlement may impair the interests of other creditors by repaying some favored creditors' debts while leaving others with nothing. The enforcement procedures as discussed above, are a means of dealing with debts on a one-by-one basis, which means that the creditors who apply this procedure may be repaid in full but in circumstances that exhaust all the property of the debtors in a case where assets are insufficient to meet all liabilities. Under these circumstances, those enforcing creditors may receive the maximum amount of debt while other creditors may not receive anything. This problem is partially addressed by the Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (hereinafter, "Interpretation of the Civil Procedure Law").<sup>58</sup> This direction applies if a creditor has benefited from an enforcement procedure and the properties of the person subject to enforcement are insufficient pay off all of the debtor's other debts, and it enables other creditors to apply to the people's court to participate in the distribution of

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<sup>58</sup> [Interpretation of the Supreme People's Court on the Application of the <Civil Procedure Law>] (promulgated by Sup. People's Ct. Jan. 30, 2015, effective Feb. 4, 2015) (China).

properties.<sup>59</sup> This system can be seen as an embryonic form of a personal insolvency system, in enabling a collective means of satisfaction of debts, however, it is not entirely an approach of equality, since only creditors who have made such an application may benefit from the distribution of properties, and it does not therefore enable all of the creditors to participate in the distribution of properties. This avoids a potential free-rider problem, which would otherwise arise in a case where other claimants could benefit from the efforts of the applicant without expenditure of their own efforts, but at the risk of potentially creating an unfair “race to the courthouse”. So, it may be regarded as a good start but not good enough.

iv). A more compassionate approach

The most significant difference between personal insolvency and corporate bankruptcy is of course that the natural person will live on in the world after the bankruptcy. Therefore, the personal insolvency law aims to give a fresh start for the debtors, enabling them to become useful and productive members of society again and to support their families.<sup>60</sup> There are great variations in approach between bankruptcy systems in this regard, a point which will be returned to below. As part of this fresh start bankruptcy laws commonly exempt from the estate available for creditors property to meet the minimum domestic (and if appropriate business) needs of a

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<sup>59</sup> This approach is the Participatory Distribution System; *see* Interpretation of the Civ. Pro. L., art. 508.

<sup>60</sup> *E.g.*, the Insolvency Act 1986, s. 283(2) (UK) and 11 U.S.C. § 522 (West).

debtor<sup>61</sup> and these debtors can also potentially be released from their heavy debt burden,<sup>62</sup> allowing them to restart from zero. Bankruptcy proceedings can therefore enable debtors to maintain their dignity and potentially to continue to be productive and providing.

The fresh start policy is a common feature of personal insolvency systems, and it can be traced to the England and the passage of the first discharge provision in 1705.<sup>63</sup> This law was effectively a debt collection measure for the benefit of creditors and far removed from modern fresh start laws,<sup>64</sup> varied as they may be. However, it marked the beginnings of an approach enabling a financially troubled individual an opportunity to begin a new and unencumbered financial chapter in his or her life.<sup>65</sup>

In the light of the fresh start approach, it can be said that a personal insolvency system upholds the concept of assistance founded on principles of humanity and justice.<sup>66</sup> Releasing the debtors from the heavy debt burden and giving them a new beginning is also an important objective of a

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<sup>61</sup> Jason J. Kilborn, *supra* note 11, para 222.

<sup>62</sup> Although some systems only provide the debtor with a fresh start upon a scheme of repayment being satisfied: Tuula Linna, *supra* note 22.

<sup>63</sup> Bankruptcy Act, 4 Anne c. 17 (1705). See Louis Edward Levinthal, *Early History of English Bankruptcy*, 67 U. PA. L. REV. 1, 18-20 (1919); Lawrence Shepard, *Personal Failures and the Bankruptcy Reform Act of 1978*, 27 J. L. & ECON. 419, 421-22 (1984).

<sup>64</sup> Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge* 65 AM. BANKR. L. J. 325, 333 (1991).

<sup>65</sup> See Rafael Efrat, *supra* note 37, at 82.

<sup>66</sup> 1 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS, 472 (1753).

personal insolvency system.<sup>67</sup> A discharged debtor may return to being a productive member of society, and bankruptcy fresh starts also may be regarded as aiding societal harmony more generally through limiting the need for society to provide for the debtor and his family.<sup>68</sup> The fresh start will however often be subject to conditions, such restrictions on conduct. It may be that the fresh start can be lost in the event of misconduct, which will encourage the debtor to cooperate.<sup>69</sup> This need for a fresh start reflects a fundamental difference from the corporate legal person bankruptcy. A company will lose the status of legal subject after its bankruptcy,<sup>70</sup> so there is no need to provide such a similar protection for it.

#### IV difficulties which lie in the way of such a system

In spite of several compelling reasons for the introduction of a personal insolvency system there are a number of difficulties which should be noted.

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<sup>67</sup> Wen Jie & Zhang Liqin, *Research on Establishing China's Personal Insolvency System*, 3 SHANGHAI ACAD'Y. OF SOC. SCI. ACAD. Q. 69, 73 (2002).

<sup>68</sup> Charles Jordan Tabb, *Scope of the Fresh Start in Bankruptcy: Collateral Conversions and the Dischargeability Debate*, 59 GEO. WASH. L. REV. 56, 94-95 (1990).

<sup>69</sup> *Id.*

<sup>70</sup> [Enterprise Bankruptcy Law of 2006], art. 121: "A bankruptcy administrator shall, within 10 days as of the day when the procedures for bankruptcy are concluded, handle the formalities for write-off in the organ as originally in charge of the registration of the bankrupt upon the strength of the decision of the people's court on concluding the procedures for bankruptcy."

## A. public concerns about the system

Given China's status as socialist people's democratic dictatorship, under which the people are considered the masters of the country, public support for the bankruptcy law is likely to be needed. Laws are generally enacted by the National People's Congress and whether a legal system is successful or not mainly depends on how much the people support and abide by it. Unfortunately, a personal insolvency system is regarded with suspicion by many.

As noted, since ancient times in China, the society has generally recognized the traditional idea that "the sons should pay off all the debts of their fathers", and paying off debts is regarded as an unquestionable moral imperative.<sup>71</sup> The personal insolvency system will probably result in some creditors receiving only part of what they are owed, or in some cases nothing at all, which will be contrary to these traditional beliefs. Not only may non-payment, or partial payment, be difficult for creditors to accept, but the debtor itself may bear the psychological burden of "debt" due to inherent moral thinking.<sup>72</sup> More recent years have given rise to different psychological pressures towards debt repayment as social capital has grown in importance as a means of gaining trust. A person who intentionally fails to pay their debts will be branded a *lao lai* (老赖) and this is an

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<sup>71</sup> Relationships, including business relationships, are defined by reciprocal obligations and expectations of fair exchange, although stronger moral obligations arise from relationships giving rise to emotional debts: Hui-Ching Chang & G. Richard Holt, *Debt-Repaying Mechanism in Chinese Relationships: An Exploration of the Folk Concepts of Pao and Human Emotional Debt*, 27 RES. LANG. & SOC. INTERACT. 351, 361 (1994).

<sup>72</sup> Different types of debt will have different impacts on levels of unhappiness: Zhifeng Liu et al., *Household Debt and Happiness: Evidence from the China Household Finance Survey*, 27 APPLIED ECON. LETTERS 199 (2020).



untrustworthy figure which is commonly referred to in discussion of a potential personal insolvency system.<sup>73</sup> Failure to pay debts can result in an individual being blacklisted<sup>74</sup> and in many instances threats of this can result in debts being paid. Social shaming tactics such as featuring the debtor on a billboard or on social media can be used to humiliate those who fail to pay their debts in spite of being able to do so.<sup>75</sup>

Such branding has led to fears of a personal insolvency system presenting a risk of moral hazard. If one was to search Chinese sites online with the term *Gèrén pòchǎn* (个人破产) [personal insolvency] or similar key words the results would list lots of articles expressing consternation that person could walk away from their debts under a personal insolvency system. It is no doubt a common public concern that the bankruptcy system will be open for exploitation by *Lao Lai*,<sup>76</sup> ignoring a need to enable debtors to obtain a fresh start on a legitimate footing and with equal

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<sup>73</sup> For example, it is noted in all of the newspaper articles listed in footnote 132 below.

<sup>74</sup> Norms which would otherwise lead to a person being being favourably redlisted are not otherwise clear. S. Englemann et al., *Clear Sanctions, Vague Rewards: How China's Social Credit System Currently Defines "Good" and "Bad" Behavior* FAT\* '19, CONF. ON FAIRNESS, ACCOUNTABILITY & TRANSPARENCY (Association for Computing Machinery, 2019).

<sup>75</sup> Rui Zhong, *In China, Social Credit is Just a More Invasive Form of Social Media*, CODA Nov. 31, 2019), <https://www.codastory.com/authoritarian-tech/china-social-credit/>.

<sup>76</sup> Li Jinlei (李金磊), *Gèrén Pòchǎn Zhēn Yào Láile! Lǎo Làimen De Jiùshù Háishì Kuánghuān?* (个人破产真要来了！老赖们的救赎还是狂欢?) [*Personal Bankruptcy is Really Coming! Lao Lai's Salvation or Carnival?*] TELLER REPORT CHINA NEWS CLIENT BEIJING (Jun. 3, 2020) (China), [http://www.xinhuanet.com/fortune/2020-06/03/c\\_1126069023.htm](http://www.xinhuanet.com/fortune/2020-06/03/c_1126069023.htm) (last visited Aug. 2020).

access to all who find themselves unable to repay their debts in full.<sup>77</sup> Many debtors can of course end up in such a position through misfortune and it would not be the right only of a privileged and potentially dishonest few to apply personal insolvency, all could do so. Nonetheless, attitudes towards debtors may mean that many Chinese will find it difficult to accept a personal insolvency system.

## B. Inadequate infrastructure

A system does not exist in isolation and behind a personal insolvency system will be dependence on a lot of other auxiliary systems which are vital to the success of an insolvency system. Looking at individual bankruptcy systems in other countries, such related systems include the property registration system, important for the identification of creditor entitlements as well as the scope of the bankruptcy estate, and a social security system, important for supporting bankrupts who lose their livelihoods as well as employees made redundant as a result of the proceedings. As outlined in this section, this supporting infrastructure in China is not yet adequately developed but this should not stand in the way of a personal insolvency system.

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<sup>77</sup> The Chapter 11 reorganisation in the United States of the affairs of the Chinese businessman Jia Yueting also drew attention to the concept of bankruptcy: *Re Jia Yueting*, Case No. 2:19-BK-24804-VZ (Bankr. C.D. Cali), formerly No. 19-12220 (Bankr. D. Del.). Caiwei Chen, *US Court Confirms Restructuring of FF Founder Jia Yueting's Personal Bankruptcy*, PANDAILY (May 22, 2020), <https://pandaily.com/us-court-confirms-restructuring-of-ff-founder-jia-yuetings-personal-bankruptcy/>; Li Gong (李攻), *Gèrén Pòchǎn Bùshì Bǎohù "Lǎo Lài", Jiākuài Lìfǎ Shì Zài Bì Xíng* (个人破产不是保护“老赖”，加快立法势在必行) [*Personal Bankruptcy is not to Protect the "Lao Lai", it is Imperative to Expedite Legislation*], SINA FINANCE (May 26, 2020) (China), <https://finance.sina.com.cn/wm/2020-05-26/doc-iircuyvi5153192.shtml>.

i) the unsound social security system

The weaker the social safety net a particular country provides to its citizens, the more likely it is that individuals will resort to borrowing to obtain services otherwise provided by the government, such as education, medical benefits and housing. Also, a government's decision to provide limited financial welfare benefits results in a diminished social safety net for individuals, leading to greater individual financial vulnerability arising from job layoffs, medical bills<sup>78</sup> or family dissolution.<sup>79</sup> The unsound social security system can often be a contributing cause of the personal insolvency and if the PRC was to introduce a personal insolvency system it would also be a factor which would deepen the difficulties of those who become bankrupt, since unemployment security is a particularly underdeveloped aspect of the social security system.

The construction of China's social security system began in the "seventh five-year" plan of the state in 1982<sup>80</sup> and it has progressed in subsequent years. The types of protection, coverage and security have been significantly improved, and a social security system with Chinese characteristics has been basically formed. However, China still has a long way to go to build an

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<sup>78</sup> In a United States context, see Tal Gross & Matthew J. Notowidigdo, *Health Insurance and the Consumer Bankruptcy Decision: Evidence from Expansions of Medicaid*, 95 J. PUB. ECON. 767 (2011).

<sup>79</sup> Rafael Efrat, *supra* note 33.

<sup>80</sup> Prior to this time, state benefits had been provided to employees of state-owned enterprises via those enterprises. See JCB Leung, *Dismantling the "Iron Rice Bowl": Welfare Reforms in the People's Republic of China*, 23 J. Soc. POL'Y 341, 343 (1994).

adequate security system to help bankrupted debtors since unified social security legislation is still lacking and of course there is no tradition for supporting bankrupts.<sup>81</sup>

The state of the social security system may indeed influence the bankruptcy system that is implemented. Efrat has hypothesized that individuals in a given country that have access to significant credit and a limited government safety net are more likely to find a fresh start policy that is broad in scope.<sup>82</sup> This is an interesting hypothesis for China given its current trajectory. Since credit plays a more and more important role in China nowadays it should follow that a liberal bankruptcy regime will become necessary given the lack of a developed social safety net.<sup>83</sup> As outlined in the final section, there are signs that such an approach may indeed be taken.

To protect the public interest from dishonest and irresponsible debtors, most countries attach conditions to the fresh start offered to debtors. They may regulate that the debtors will be subject to restrictions after bankruptcy and that they cannot engage in some occupations.<sup>84</sup> It can be

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<sup>81</sup> There is no constitutional provision for social insurance relief for bankrupts. XIANFA (宪法) [Const. of the People's Republic of China] (rev'd 2018), art. 45(1): "Citizens of the People's Republic of China have the right to material assistance from the state and society when they are old, ill or disabled. The state develops social insurance, social relief and medical and health services that are required for citizens to enjoy this right."

<sup>82</sup> Rafael Efrat, *supra* note 33.

<sup>83</sup> See R. BERTHOUD & E. KEMPSON, CREDIT AND DEBT: THE PSI REPORT (1992).

<sup>84</sup> Nicola Howell & Rosalind Mason, *Reinforcing Stigma or Delivering a Fresh Start: Bankruptcy and Future Engagement in the Workplace*, (2015) 38 UNSWLJ 1529, 1533; Fiona Tolmie, *Introduction to Corporate and Personal Insolvency Law* (2d ed, 2003), Ch. 22.

difficult for such debtors to get out of their predicament just based on their limited free property which they are allowed to retain post-bankruptcy.<sup>85</sup> This requires the state to provide a social security fund to guarantee their basic living needs.

ii). the incomplete property registration system

The incomplete and previously fragmented property registration system, has made it more difficult for China to implement the personal insolvency system and indeed some Chinese scholars have regarded this as an insurmountable barrier to the establishment of such an insolvency system.<sup>86</sup>

The reason why a property registration system is an important prerequisite for the establishment of China's personal insolvency system is that it is only by clearly knowing the individual's property information that the court can determine whether the individual meets the relevant conditions of personal insolvency, that is, that his property is insufficient to repay his debts. This registration system is also necessary for the state of personal property to be clarified and the

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<sup>85</sup> Tu Xiaoxia (屠小霞), *Geren Pochan Falv Zhidu Yanjiu* (个人破产法律制度研究) [Research on Personal Insolvency Legal System], 6 *Fazhi yu Shehui* (法制与社会) [Legal Sys. & Soc'y] 98 (2017).

<sup>86</sup> Zhao Weinan (赵伟男), *Cong Falv Jiaodu Tantaowoguo Geren Pochan Zhidu de Goujian* (从法律角度探讨我国个人破产制度的构建) [Exploring the Construction of China's Personal Insolvency System from the Legal Point of View], 3 *FAXUE YANJIU* (法学研究) [Legal Research] 101 (2018, May).

creditors to be paid off in a reasonable and fair manner. Determining the debtor's property is an essential feature of a personal insolvency system.

Compared with corporate bankruptcy, bankruptcy property in the case of personal insolvency has the following characteristics: firstly, the quantity and state of the property of individual debtor is often undisclosed, some property will be in the form of cash, the existence and value of which can't always be determined by others. Moreover, the property of individual debtors is often mixed with the property of other family members, which increases the difficulties of identifying bankruptcy property. Therefore, in the personal insolvency procedure, the confirmation of the debtor's estate is relatively complicated. In practice, property information systems will by necessity focus on limited categories of property, notably interests in land and a register of interests in such property was established in 2007<sup>87</sup> and expanded in 2015.<sup>88</sup> There is therefore likely to be good information in respect of the debtor's most valuable assets. These initiatives increase availability of personal property information and they lay a good foundation for the

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<sup>87</sup> Wuquan Fa (物权法) [The Property Law of 2007] (promulgated by the Nat'l People's Cong.), art. 9(1), 2007 (China): "The creation, change, transfer or elimination of the real right of a real property shall become effective after it is registered according to law; it shall have no effect if it is not registered according to law, except it is otherwise prescribed by any law."

<sup>88</sup> Bu Dongchan Dengji Zanxing Tiaoli (不动产登记暂行条例) [Interim Regulation on Real Estate Registration] (effective March 1, 2015) (China), establishing a real estate registration system including details of the extent of property and transaction information, to provide a unified system for the real-time sharing of registration information at the national, provincial, municipal and county levels.

implementation of the personal insolvency system. However, it is notable that, due to the complexity of practice and the diversity and dispersion of personal property, it is not often possible to fully determine the property which falls within the debtor's estate and there are still possibilities for concealing or illegally disposing of property in practice. Weaknesses in China's current property registration system mean that the possibility and frequency of such difficulties will be considerable.

### iii). the imperfect credit information system

China is also still in the process of developing sound credit information systems, and in terms of information for creditors it lags behind equivalent systems in jurisdictions such as the US,<sup>89</sup> leading to fears that this may result in the abuse of this system and this may undermine any personal insolvency system that may develop. In countries like the US with mature credit information systems the availability of financial information regarding debtors can enable portfolio management by creditors and prediction of bankruptcy risks. While in China, the lack of a sophisticated credit information system, could potentially give sceptics the first impression that the bankruptcy system may make no difference to the debtors and this will contribute to their resistance to the construction of this system.

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<sup>89</sup> Zhongguo Renmin Yinhang Jinan Fenheng Ketu zu (中国人民银行济南分行课题组) [People's Bank of China Jinan Branch Research Group], Zhengxin Xitong Jianshe yu Geren Pochan Zhidu Yanjiu (征信系统建设与个人破产制度研究) [Research on Credit Information System Construction and Personal Insolvency System], 4 WUHAN JINRONG (武汉金融) [Wuhan Fin.] 50 (2012). People's Bank of China Jinan Branch Research Group, *Research on Credit Information System Construction and Personal Insolvency System*, 4 WUHAN FIN. 50 (2012).

Additionally, an effective credit information system can also be helpful for strengthening the ability of creditors to predict and control risks and limiting the potential for debt disputes. All of the relevant information will be included in such a personal credit information system, which will have a direct connection with the credit rating agencies and economic interests of the market participants, reflecting on the debtor's personal reputation, potentially leading to trading opportunities and professional qualifications, and this information can also supervise their compliance with laws and regulations, and encourage them to conduct honest transactions.<sup>90</sup>

The credit information system started at a relatively late stage in China, but it has made great progress in recent years under both government and private initiatives. In November 2003, the People's Bank of China Credit Information Bureau, which was mainly responsible for personal credit information and credit management, was formally established and this officially launched the construction of China's personal credit rating system. This was done to enable banks to have greater information about potential borrowers as well as partly to enable greater availability of credit for persons about whom information was lacking. Private sector credit information systems

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<sup>90</sup> Liu Jing (刘静), *Xinyong Queshi yu Lifa Pianhao—Zhongguo Geren Pochan Lifa Nanti Jiedu* (信用缺失与立法偏好——中国个人破产立法难题解读) [Lack of Credit and Legislative Preference—Interpretation of the Problem of China's Personal Insolvency Legislation], 2 SHEHUI KEXUE JIA (社会科学家) [Soc. Scientist] 100 (2011).



were resisted at this time but have since grown in significance,<sup>91</sup> as discussed below. In 2004, in accordance with the instructions of the Party Central Committee and the State Council, the People's Bank of China began to establish a centralized and unified personal credit database nationwide and in January 2006, the database was launched and officially networked. Since the 18th National Congress of the Communist Party of China, the Party Central Committee and the State Council have attached great importance to the construction of the social credit system, and in 2014 officially issued a national top-level design document to upgrade it to the height of a national governance system and with modernized governance capabilities. At the end of March 2016, credit information in respect of a total of 885 million natural persons and 21.39 million companies and other organizations were included<sup>92</sup> and by 2018 China's credit rating system had grown to become the world's largest and most widely used database of credit information.<sup>93</sup> More

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<sup>91</sup> Mo Chen & Jens Grossklags, *An Analysis of the Current State of the Consumer Credit Reporting System in China*, 4 PROC. ON PRIVACY ENHANCING TECH. 89 (2020).

<sup>92</sup> Zhang Shen, *People's Bank of China: 885 Million Personal Information Has Been Collected in the Credit Information System*, ECON. DAILY (Jun. 14, 2016).

<sup>93</sup> See Zhao Yang (赵妍), *Zhōngguó Zhēng Xìn Tìxì Chūbù Jiànli Bing Fāhuī Zhòngyào Zuòyòng* (中国征信体系初步建立并发挥重要作用) [*China's Credit Information System Was Initially Established and Played an Important role*], CRI ONLINE (Oct. 22, 2018), <http://news.cri.cn/20181022/dbdc3a1b-b30f-1f7c-de46-6d23fed74752.html> (last visited Aug. 5, 2019) (China). See also CBN Editor, *PBOC Credit Reference Center Becomes World's Largest Credit Information System*, CHINA BANKING NEWS (Jun. 19, 2019).

recently, the credit bureau of the People's Bank of China has been upgraded and it now contains a greater range of information about debtors for use in evaluating loan applications.<sup>94</sup>

Not only is the range and extent of credit information held in the public system increasing but credit information in private sectors is also growing and is playing an increasingly important social role through its bearing on social capital.<sup>95</sup> In this regard it also raises issues for the introduction of the personal insolvency system. At the beginning of 2018, the People's Bank of China accepted the application of the personal credit service of Baihang Credit Information Co., Ltd. (百行征信有限公司),<sup>96</sup> a private credit scoring initiative designed to open up borrowing opportunities, in particular in the fintech sector, for the millions without credit histories. By the end of October 2018, Baihang Credit Information had signed credit information sharing cooperation agreements with 241 institutions, covering network microfinance companies, auto finance companies, financial leasing companies, private banks, etc.<sup>97</sup> although there have also

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<sup>94</sup> Frank Tang, *China's Financial Credit Database of 1 Billion People, 28 Million Companies Gets an Upgrade*, SOUTH CHINA MORNING POST (Jan. 19, 2020).

<sup>95</sup> Mo Chen & Jens Grossklags, *supra* note 91.

<sup>96</sup> People's Bank of China (中国人民银行), *Guānyú Bǎi Xíng Zhēng Xìn Yǒuxiàn Gōngsī (Chóu) Xiāngqūān Qīngkuàng De Gōngshì* (关于百行征信有限公司 (筹) 相关情况的公示) *Publicity on the Relevant Situation of Baihang Credit Information Co., Ltd.* (Jan. 4, 2018) (China), <http://www.pbc.gov.cn/rmyh/105208/3456248/index.html>, (last visited Apr. 12, 2019).

<sup>97</sup> *Id.* at 53.

been some notable holdouts.<sup>98</sup> This private credit information system can complement the basic national financial credit information database since it is drawn from different sources,<sup>99</sup> which plays an important role in the improvement of the coverage of China's credit information system. With the improvement of China's credit system, credit reports have gradually infiltrated into people's daily economic activities. Other significant creditor information systems that have grown in the private sector focus on reward systems for those who manage their debts well and they are not licensed for wider credit information services.<sup>100</sup>

Individuals with poor credit records may face a number of limitations and inconveniences in personal loans, visas, startups, and commercial transactions. In June 2018, the National Credit Information Sharing Platform has been connected to 44 ministries and commissions and all provinces, autonomous regions and municipalities, and collected 17.5 billion pieces of credit information. It has established an information verification and superposition mechanism with the National Population Bank to improve the level of information held in respect of natural persons, promoting the elimination of "information islands" between government departments and strengthening collaborative supervision. At the same time, the "Credit China" website and other

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<sup>98</sup> Yun Yang & Lian Nu, *Alibaba and Tencent refuse to Hand Loans Data to Beijing*, FINANCIAL TIMES (Sept. 19, 2019).

<sup>99</sup> *Id.*

<sup>100</sup> Hu Yue & Guo Yingzhe, *Tencent Launches Credit Scoring System Based on WeChat Purchases*, CX TECH (Jun. 8, 2020), <https://www.caixinglobal.com/2020-06-08/tencent-launches-credit-scoring-system-based-on-wechat-purchases-101564336.html> (last visited Aug. 25, 2020).

platforms provide public credit information inquiry services, with a daily visit volume of 10 million people. There is also public demand for wider credit information, with contentions that the range of the credit information should be expanded, and that refusals to pay the electricity bill and the property fees should also be included.<sup>101</sup>

Besides, since 2005, the People's Bank of China has continued to carry out publicity and education on credit reporting and related financial knowledge for college students, ordinary borrowers and the public. Driven by this work, the credit consciousness of Chinese society has gradually increased, bringing greater understanding of credit information, and individuals are beginning to actively check their credit history and pay attention to their letters of credit.<sup>102</sup>

Credit information is of increasing importance in debt enforcement with the *Zhōnghuá Rénmín Gònghéguó Guójiā Fāzhǎn hé Gǎigé Wěiyuánhùi* (中华人民共和国国家发展和改革委员会)

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<sup>101</sup> However such utility bill information is not included in the second generation version of credit reporting. See, Wan Zhou, (水电欠费不纳入征信系统体现法治理性) [Water and Electricity are not Included in Credit Information System] <http://opinion.people.com.cn/n1/2020/0120/c1003-31556079.html>.

<sup>102</sup> See People's Bank of China, Credit Information System Bureau (征信管理局), [*Diǎnxíng Ànlì*] *Gèrén Zhēng Xìn Xìtǒng Jiànshè zài Tígāo Dàxuéshēng Xìnyòng Yìshí, Cùjìn Guójiā Zhù Xué Dàikuǎn Zhèngcè Shíshī Fāngmiàn De Ànlì* (【典型案例】个人征信系统建设在提高大学生信用意识、促进国家助学贷款政策实施方面的案例) *Typical Cases in Which the Construction of a Personal Credit Information System Improves the Credit Awareness of College Students and Promotes the Implementation of the National Student Loan Policy*, PUBLICITY & EDUCATION [webpage] (Oct. 11, 2006, 4:28pm), <http://www.pbc.gov.cn/zhengxinguanliju/128332/128428/128450/2828251/index.html> (last visited Nov. 9, 2019).

[National Development and Reform Commission] and the courts using credit information to leverage the reputation of debtors. Powers to limit the behavior of debtors who fail to pay their debts include those under The Civil Procedure Law (rev'd 2017),<sup>103</sup> which provides that,

*Where the party against whom enforcement is sought fails to perform obligations determined in a legal instrument, the people's court may take or notify a relevant entity to assist in taking the measure of restricting exit from China, the measure of recording the failure in the credit system, the measure of publishing information on the failure on media and other measures prescribed by law.*<sup>104</sup>

This approach leverages the credit system to address the problem of unsatisfied judgments, noted above. In a similar vein, another Judicial Interpretation, named Several Provisions of the Supreme People's Court on Restricting High Consumption of Judgment Debtors,<sup>105</sup> provides that,

*Where a judgment debtor does not fulfill the payment obligation determined in an effective legal instrument within the period specified in the notice of enforcement, the people's court shall restrict the high consumption by the judgment debtor.*<sup>106</sup>

Such restrictions have proved effective in addressing enforcement difficulties and payment has been forthcoming in many instances of debtors unwilling to pay. In this regard the national courts have also established the China Executive Information Disclosure Website, to aid the “basic solution to the implementation of the difficult cases”. Here the relevant executive information is disclosed from multiple sources, and the public can view the information issued by the court about the person against whom execution has been ordered and who is considered *lao lai* and no longer

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<sup>103</sup> Civ. Pro. L., *supra* note 52.

<sup>104</sup> Civ. Pro. L., *supra* note 52, art. 255.

<sup>105</sup> Supreme People's Court, *Several Provisions of the Supreme People's Court on Restricting High Consumption of Judgment Debtors* (issued on Jul. 1, 2010), China.

<sup>106</sup> *Id.* at art. 1.

trustworthy and therefore subject to a range of limitations on consumption. Up to April 12, 2019, 13,607,207 people are on the list of the list of the untrustworthy debtors, 23,063,159 people are restricted from taking the airplane, and 5,748,958 people are limited in taking the train.<sup>107</sup>

The underdeveloped credit information system may once have been a significant barrier to the introduction of a personal insolvency system, however there has been continuous improvement, and the credit information system can operate in a manner that is complimentary such personal insolvency system as may be established, since personal credit risk is a factor in predicting the likelihood of default and personal insolvency.

### C. the special problem of a personal insolvency system for Chinese farmers

Although China currently has many rural areas that are already very affluent, overall, per capita GDP is still very low, the urban-rural gap is still large, and there are many unproductive places in the industrial structure. In view of this disparity, some Chinese scholars have contended that there are several reasons why a personal insolvency system would be inappropriate for use in rural China, given peculiarities regarding the property of rural debtors.<sup>108</sup> One problem that has been noted is that it is difficult to identify the personal property of rural villagers and this would inhibit the application of the personal insolvency procedure. It is also notable that land is a necessity

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<sup>107</sup> China Executive Information Disclosure Website, <http://zxgk.court.gov.cn/> (last visited Nov. 9, 2019).

<sup>108</sup> Hu Ling (胡玲), (债务人生存权益视角下的我国个人破产立法研究) [*Research on China's Personal Insolvency Legislation from the Perspective of Debtor's Survival Interests*], 8 CHINA LEGAL PUB. HOUSE 63 (2014).

for the farmers to make a living in rural areas and it provides their main source of income, however they have no ownership of the land because land is owned by the state or a collective in China and the land also has a specific agricultural use, so it can't be used for any other purpose, such as construction,<sup>109</sup> which would limit its value to an enforcing creditor.

As with land there will be other properties, such as farming tools, that are also necessary for the farmer to earn their living, so that the loss of livelihood that enforcement against such assets by the court would entail, might be considered a violation of humanitarian principles. Mature bankruptcy systems will typically provide an exemption of such tools from the debtor's estate in order that a fresh start can be made by the debtor.<sup>110</sup>

Besides, the income of rural villagers is difficult to value as there can be uncertainty regarding the income earned by rural villagers' operating industries as well as the income earned by rural villagers employed by others. Moreover, in rural China, there is often no clear distinction between personal property and family property. Thus, it would be difficult to determine whether rural

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<sup>109</sup> Zhonghua Renmin Gonghe Guo Nongcun Tudi Chengbao Fa (中华人民共和国农村土地承包法) [Rural Land Contract Law of the People's Republic of China], art. 11(1) (China): "Rural land contracting operations shall abide by laws and regulations and protect the rational development and sustainable use of land resources. The contracted land shall not be used for non-agricultural construction without legal approval."

<sup>110</sup> In contrast, for example, the UK Insolvency Act 1986 § 283(a) exempts tools of the debtor's trade from the estate that is available for distribution to creditors. Similarly, US bankruptcy law allows an exemption for tools of the trade up to a specific value: 11 USC § 522(d)(6).

villagers meet bankruptcy eligibility standards, or when they have met the standards, it would be hard to confirm the scope and quantity of bankruptcy property.<sup>111</sup>

Based on the above reasons, some scholars think it is not appropriate to implement the personal insolvency system in this sector in the current situation. And in the future the specific regulations of the personal bankruptcy for Chinese farmers should be made carefully with provisions enabling rural agricultural debtors to continue to earn a livelihood.

#### D. further reflections on potential difficulties

Apart from the difficulties discussed above, it may further be noted that China now has a poor standard of management for financial institutions and a lack of risk control governance capabilities. There is also no developed system of internal networking among financial institutions, and existing regulations and mechanisms are inadequate. The hasty implementation of a general personal insolvency system may bring immeasurable risks of bad debts and a weakened financial position to financial institutions that were previously poorly resistant to risk.

As discussed above, due to the imperfect financial architecture in respect of personal debt, there are public concerns about the potential for debtors, in particular ‘lao lai’, to use this system to

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<sup>111</sup> Zhu Tao (朱涛), *Geren Pochan Weishishangzao: Cong Zhongguo Nongcun Xianzhuanglunzhi* (个人破产为时尚早—从中国农村现状论之) [“Personal insolvency” is Premature--On the Current Situation of Rural Economy’], 8 QIAN YAN (前沿) [Forward Position] 87 (2009).



evade debt as it will help the debtors to free themselves from heavy debts that they have incurred.

This is a commonly discussed concern among Chinese.

## V Possibilities for the establishment of the personal insolvency system in China

It cannot be denied that significant difficulties stand in the way of the enactment of a personal insolvency law, albeit that it is urgently necessary. The Taizhou and Wenzhou cases and new Shenzhen law, discussed below, signal significant advancements on a regional level, however they also represent progress towards the establishment of such a system nationally and with further progress it will be possible to do so in the future. In recent years China has made great strides towards the advancement of the rule of law and in legal reforms to support the developing Chinese market economy, including a corporate insolvency system and the development of specialist courts.<sup>112</sup> The development of a personal insolvency system is a logical progression, in particular given the increasing role that consumer credit has played in policies for the development of the Chinese economy and the growth of mortgage lending, credit card usage and borrowing through smartphone apps.<sup>113</sup>

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<sup>112</sup> R. Parry & Y. Long, *China's Enterprise Bankruptcy Law, Building an Infrastructure Towards a Market-Based Approach*, 20 J. CORP. L. STUD. 157 (2020).

<sup>113</sup> Wright & Feng, *supra* note 1.

## A. the preparations for establishment the personal insolvency system

The success of a national personal insolvency system will depend on adequate preparation since the enactment of a law is insufficient in itself and institutional support is important also.<sup>114</sup> As noted, in China, although there have been good developments in terms of the construction of a credit information system and the property registration system, both of which will be important supporting systems for the personal insolvency system there is still much progress to be made. The present levels of development may contribute to uncertainties for creditors this arguably does not present a reason to delay the enactment of a personal insolvency law, since creditors can assess risks for themselves in deciding whether to advance credit and on what terms.

## B. the possibilities of identifying property falling within the debtor's estate

In the absence of a sophisticated property information system, the identification of the debtor's property falling within the estate can be aided by a property declaration requirement for those debtors applying for personal bankruptcy. The prospect of a fresh start for honest debtors<sup>115</sup> can act as an incentive for cooperation, in particular if a fresh start will be denied to those who are obstructive or mendacious, as well as the possibility of criminal penalties in serious cases. Further information about the estate property may potentially be obtained through a reporting system and through property information systems, as well as investigation by an administrator.

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<sup>114</sup> Jingxia Shi, *Twelve Years to Sharpen One Sword: The 2006 Enterprise Bankruptcy Law and China's Transition to a Market Economy*, 16 NORTON J. BANKR. L. & PRAC. 645, 649 (2007).

<sup>115</sup> Scott F. Norberg, *Fraudulent Transfers and the Fresh Start in Bankruptcy*, 93 AM. BANKR. L. J. 139 (2019).

As noted, a scheme for registration of real estate,<sup>116</sup> is developing and this may provide information about the most valuable property in the estate. There are also safeguards such as the Anti-Money Laundering Law,<sup>117</sup> The Provisions Concerning the Real-Name Personal Savings Account System,<sup>118</sup> Measures for the Administration of RMB Bank Settlement Accounts,<sup>119</sup> and other legal systems, requiring that individual RMB bank deposit accounts<sup>120</sup> must be opened under the debtor's real name, that is, when depositors open various personal bank accounts, they must present valid, legal and complete valid supporting identification document, and the account name must be the same as the depositor's name in the supporting documentation provided.

### C. The government's belief in establishing a personal insolvency system

Whether to establish a personal insolvency system or not is of course the choice of a country's legislature, which is based on the needs and possibilities of such a system and influenced by the

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<sup>116</sup> Budong Chan Dengji Zanxing Tiaoli (不动产登记暂行条例) [Interim Regulations on the Registration of Real Estate] (rev'd 2019).

<sup>117</sup> [Anti-Money Laundering Law], Order No. 285 of the State Council (promulgated by Standing Comm. of the Nat'l People's Cong., Oct. 31 2006).

<sup>118</sup> [The Provisions Concerning the Real-Name Personal Savings Account System], Order No.5 of the People's Bank of China (promulgated by the State Council, Mar. 20, 2000). The law is made with the intent of ensuring the truthfulness of personal savings accounts and protecting the lawful rights and interests of depositors.

<sup>119</sup> [Measures for the Administration of RMB Bank Settlement Accounts], (promulgated by Instrumentalities of the State Council, All Banks, People's Bank of China, Apr. 10, 2003). These measures were partially invalid.

<sup>120</sup> Including personal bank settlement accounts, personal current savings accounts, personal time deposit accounts, personal notice deposit accounts, etc., hereinafter referred to as personal bank accounts.

public interest. To date the Representatives of the National People's Congress (NPC) have regularly filed individual bankruptcy legislation proposals but none has yet been successful. This is perhaps unsurprising given the significance that a bankruptcy system would have, both in terms of historical ideologies and also in terms of going against suspicion and skepticism by many. Initial steps in formulating a way forward have been taken by the Supreme People's Court, as outlined below. However, as with the corporate insolvency system, swifter progress will be made on a regional level and it is likely that this will pave the way for a breakthrough in the NPC eventually. As in the development of corporate insolvency laws it is Shenzhen that is leading the way towards the enactment of personal insolvency legislation, although a notable interim approach has been developed in another leading economic area, Zhejiang, through case law developments in Taizhou and Wenzhou, through collective debt settlement mechanisms, building on the start made by the Supreme People's Court.

i.) Supreme People's Court

In an initial important development in 2018, Zhou Qiang, President of the Supreme People's Court, viewed a personal insolvency system as important to support the enforcement efforts that were noted above. The legislative proposals on the establishment of a personal insolvency system reflect the high political position of the Supreme People's Court, a strong sense of urgency, a more

receptive outlook, more practical thinking and a sense of responsibility.<sup>121</sup> There was also support at the same time for a personal bankruptcy system in the interests of domestic stability from another judge Du Wanhua, Deputy Director of the Advisory Committee of the Supreme People's Court, who has been a leading influence in the development of the insolvency system.<sup>122</sup> These developments influenced the case law discussed below. In June 2019 there was further support by the Supreme People's Court for investigation of the possibility of a bankruptcy system. This appeared in a multi government agency report on improvements to exit procedures for all types of market participant, and the establishment of a bankruptcy system for natural persons.<sup>123</sup>

## ii). Taizhou

Building upon the initiative of the Supreme People's Court the Taizhou case has been reported by some to be the first example of an individual benefiting from the changing approach to personal

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<sup>121</sup> The Supreme Court: "it is recommended that natural persons who are 'executable' can declare personal insolvency" (Oct. 29, 2018), [http://www.chinapeace.gov.cn/2018-10/29/content\\_11491180.html](http://www.chinapeace.gov.cn/2018-10/29/content_11491180.html) (last visited Nov. 17, 2019).

<sup>122</sup> Du Wanhua (杜万华), *Jiéhé Dāngqián Xíngshì Luòshí "Jìyào" Jīngshén Jījī Tuījìn Wǒguó Pòchǎn Shēnpàn Gōngzuò Mài Shàng Xīn Táijiē* (结合当前形势落实“纪要”精神积极推进我国破产审判工作迈上新台阶) [*Combining the Modern Situation and the Minutes, Actively Promoting Bankruptcy Trial Work to a New Level*] (Oct. 31, 2018) (China), [http://rmfyb.chinacourt.org/paper/images/2018-10/31/05/2018103105\\_pdf.pdf](http://rmfyb.chinacourt.org/paper/images/2018-10/31/05/2018103105_pdf.pdf).

<sup>123</sup> Notice by the National Development and Reform Commission (国家发展和改革委员会), the Supreme People's Court (最高人民法院), the Ministry of Industry and Information Technology (工业和信息化部) and Other Departments of Issuing the Jiakuai Wanshan Shichang Zhuti Tuichu Zhidu Gaige Fangan (加快完善市场主体退出制度改革方案) [Reform Plan for Accelerating Improvement of the Exit System for Market Participants], NAT'L DEV. & REF. COMM'N, (Doc. No. 1104, Jun. 22, 2019).

insolvency,<sup>124</sup> although it is also a simple approach involving no assets and so Chinese scholars regard the Wenzhou case that follows to be the first case with substantial bankruptcy functions and procedures. Administrators had been appointed in three cases and, following the administrators' investigations, one of these debtors gained relief from Ou Hai District Court. The case concerned the unfortunate Mr. Ke, who had been had been a victim of fraud and had incurred significant liabilities as a result and with meagre means he was not in a position to repay his debts. An administrator was appointed to ascertain Ke's financial position. In April 2019 the Taizhou court, influenced by the Supreme People's Court initiatives, declared that the debtor had no available property for distribution to creditors and declared the debt liquidation process to be terminated.<sup>125</sup> The approach taken in the case was based on section 120 of the Enterprise Bankruptcy Law of 2006, which enables proceedings in respect of companies to be terminated in the event that there are no assets available for distribution. Two other debtors whose applications for relief came before the Taizhou court had their cases dismissed: one on account of a failure to cooperate by answering creditors' question and the other on account of a failure to give a truthful account of his debt situation.<sup>126</sup> Subsequently, on May 8, 2019, the Taizhou Intermediate Court announced the development of collective procedures for debt resolution.

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<sup>124</sup> *A Way Out*, *supra* note 26.

<sup>125</sup> *Id.*

<sup>126</sup> *Sān Fèn "Gèrén Pòchǎn" Cǎidìng Shū, Yīrén "Pòchǎn", Liǎng Rén Huīfù Zhíxíng* (三份“个人破产”裁定书，一人“破产”，两人恢复执行) [*Three "Individual Bankruptcy" Rulings, One "Bankrupt" and Two Resume Execution*] (Aug. 31, 2019, 11:50pm) (China), [https://www.sohu.com/a/337868903\\_618578](https://www.sohu.com/a/337868903_618578) (last visited Aug. 24, 2020).

### iii). Wenzhou collective debt settlement

This high-profile personal debt settlement case in Wenzhou in October 2019,<sup>127</sup> has more widely received accolades as the first personal insolvency case in China.<sup>128</sup> It has greater complexity than the Taizhou case in the approach taken, as it was a case involving assets. The foundation for this case had been laid by the Intermediate Court in Wenzhou issuing Implementing Opinions on Collective Resolution of Personal Debts, which were rolled out to 11 primary courts. These Opinions noted that the lack of a personal insolvency law was harming entrepreneurial spirit and they were aimed at resolving the plight of honest but unfortunate entrepreneurs, rather than at struggling debtors more generally. In particular a pilot debt resolution scheme was regarded as important towards resolving the corporate guarantee chains problem,<sup>129</sup> as well as offering

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<sup>127</sup> *Shǒu Lì Gèrén Zhàiwù Qīnglǐ àn Mài Chū Chóng Yào Yībù* (首例个人债务清理案迈出重要一步) [*An Important Step in the First Personal Debt Liquidation Case*], Legal Daily (Nov. 15, 2019, 8:26am) (China), <http://legal.people.com.cn/n1/2019/10/11/c42510-31393297.html> (last visited Aug. 24, 2020). On the morning of October 9, 2019, the Intermediate People's Court of Wenzhou City, Zhejiang Province, and the Pingyang County People's Court jointly reported the case which gave rise to a collective resolution of the debts of an insolvent corporate shareholder of a certain bankrupt enterprise in Wenzhou.

<sup>128</sup> Zhang Yiwen (张译文), *Quánguó Shǒu Lì Gèrén Pòchǎn Shízhì Gōngnéng Gèrén Zhàiwù Jízhōng Qīnglǐ Ànjiàn Bàn Jié* (全国首例个人破产实质功能个人债务集中清理案件办结) [*The Country's First Case of Centralized Liquidation of Personal Debts with Substantial Functions for Personal Bankruptcy is Completed*], SINA FINANCE (Oct. 10, 2019), [http://finance.sina.com.cn/money/bank/bank\\_hydt/2019-10-10/doc-iicezuev1177834.shtml](http://finance.sina.com.cn/money/bank/bank_hydt/2019-10-10/doc-iicezuev1177834.shtml), (last visited Aug. 17, 2020); Shuai Guo, *The First Personal Bankruptcy Case in China*, LEIDEN LAW BLOG (Oct. 18, 2019), <https://leidenlawblog.nl/articles/first-personal-bankruptcy-case-in-china>.

<sup>129</sup> Gabriel Wildau, *In Wealthy Chinese City, Debt Guarantees Spark Default Contagion*, REUTERS BUSINESS NEWS (Apr. 27, 2014); Shu Zhang, *Debt Guarantee Tangle – China's Private Firms Hit by Default Contagion*, REUTERS STOCKS NEWS (Feb. 12, 2019); *China's Chain of Debt Guarantees Looms as Systemic Danger*, BLOOMBERG

indebted entrepreneurs an opportunity for a fresh start. There would be a strict investigation of the debtor's property, an opportunity for creditors to ask questions of the debtor at a creditors' meeting and strict supervision of the settlement.<sup>130</sup> The role of the court would be to facilitate the settlement as well as screening to guard against exploitation of the system for debt evasion.

In the first of many cases under these Opinions,<sup>131</sup> the debtor Cai, as a shareholder of a bankrupt enterprise in Wenzhou, had been held to be jointly and severally liable for the debt of the bankrupt enterprise of RMB 2.14 million yuan. This liability led to Cai's insolvency because Cai had a monthly income of only 4,000 yuan and assets of less than 10,000 yuan, as well as medical bills and University education fees for his child. Under the coordination of the Pingyang County Court, an administrator was appointed and a creditors' meeting held. Cai and his creditors reached a settlement agreement that Cai would within 18 months settle the claims against him. Under the terms of the settlement he only needed to repay 1.5% of the debts, about 32,000 yuan but he also agreed that if within the next 6 years his family income exceeded 120,000 yuan he would pay 50% of the excess towards the settled creditor claims. The terms of the settlement allowed Cai to retain living expenses and medical expenses. Perhaps unsurprisingly there was some criticism of the

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NEWS (Nov. 18, 2018, 1:30pm), <https://www.bloomberg.com/news/articles/2018-11-18/china-s-daisy-chain-of-debt-guarantees-looms-as-systemic-danger>

<sup>130</sup> *Wēnzhōu Shěnjié Quánguó Shǒu Lì “Gèrén Pòchǎn” Àn* (温州审结全国首例“个人破产”案) [*Wenzhou Concluded the Country's First “Personal Bankruptcy” Case*], BEIJING YOUTH DAILY (Oct. 11, 2019) (China), [http://www.xinhuanet.com/legal/2019-10/11/c\\_1125089261.htm](http://www.xinhuanet.com/legal/2019-10/11/c_1125089261.htm), (last visited Aug. 24, 2020).

<sup>131</sup> Yiwen, *supra* note 128, reporting 19 other eligible cases.



case based on the mistaken belief that Cai had the status of *lao lai*<sup>132</sup> but Cai was not in fact badged in this way<sup>133</sup> and he was a good example of the honest but unfortunate debtor who should be able to benefit from bankruptcy relief and for whom, in the public interest, relief should be granted. As a condition of the debt settlement Cai was subject to restrictions for the next three years, specifically providing that he was unable to act as legal representative of any legal entity. Cai was also during this time required not to travel first class or on high speed trains and to obtain permission to travel abroad. Similar restrictions may be anticipated as a condition of a fresh start should a national personal insolvency system be introduced, since they are based on *Guānyú Xiànzhi Bèi Zhíxíng Rén Gāo Xiāofèi Jí Yǒuguān Xiāofèi De Ruògān Guīdìng* [Several Provisions of the Supreme People's Court on Restricting the High Consumption of the Person Subject to Enforcement]<sup>134</sup> and similar restrictions also apply under the new Shenzhen Regulations, discussed next.

#### iv). Shenzhen Special Economic Zone Personal Insolvency Regulations

There has long been progress towards personal insolvency legislation in Shenzhen Special Economic Zone and this has enabled rapid progress to be made towards the enactment of the new

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<sup>132</sup> Noted in Yifu, *supra* note 3.

<sup>133</sup> BEIJING YOUTH DAILY, *supra* note 125.

<sup>134</sup> Supreme People's Court (最高人民法院), *Guānyú Xiànzhi Bèi Zhíxíng Rén Gāo Xiāofèi Jí Yǒuguān Xiāofèi De Ruògān Guīdìng* (关于限制被执行人高消费及有关消费的若干规定) [Several regulations on restricting the high consumption of persons subject to enforcement and related consumption] (Adopted at the 1487th meeting of the Judicial Committee of the Supreme People's Court on May 17, 2010, and adopted by the Supreme People's Court at the 1657th meeting of the Judicial Committee of the Supreme People's Court on July 6, 2015, rev's'd July 22, 2015)

Regulations in recent months. The initiative towards the development of personal insolvency laws began when the Shenzhen Lawyers Association submitted legislative advice in 2013 about formulating personal insolvency regulations to Shenzhen Municipal People’s Congress. The Shenzhen Intermediate People’s Court also completed a personal insolvency legislation research project in 2017, and submitted its report on the matter, which led to the Shenzhen Special Economic Zone Personal Insolvency Regulations (Proposed Draft) being presented to the Shenzhen Standing Committee of Municipal People’s Congress.<sup>135</sup>

More recently pressure in the wake of the COVID-19 crisis has led to further swift progress being made and following a consultation on the draft legislation, announced on 2 June, 2020, the Shenzhen Special Economic Zone Personal Insolvency Regulations were published on 26 August, 2020 and will become effective on 1 March, 2021. This legislation represents a significant step towards the enactment of personal insolvency legislation on a national level.

Shenzhen is a particularly good choice of a pilot area for personal insolvency legislation since it has a good reputation for handling corporate insolvencies, as well as having a large number of sole traders and owner-managers of companies, including MSMEs, who would potentially benefit

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<sup>135</sup> *Guānyú “Shēnzhèn Jīngjì Tèqū Gèrén Pòchǎn Tiáolì (Zhēngqiú Yìjiàn Gǎo)” Gōngkāi Zhēngqiú Yìjiàn De Gōnggào* (关于《深圳经济特区个人破产条例（征求意见稿）》公开征求意见的公告) [Announcement on Public Consultation on the “Regulations on Personal Bankruptcy” of the Shenzhen Special Economic Zone (Draft for Comment)], (issued by Standing Comm. People’s Cong., Shenzhen Municipality, Jun. 2, 2020) (China), [http://www.szrd.gov.cn/szrd\\_zyfb/szrd\\_zyfb\\_tzgg/202006/t20200602\\_19246539.htm](http://www.szrd.gov.cn/szrd_zyfb/szrd_zyfb_tzgg/202006/t20200602_19246539.htm) (last visited Aug. 20, 2020)

from bankruptcy relief in the event of a downturn in fortunes. The Regulations apply only where the debtor resides in Shenzhen Special Economic Zone and has participated in social insurance in Shenzhen for three consecutive years<sup>136</sup> and the spouse of such a person can apply simultaneously.<sup>137</sup> Since the area of personal insolvency law is new, a “Bankruptcy Administration Department” to handle personal bankruptcy affairs, is to be established locally to provide guidance to debtors, supervision of administrators and information for the public.<sup>138</sup> This innovation has been favorably regarded.<sup>139</sup>

The Regulations are fairly detailed and include 13 chapters and 157 articles covering all aspects of bankruptcy proceedings including the processes for application and acceptance of the case,<sup>140</sup> the appointment of a bankruptcy administrator,<sup>141</sup> the debtor’s property,<sup>142</sup> bankruptcy costs,<sup>143</sup>

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<sup>136</sup> [Shenzhen Regulations], *supra* note 2, Art. 2.

<sup>137</sup> [Shenzhen Regulations], *supra* note 2, Art. 171.

<sup>138</sup> [Shenzhen Regulations], *supra* note 2, Arts 6 and 155.

<sup>139</sup> Zou Ningbo (邹宁博), “*Shēnzhèn Jīngjì Tèqū Gèrén Pòchǎn Tiáolì (Zhēngqiú Yìjiàn Gǎo)*” *Fābù Duō Xiàng Nèiróng Jùyǒu Túpò Xīng* (《深圳经济特区个人破产条例（征求意见稿）》发布 多项内容具有突破性)

[*Shenzhen Special Economic Zone Personal Bankruptcy Regulations (Draft for Solicitation of Comments) Released with Breakthroughs in Multiple Contents*], VOICE OF CHINA (Jun. 4, 2020) (China),

[http://china.cnr.cn/xwwgf/20200604/t20200604\\_525116918.shtml?from=groupmessage&isappinstalled=0](http://china.cnr.cn/xwwgf/20200604/t20200604_525116918.shtml?from=groupmessage&isappinstalled=0), (last visited Aug. 10, 2020).

<sup>140</sup> [Shenzhen Regulations], *supra* note 2, Ch. 2.

<sup>141</sup> [Shenzhen Regulations], *supra* note 2, Arts 16 and 17.

<sup>142</sup> [Shenzhen Regulations], *supra* note 2, Ch. 3.

<sup>143</sup> [Shenzhen Regulations], *supra* note 2, Ch. 5.

the filing of claims by creditors,<sup>144</sup> a creditors' meeting,<sup>145</sup> as well as processes for reorganization,<sup>146</sup> reconciliation, or settlement<sup>147</sup> and liquidation.<sup>148</sup> Reference can also be made to the Civil Procedure Laws and Enterprise Bankruptcy Law for interpretation in the event that the Shenzhen Regulations do not cover a point that arises.<sup>149</sup>

The Regulations enable debtors who have lost the ability to repay their debts, or whose assets are insufficient to repay their liabilities, to make a fresh start, regardless of whether their debts were incurred through business activities.<sup>150</sup> It enables bankruptcy proceedings to be commenced by the debtor, or by creditors holding claims of 500,000 yuan (around £55,000 or \$70,800) or more.<sup>151</sup> Reorganization enables debtors with predictable regular future income to repay their debts over a longer period of time,<sup>152</sup> up to five years.<sup>153</sup>

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<sup>144</sup> [Shenzhen Regulations], *supra* note 2, Ch. 4.

<sup>145</sup> [Shenzhen Regulations], *supra* note 2, Ch. 6.

<sup>146</sup> [Shenzhen Regulations], *supra* note 2, Ch. 8.

<sup>147</sup> [Shenzhen Regulations], *supra* note 2, Ch. 9. This Chapter provides a process whereby the debtor can reach a compromise with creditors, enabling debts to be repaid and the closure of liquidation proceedings.

<sup>148</sup> [Shenzhen Regulations], *supra* note 2, Ch. 7.

<sup>149</sup> [Shenzhen Regulations], *supra* note 2, Art. 172.

<sup>150</sup> [Shenzhen Regulations], *supra* note 2, Arts 2, 8.

<sup>151</sup> [Shenzhen Regulations], *supra* note 2, Art. 9.

<sup>152</sup> [Shenzhen Regulations], *supra* note 2, Ch. 8.

<sup>153</sup> [Shenzhen Regulations], *supra* note 2, Art. 115(1), which also provides that mortgage repayments can be made over a longer period.

Like the Taizhou and Wenzhou decisions, the Shenzhen Regulations emphasize the importance of enabling honest but unfortunate debtors to obtain relief and there are various safeguards that may provide assurance to sceptics who fear that the fresh start can be exploited by the *lao lai*.<sup>154</sup> The Regulations expressly require honesty and credibility in the process of claims liquidation<sup>155</sup> and the probity of proceedings is underpinned by 1) various obligations for the debtor, including disclosure requirements, 2) the scrutiny of a case by the court, 3) the appointment of an administrator, 4) the formation of a creditors' meeting, 5) transaction avoidance provisions, as well as 6) a wide range of restrictions on the debtor's conduct.

- 1) Obligations for the debtor: A debtor applying for relief must disclose their reasons for doing so, as well as details of their income, their dependents and employees, their estate and the claims against them and they must also supply a statement that they act in good faith.<sup>156</sup> The debtor will also be subject to various obligations to cooperate,<sup>157</sup> such as detailed disclosure to the administrator of property owned by the debtor or another close family member in the debtor's household<sup>158</sup> and the debtor must regularly report on their personal income, expenditure and property to the administrator and the Bankruptcy Administration Department and must disclose any instances of various categories of transaction, such as where the debtor made a large payment, or paid debts

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<sup>154</sup> [Shenzhen Regulations], *supra* note 2, Explanatory Notes.

<sup>155</sup> [Shenzhen Regulations], *supra* note 2, Art. 3.

<sup>156</sup> [Shenzhen Regulations], *supra* note 2, Art. 8.

<sup>157</sup> [Shenzhen Regulations], *supra* note 2, Art. 21.

<sup>158</sup> [Shenzhen Regulations], *supra* note 2, Arts 33 and 34.

which were not due.<sup>159</sup> Debtors who fail to cooperate or engage in concealment of assets or other dishonest behavior can be reprimanded and may be subject to criminal proceedings.<sup>160</sup> The debtor will be subject to ongoing obligations during a three year inspection period which applies following the opening of proceedings.<sup>161</sup> This inspection period can be extended for up to two years in the event that the debtor violates any of the restrictions<sup>162</sup> but the inspection period can also be shortened in the event that the debtor is able to voluntarily repay a greater percentage of debts.<sup>163</sup>

- 2) Court scrutiny: Complex cases can be investigated by the court and are otherwise handled on paper<sup>164</sup> and an application for relief can be rejected the event of dishonest conduct or intent.<sup>165</sup> Clear and low value cases can be dealt with under a summary procedure.<sup>166</sup>

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<sup>159</sup> [Shenzhen Regulations], *supra* note 2, Art. 35.

<sup>160</sup> [Shenzhen Regulations], *supra* note 2, Art. 167. Family members can also be liable in various circumstances: Art. 168.

<sup>161</sup> [Shenzhen Regulations], *supra* note 2, Art. 95.

<sup>162</sup> [Shenzhen Regulations], *supra* note 2, Art. 96.

<sup>163</sup> [Shenzhen Regulations], *supra* note 2, Art. 100.

<sup>164</sup> [Shenzhen Regulations], *supra* note 2, Art. 12.

<sup>165</sup> [Shenzhen Regulations], *supra* note 2, Art. 14(2) and (3).

<sup>166</sup> [Shenzhen Regulations], *supra* note 2, Ch. 10.

- 3) Administrator: An administrator may be proposed by creditors and approved by the court, or if there is no such nomination, or if the nomination is unsuitable, by the Bankruptcy Administration Department.<sup>167</sup>
- 4) Creditors' meeting: A creditors' meeting is formed to carry out various functions including a review of the debtor's list of exempt property, verification of claims and to review and approve any reorganization plan.<sup>168</sup> A creditors' committee can also be established.<sup>169</sup> As noted above, the attendance of the debtor before such a meeting was regarded as important in the Wenzhou case as supporting the honesty of the proceedings.
- 5) Transaction avoidance: The probity of the proceedings is also supported by transaction avoidance provisions. In particular transactions will be void where they involved concealment, transfer or improper disposal of property to avoid debts, or involved the fabrication of debts or admittance of falsified debts.<sup>170</sup> Transactions entered into in the two years leading up to the bankruptcy application can be avoided in various circumstances,<sup>171</sup> and debts paid in the six months prior to the bankruptcy application

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<sup>167</sup> [Shenzhen Regulations], *supra* note 2, Arts 16-18.

<sup>168</sup> [Shenzhen Regulations], *supra* note 2, Art. 73.

<sup>169</sup> [Shenzhen Regulations], *supra* note 2, Art. 74.

<sup>170</sup> [Shenzhen Regulations], *supra* note 2, Art. 42.

<sup>171</sup> [Shenzhen Regulations], *supra* note 2, Art. 40.

can be avoided except in cases where the payment was to the benefit of the debtor's estate or was necessary for the debtor's normal life.<sup>172</sup>

- 6) Restrictions on the debtor: Bankruptcy will impact on the debtor professionally, since they will not be permitted to act as director, supervisor or manager of a company, neither listed nor non-listed, nor a financial institution nor engage in such other occupations as may be specified.<sup>173</sup> However reorganization will not impact on the debtor's employment.

Debtors are also expected not to incur expenditure that is not necessary for their life or work<sup>174</sup> and in particular they should not lead lavish lifestyles while applying for bankruptcy, such as by flying business class or staying in a high-quality hotel or visiting a golf course or nightclub.<sup>175</sup> Nor may debtors acquire real estate or motor vehicles or engage in construction or redecoration.<sup>176</sup> These restrictions parallel those set out in *Guānyú Xiànzhì Bèi Zhíxíng Rén Gāo Xiāofèi Jí Yǒuguān Xiāofèi De Ruògān Guīdìng* [Several Provisions of the Supreme People's Court on Restricting the High Consumption of

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<sup>172</sup> [Shenzhen Regulations], *supra* note 2, Art. 41. In the case of a connected party this article applies to any payments made in the two years leading up to the bankruptcy filing.

<sup>173</sup> [Shenzhen Regulations], *supra* note 2, Art. 86.

<sup>174</sup> [Shenzhen Regulations], *supra* note 2, Art. 23(8).

<sup>175</sup> [Shenzhen Regulations], *supra* note 2, Art. 23(1) and (2).

<sup>176</sup> [Shenzhen Regulations], *supra* note 2, Art. 23(3) and (4).



the Person Subject to Enforcement]<sup>177</sup> and also those noted above in the Taizhou and Wenzhou cases. There is therefore evidence of the development of a uniform approach to the matter of appropriate restrictions on those seeking personal insolvency relief and it may be expected that this approach will be carried forward in the event of national personal insolvency legislation.

It is expected that debtors will be able to make a fresh start at the end of the bankruptcy proceedings and they will be able to retain property up to a value of 200,000 yuan (around \$29,000 or £23,000) that is not used to pay off their debts, as well as means to cover necessities and expenses of the debtor and their family, costs of medical treatment and education and sentimental items, except those of high value. This maximum value of exemptions will make it difficult for debtors to retain their homes,<sup>178</sup> unless some compromise can be reached with creditors.

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<sup>177</sup> Supreme People's Court (最高人民法院), *Guānyú Xiànzhi Bèi Zhíxíng Rén Gāo Xiāofèi Jí Yǒuguān Xiāofèi De Ruògān Guīdìng* (关于限制被执行人高消费及有关消费的若干规定) [Several Regulations on Restricting the Excessive Consumption by Persons Subject to Enforcement and Related Consumption] (Adopted at the 1487th meeting of the Judicial Committee of the Supreme People's Court on May 17, 2010, and adopted by the Supreme People's Court at the 1657th meeting of the Judicial Committee of the Supreme People's Court on July 6, 2015, rev's'd July 22, 2015)

<sup>178</sup> Sun Ling and Liu Yichen (孙莹、刘祎辰), *Shēnzhèn Jīngjì Tèqū Gèrén Pòchǎn Tiáolì* "Gōngbù Míngquè Shēnqǐng Pòchǎn De Zhàiwùrén Huòmiǎn Cáichǎn Shàngxiàn Wéi 20 Wàn Yuán" (《深圳经济特区个人破产条例》公布明确申请破产的债务人豁免财产上限为 20 万元) [*The Personal Bankruptcy Regulations of the Shenzhen Special Economic Zone Announced that the Debtor's Exempt Property Limit for Bankruptcy Applications is 200,000 Yuan*] (China) [http://www.sohu.com/a/415970767\\_362042](http://www.sohu.com/a/415970767_362042).

Shenzhen is one of the most expensive places in China in which to own real estate,<sup>179</sup> with a reported average cost of 62,000 yuan (around \$9000 or £6700) per square meter (10.8 sq. feet).<sup>180</sup> Discharge is anticipated after three years from the commencement of the bankruptcy. The system therefore offers prospects to creditors of a fresh start on reasonable terms. Commentators tended to view the Shenzhen legislation favorably at its draft stage,<sup>181</sup> with the main criticism based on speculation that if the rate of personal insolvency cases is to turn out to be equivalent to

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<sup>179</sup> Alice Woodhouse, *Shenzhen Joins Top Five Cities with Most Expensive Housing*, FINANCIAL TIMES (Apr. 12, 2019).

<sup>180</sup> Michael Standaert, *This Chinese City Wants to Make Housing More Affordable, but...*, AL JAZEERA (Dec. 13, 2019), <https://www.aljazeera.com/ajimpact/chinese-city-housing-affordable-191213042354066.html>.

<sup>181</sup> The following are all Chinese language sources. Zou Ningbo, *supra* note 139; Yang Yangteng (杨阳腾), *Gèrén Pòchǎn Zhìdù Bù Huì Chéng “Lǎo Lài” Bìfēngǎng* (个人破产制度不会成“老赖”避风港) [*Personal Bankruptcy Law Will Not Become a Safe Haven*], *Jingji Ribao* (经济日报) [ECONOMIC DAILY], Jun. 7, 2020, <https://cn.chinadaily.com.cn/a/202006/07/WS5edcadb8a31027ab2a8ced14.html> (Aug. 25, 2020); Li Jinlei (李金磊), *Gèrén Pòchǎn Zhēn Yào Láile! Lǎo Làimen De Jiùshù Háishì Kuánguān?* (个人破产真要来了！老赖们的救赎还是狂欢?) [*Personal Bankruptcy is Really Coming! Lao Lai's Salvation or Carnival?*], *TELLER REPORT, CHINA NEWS CLIENT BEIJING* (Jun. 3, 2020), [http://www.xinhuanet.com/fortune/2020-06/03/c\\_1126069023.htm](http://www.xinhuanet.com/fortune/2020-06/03/c_1126069023.htm) (last visited Aug. 25, 2020); Peng Jiang, *Yǔnxǔ Gèrén Pòchǎn Bìngfēi Gěi “Lǎo Lài” Kāihòumén* (允许个人破产并非给“老赖”开后门) [*Allowing Personal Bankruptcy Does not Open Door to “Lao Lai”*], *QS THEORY* (Jun. 9, 2020) [http://www.qstheory.cn/llwx/2020-06/09/c\\_1126090178.htm](http://www.qstheory.cn/llwx/2020-06/09/c_1126090178.htm) (last visited Aug. 25, 2020); Sun Weiwei (孙维维), *Gèrén Pòchǎn Fǎ Láile! Nǎxiē Rén Kě Shēnqǐng? Shìfǒu Huì Zòngróng “Lǎo Lài”?* (个人破产法来了！哪些人可申请？是否会纵容“老赖”?) [*The Personal Bankruptcy Law Is Here! Who Can Apply? Will It Indulge “Lao Lai”?*], *YICAI MEDIA* (Jun. 3, 2020), <https://www.yicai.com/news/100654901.html> (last visited Aug. 25, 2020).

the rate in the United States this will place a heavy burden on the courts.<sup>182</sup> The restriction to local cases should at least help to prevent a rush of forum shopping cases from elsewhere in China.

## VI Conclusion

The necessity of a personal insolvency law in China is doubtless, and the construction of such a system in the face of changing ideologies and significant resistance by many citizens, as well as under-developed supporting infrastructure should best be done step by step. Indeed, other countries which have established personal insolvency systems have not done so overnight but rather have enacted bankruptcy laws and developed a supporting infrastructure over time. In China the supporting infrastructure, including under-developed property information, credit information and debt enforcement systems should arguably not necessitate delay to the establishment of a personal insolvency system. As the insolvency system develops so too will the supporting infrastructure and until that time creditors can take steps to protect their own interests. The Supreme People's Court is playing a leading role in encouraging a fresh start for overburdened debtors and the regional developments in Zhejiang and in particular Shenzhen, discussed above, can inform the development of a personal insolvency system at a national level. A fairly consistent pattern has emerged of systems enabling honest but unfortunate debtors to

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<sup>182</sup> Chen Xiahong (陈夏红), *Pòchǎn Fǎ De Wēndù: Gèrén Pòchǎn Àn Rúshān, Pòchǎn Fǎguān Hé Chù Lái* (破产法的温度 | 个人破产案如山, 破产法官何处来) [*Personal Bankruptcy Cases Are Like Mountains, Where Does the Bankruptcy Judge Come From?*], THE PAPER (Jun. 18, 2020, 9:49pm) (China), [https://www.thepaper.cn/newsDetail\\_forward\\_7878364](https://www.thepaper.cn/newsDetail_forward_7878364) (last visited Aug. 10, 2020).

obtain a fresh start, regardless of whether or not their debts are business debts or consumer debts.

Addressing public concerns, the nascent systems all have safeguards designed to prevent exploitation by the dishonest, in requiring of debtors an honest declaration, subjecting the debtor's estate to investigation by an administrator, requiring that the debtor is available for interrogation by a meeting of creditors and also placing limitations on the debtor enjoying luxuries during the bankruptcy. The success of the personal insolvency system will depend on these safeguards assuaging public concerns regarding over-indebted persons since there is a shadow cast by the dishonest *lao lai* even though the regional personal insolvency systems are not designed to aid such persons. It is perhaps this, rather than a need for further institutional development, that will present the greatest obstacle to the development of a national personal insolvency system.