LAME-DUCK BANKRUPTCY INSTITUTIONS UNDER GOVERNMENT INTERVENTION IN REORGANISATION OF LISTED COMPANIES IN CHINA (Part 1)

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Government intervention in the bankruptcy reorganisation of listed companies in China constitutes a major obstacle to implement the Enterprise Bankruptcy Law of the People's Republic of China which was enacted in 2006 (2006 EBL).[1] *The 2006 EBL improves upon its predecessor legislation—the 1986 EBL, which granted extensive powers to the Chinese government for its administrative control over the bankruptcy of enterprises, mainly state-owned enterprises. A new administrator mechanism has been established to replace the old liquidation group; the power of the creditors' meeting has been strengthened and the creditors' committee has been established in the 2006 EBL to better protect the interests of the creditors, which was intentionally ignored under the 1986 EBL; the people's court obtained more powers in confirming the reorganisation plans by using its cramdown power and controlling the bankruptcy proceedings under the 2006 EBL. One of the goals of the lawmakers to improve these bankruptcy institutions is to reduce the government intervention in China and protect the interests of stakeholders. However, government intervention in fact renders these bankruptcy institutions weak and cannot function as expected by the lawmakers. This article analyses the negative effects exerted on these institutions by the government intervention in the bankruptcy reorganisation of listed companies in China and argues that the government should return the powers to the bankruptcy institutions in order to let the bankruptcy system serve a better function in China's market.*

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[1] The English version of the Enterprise Bankruptcy Law (EBL) of the People's Republic of China (PRC), available at http://www.npc.gov.cn/englishnpc/Law/2008-01/02/content_1388019.htm (visited 3 February 2016). The new EBL was passed by the Standing Committee of the National People's Congress (NPCSC) on 27 August 2006 and came into effect on 1 June 2007.

This article is published in two parts. The first part discusses the negative effects of government intervention on bankruptcy institutions. The second part, appearing in the next issue, analyses the effects of the reorganisation on the listed companies exerted by the government.

1. Introduction

This article examines the negative impacts exerted by government intervention on bankruptcy institutions, namely the creditors' meeting and committee, the bankruptcy administrator and the people's court. The 2006 Enterprise Bankruptcy Law (EBL) has established the creditors' committee,[2] which did not exist in the 1986 EBL, to supervise the management and disposal of the bankruptcy estate when creditors' meetings are not in session, and to supervise the distribution of the bankruptcy estate and other duties as entrusted by the creditors' meeting.[3] The powers of creditors' meeting have been expanded.[4] The 2006 EBL attempts to provide creditors with more autonomy to protect their interests by strengthening the creditors' meeting and establishing the creditors' committee. Moreover, a new bankruptcy administrator system is established to fairly protect the interests of all stakeholders. The bankruptcy administrator could be assumed by social intermediaries, such as law, accountancy and liquidation firms, and professional individuals affiliated with social intermediaries.[5] The power of the people's court is also strengthened. The 2006 EBL entrusts the people's court with the power to cramdown reorganisation plans rejected by creditors under certain conditions.[6] All these measures aim to pave the way for bankruptcy institutions to play a more fundamental role in the bankruptcy of enterprises and reduce the meddling of the government in enterprise bankruptcy. However, these bankruptcy institutions do not work well because the government still plays a strong role in the reorganisation of listed companies in practice.

[2] S 2 of Ch VII of the 2006 EBL.

[3] Art 67 of the 2006 EBL.

[4] Art 61 of the 2006 EBL.

[5] Art 24 of the 2006 EBL.

[6] Art 87 of the 2006 EBL.

This article comprises six sections. Section 2 explores the problems with the obstinate liquidation group.[7] The liquidation-group administrator dominates the reorganisation of listed companies in practice. In this section, negative impacts of the government-official-dominated liquidation group on the new administrator mechanism are examined. The liquidation groups are more partial towards the rights of shareholders. The protection of shareholders' interests is achieved at the costs of general creditors. Creditors are actually placed in a less powerful position than the shareholders in the reorganisation of listed companies. Impediments towards an independent and impartial administrator system are also discussed.

Section 3 focuses on the problems of the creditors' meeting and committee. These two institutions have very limited power in practice. First, the rights and duties of these two institutions and their power over the replacement and supervision of the administrator under the 2006 EBL are reviewed. The power of these two institutions to supervise and control the administrator—the liquidation group in particular, is far from adequate. Furthermore, the attitude of the people's court and the liquidation-group administrator towards the protection of the creditors' rights is also problematic as they encroach the rights and interests of the creditors.

In Section 4, the subordinate role of the people's court to the government in the reorganisation process of listed companies in China is discussed. The people's court cannot independently make decisions on whether they can accept or reject the reorganisation applications of listed companies in practice. Prior approval from the government is a prerequisite. Furthermore, the people's court cannot independently confirm the reorganisation plans of listed companies. Section 5 discusses the effects of the reorganisation of listed companies under government intervention. Section 6 concludes this article.

[7] The liquidation group can perform their duties in liquidation, conciliation and reorganisation proceedings. Its functions are not confined to liquidation although it may lead to such misunderstandings due to the wording of its name liquidation group. It is an organisation inherited from the 1986 EBL and its main function is to liquidate the SOEs. This is the reason why it was named liquidation group as no reorganisation system existed under the 1986 EBL. Although the reorganisation system was established under the 2006 EBL, the name of the liquidation group remained the same and it was granted the rights to administer the reorganisation process of enterprises.

Electronic copy available at: http://ssrn.com/abstract=2768752

2. Lack of a Well-Functioning Administrator Mechanism

Strong and efficient bankruptcy institutions are vital to the smooth implementation of the bankruptcy system in China. The World Bank, the United Nations Commission on International Trade Law (UNCITRAL) and the Organisation for Economic Co-operation and Development all emphasise the importance of institutional frameworks by recommending that member states improve the institutional capacity to better implement their bankruptcy laws.[8] The 2006 EBL has put into place a new administrator system that replaced the old liquidation group that consisted exclusively of government officials from various departments under the 1986 EBL. However, there are still many problems with this newly established administrator system.

(a) *Dominance of Liquidation Group in Reorganisation of Listed Companies*

The most conspicuous problem about the liquidation group is its lack of impartiality and independence. The administrator should be impartial in the bankruptcy process. There are many interests involved in the reorganisation process of listed companies including, *inter alia*, the interests of the debtor, the creditors, employees, holders of the recall right and of the exemption right, the government and the community. The variety of interests involved in the reorganisation process entails that the administrator should be impartial, not simply representing one or two specific parties. The UNCITRAL points out that:

> "[h]owever appointed, the insolvency representative plays a central role in the effective and efficient implementation of an insolvency law, with certain powers over debtors and their assets … and to ensure that the law is applied effectively and impartially".[9]

To ensure that the administrator is impartial, the administrator should be able to demonstrate that it is independent of the vested interests, whether these are economic,

[8] See more in the World Bank, *Principles for Effective Insolvency and Creditor/Debtor Regimes*, available at http://siteresources.worldbank.org/EXTGILD/Resources/5807554-1357753926066/ICRPrinciples-Jan2011[FINAL].pdf (visited 12 November 2014) pp 6–9, 23–24 and Terence C Halliday, "Lawmaking and Institutional Building in Asian Insolvency Reforms: Between Global Norms and National Circumstances" *in OECD, Asian Insolvency Systems: Closing the Implementation Gap* (2007), pp 22–42.

[9] The UNCITRAL, *Legislative Guide on Insolvency Law* (New York, United Nations: UNCITRAL, 2004), p 174.

familial or other in nature, as such connections would probably prejudice the interests of stakeholders in the bankruptcy process. Disclosure of conflict of interests by the administrator could reduce such possibility of prejudice. The impartiality or lack of independence can be assessed against the circumstance disclosed.[10] In addition, the legal source of the administrator's competence also requires its impartiality. Its competence is derived from the 2006 EBL,[11] not from the people's court or the agent of creditors or the debtor. The administrator is only responsible to the people's court, which has the legal right to designate the administrator pursuant to the 2006 EBL, not any of the stakeholders.[12]

Impartiality is the fundamental requirement for the administrator to perform its duties in the reorganisation process.[13] However, the administrator is not impartial in most reorganisation cases of listed companies. The liquidation-group administrator does not aim at protecting the interests of all stakeholders; it is more like the representative of local governments. The findings of a case study made by the author on the designation of different types of administrators and the interests that are protected by the liquidation-group administrator support this argument (for more details, please refer to Appendix A).

To begin with, listed companies with state investment favour the liquidation-group type administrator rather than the social-intermediary administrator. Figure 1 shows that 28 out of 29 (96.6%) listed State-owned Enterprises (SOEs)[14] designated the

[10] *Ibid.*, p 176.

[11] Art 22 of the 2006 EBL.

[12] Art 23 of the 2006 EBL.

[13] 奚晓明/Xiaoming Xi (ed), *最高人民法院: 关于企业破产法司法解释理解与适用—破产管理人制度· 新旧破产法衔接 [The SPC: On the Understanding and Application of the Judicial Interpretations of the 2006 EBL—Administrator System and the Connection between the Old and New EBL]* (北京: 人民法院出版社/Beijing: the People's Court Press, 2007), p 70.

[14] SOEs in a broad sense includes three kinds of enterprises with state investment:

(1) pure SOEs, referring to enterprises whose capitals are all owned by the state;

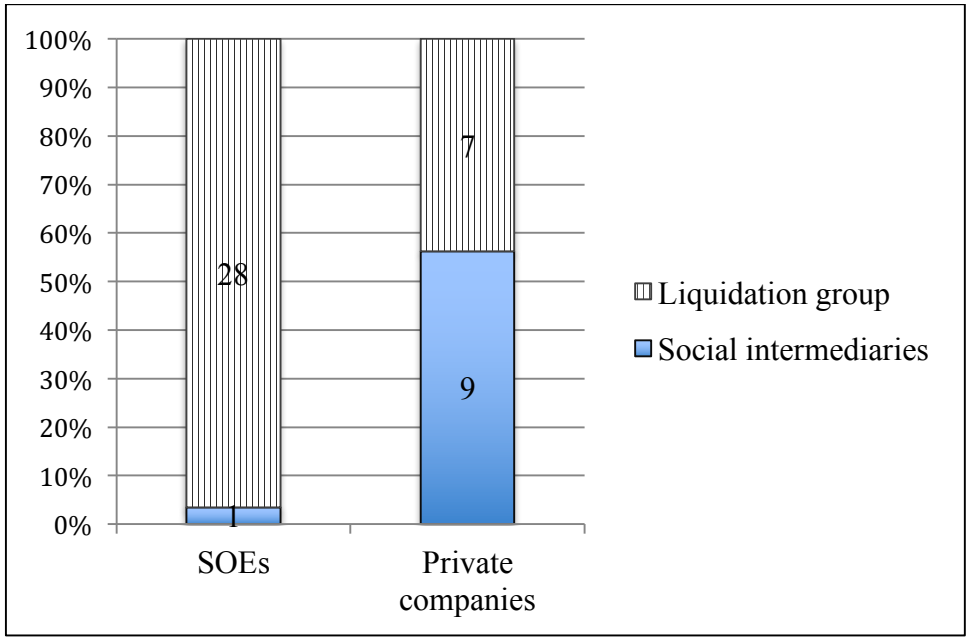
(2) enterprises controlled by the state, including absolute control (state equity >50%) and relative control (state equity <50% but have controlling power over the company) and

(3) enterprises with the state being a small shareholder.

SOEs in this article include enterprises which fall into types (2) and (3), and are called enterprises with state investment or SOEs for convenience. For the concept of SOEs, please refer to "国家统计局关于对国有公司企业认定意见的函 [Letter of the National Bureau of Statistics on the Opinion of Identifying the State-Owned Companies]", available at

liquidation group as the administrator. Among the 28 listed SOEs, 24 are companies with the state as a controlling shareholder and four are companies with the state as a small shareholder (see Figure 2).[15] In comparison, seven private listed companies out of 16 (43.8%) designated the liquidation group as the administrator. As a result, 92% of the liquidation group, which are headed by government officials, dominates the reorganisation of listed companies in China.[16]

Figure 1: Designation of the Liquidation Group as Administrator among Different Types of Listed Companies



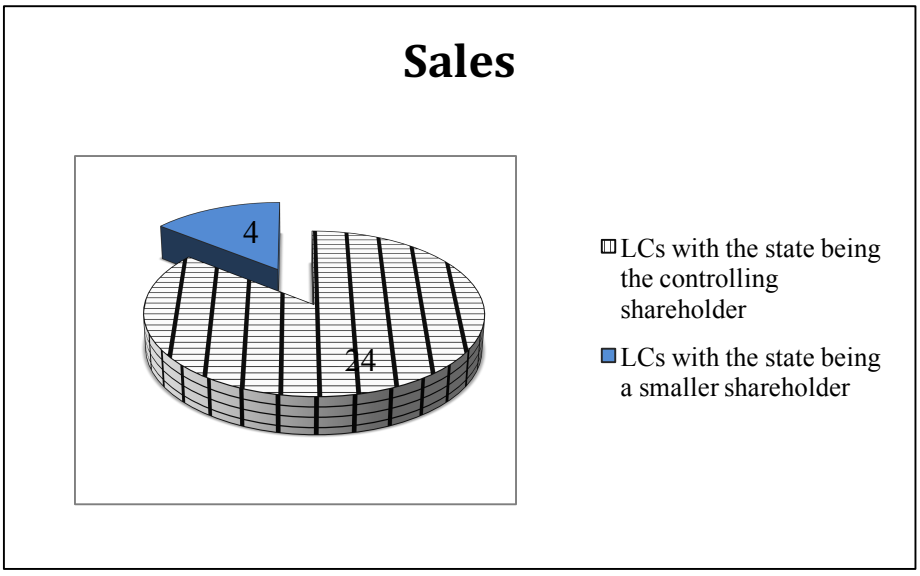
Source: The data is collected by the author from the website of http://www.cninfo.com.cn/.

Figure 2: Types of SOEs that Designated Liquidation Group as Administrator

http://policy.mofcom.gov.cn/blank/claw!fetch.action?id=g000033027 (visited 26 June 2015).

[15] In this article, both types of listed companies with the State being a controlling shareholder or a small shareholder are regarded as SOEs in a general sense. Please refer to "国家统计局关于对国有公司企业认定意见的函 [Letter of the National Bureau of Statistics on the Opinion of Identifying the State-Owned Companies]", available at http://policy.mofcom.gov.cn/blank/claw!fetch.action?id=g000033027 (visited 1 August 2015).

[16] See Appendix A for more detail.

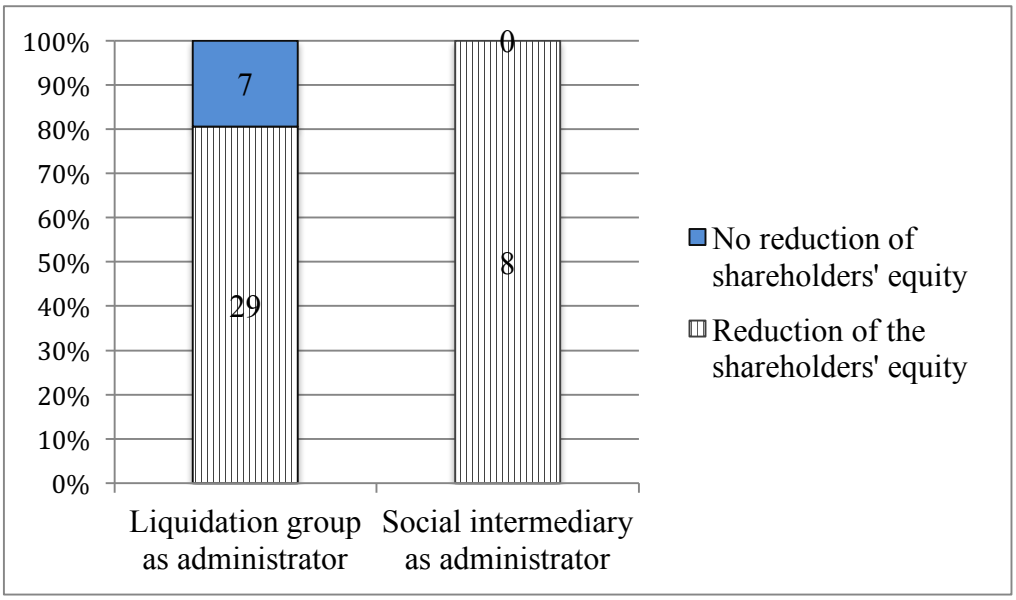


Source: The data is collected by the author from the website of http://www.cninfo.com.cn/.

Second, the liquidation group is inclined to protect the interests of state shareholders at the expense of general creditors. Insolvency cases require funds both to reorganise debtors and to cover the resettlement and other claims of workers. Local governments are not willing to foot the bill. The liquidation group, which represents the local governments, realises the goals of the government to safeguard state-owned assets in the listed companies, protects the interests of the local government, such as in terms of local taxes, gross domestic product, employment or other political interests like the administrative achievement of local officials and social stability in intervening in the reorganisation of listed companies. This is the reason why listed SOEs prefer the liquidation group to social intermediary in their reorganisation.

Among the 45 listed companies, 36 designate the liquidation group as administrator (see Appendix A). Figure 3 shows that the shareholder equity in seven of the cases among the 36 has not been reduced, while the equity has been reduced in all nine cases with a social intermediary as the administrator.

Figure 3: Comparison of Reduction of Shareholder Equity in Cases with Liquidation Group and Social Intermediary as Administrator Respectively



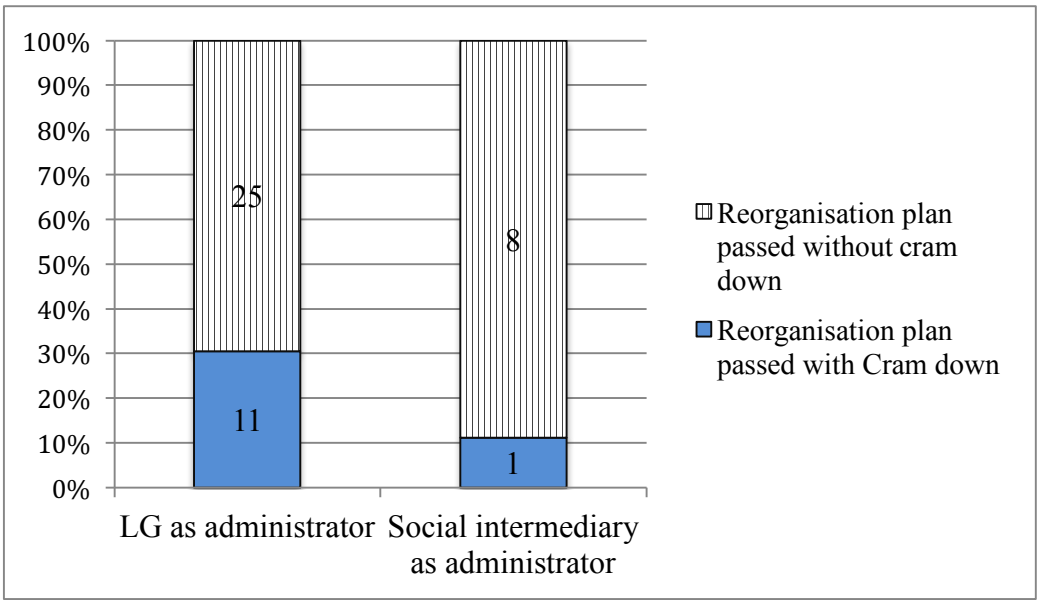
Source: The data is collected by the author. For more information, please see Appendix A: General Information of Reorganisation of 45 Listed Companies.

The liquidation group tends to file an application to the people's court to cramdown reorganisation plans rejected by a group/s of creditors (and shareholders in some cases). Figure 4 shows that the reorganisation plans are crammed down by the people's court in 11 out of the 36 (30.6%) listed companies with the liquidation group as the administrator.[17] By contrast, the reorganisation plans are crammed down in one out of the nine (11.1%) listed companies with a social intermediary as the administrator,[18] a much smaller proportion.

Figure 4: Comparison of Reorganisation Plans Confirmed by Cramdown Procedure with Liquidation Group and Social Intermediary as the Administrator Respectively

[17] The 11 listed companies are S*ST Tianfa, S*ST Guangming, *ST Jinhua, *ST Xinye, *ST Baoshuo, *ST Canghua, S*ST Tianyi, *ST Guangxia, *ST Dixian B, *ST Fangxiang and *ST Jincheng.

[18] The case is *ST Hongsheng.



Source: The data is collected by the author. For more information, please see Appendix A: General Information of Reorganisation of 45 Listed Companies.

Figure 5 shows that 8 out of 29 (27.6%) listed SOEs[19] were under the cramdown provision and this is true for 4[20] out of the 16 (25%) private companies, which is a very small difference. This indicates that it is not the ownership that leads to the different treatments between the shareholders and creditors, but the liquidation group itself. The liquidation group firmly controls the reorganisation process of both SOEs and some private listed companies. Creditors, especially small creditors, have few opportunities to negotiate the treatment of their claims and the conditions of the reorganisation, although they have such legal rights according to the 2006 EBL. Reorganisation plans drafted by the liquidation-group administrator are mainly based on negotiation with big shareholders and new investors.[21] Such plans are pressed onto creditors with little notice for their voting, which results in a much lower repayment rate to the general creditors than to other type of creditors and shareholders. According to the data collected by the

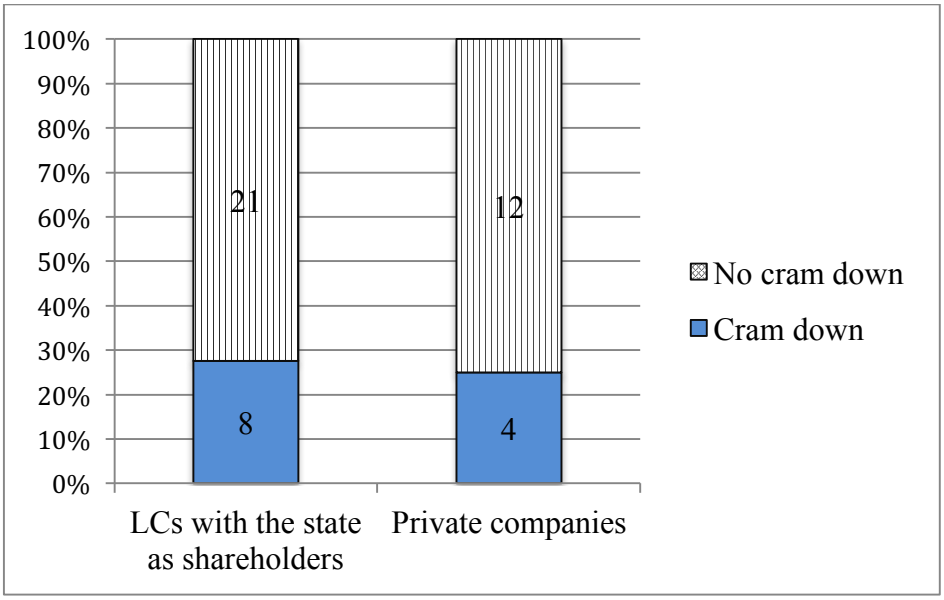
[19] These eight listed companies are S*ST Tianfa, *ST Jinhua, *ST Guangxia, *ST Xinye, *ST Baoshuo, *ST Canghua, S*ST Tianyi and *ST Jinding.

[20] The four listed companies are *ST Dixian B, *ST Fangxiang, *ST Jincheng and *ST Hongsheng.

[21] 中国政法大学破产法与企业重组研究中心研究组 (许美征执笔)/Research Group of the Bankruptcy Law and Restructuring Research Centre of China University of Political Science and Law (Drafted by Meizheng Xu), "我国上市公司重整管理人模式的案例研究/A Case Study of the Administrators of the Reorganizations of Listed Corporations in China" in 李曙光/Shuguang Li and 郑志斌/Zhibin Zheng (eds), *公司重整法律评论/Law Review of Corporate Reorganization and Restructuring* (北京: 法律出版社 /Beijing: Law Press China, 2012), p 10.

author, the average repayment rate of the listed companies without cramming down is 27.97%,[22] while those with cramming down is 13.58%.[23] The interests of the creditors could be prejudicially affected when liquidation group is involved in the reorganisation of listed companies.

Figure 5: Comparison of Reorganisation Plans Passed under Cramdown Process for Listed Companies with/without State Investment



Source: The data is collected by the author. For more information, please see Appendix A: General Information of Reorganisation of 45 Listed Companies.

To sum up, the impartiality of the administrator is greatly undermined by the partial liquidation group which mainly represents the interests of the government, at least in the reorganisation of listed companies. The liquidation group becomes the dominant form of the administrator designated by the people's court. Listed companies with the state as a shareholder, both controlling and small, prefer the liquidation-group type of administrator to social intermediaries. Liquidation groups composed of local government officials place the administrative goals and interests of local governments above all and achieve them at the expense of general creditors. In addition, compared

[22] The result is obtained from the following calculation: debt repayment rate is set as R, number of listed companies as n, then the average $R=(R_1+R_2+R_3+\ldots+R_n)/n$.

[23] *Ibid.*

with the social-intermediary administrator, the liquidation group is inclined to protect the interests of the controlling shareholders, such as State-owned Assets Supervision and Administration Committees (SASAC) at various levels or local SOEs in particular, again at the expense of general creditors. The liquidation-group administrator is also more likely than the social-intermediary administrator to apply for the cramdown procedure to approve the reorganisation plans by the people's court.

It is not that the mere presence of government officials *per se* in the liquidation group definitely prejudices the interests of parties other than those of the local governments. The real problem is that the government officials in either pure-government-official or mixed-type liquidation groups still have the final decision-making power in the reorganisation of listed companies. Other parties cannot effectively check and balance their powers. This has greatly affected the effectiveness of the new administrator mechanism.

The second problem is the lack of independence of the administrator due to the unduly involvement of the government. Social intermediaries, such as law and accountancy firms, have independent legal status and assets to undertake civil responsibilities. However, liquidation groups which are formed by government officials from different government departments (pure government-official liquidation group), legal or accountancy professionals from law, and accountancy or liquidation firms (mixed-type liquidation group) have neither independent legal status nor assets to undertake civil responsibilities for the losses they incur in the reorganisation work. Government official members of the liquidation group are subject to the instructions given by local governments. When they incur economic losses to creditors or debtors during the reorganisation procedure, the local government is not legally liable for their misdeeds. The government in fact has no legal obligation to deal with enterprise bankruptcy. Hence there is no legal ground for them to take responsibility for the misdeeds of their employees—the government officials in the bankruptcy process. It is therefore unrealistic to hold government officials personally liable for their misdeeds as they are designated by the people's court.[24] This was previously a problem with the liquidation group under the 1986 EBL and continues to exist even in the reorganisation

[24] See (n 21 above), p 10.

of listed companies under the 2006 EBL. It would still be difficult for stakeholders to make a claim for any civil compensation from the liquidation group if their interests are affected.

The independence of the administrator should include the ability to make decisions independently,[25] such as soliciting a new investor for the reorganised listed company, reduction of shareholder equity and alteration of creditor claims during the bankruptcy process of the listed companies. If the administrator follows the instructions of local government as a shareholder, its decisions on these matters will prejudice the interests of other parties, especially creditors as discussed above. In practice, the liquidation group is mainly composed of government officials. It is highly doubtful from the above discussion that such a composition of the administrator could effectively discourage the interference of the government and maintain independence to make fair and transparent decisions, which is further discussed in Section 4.

Although the institution of the administrator is introduced in the 2006 EBL, it has been greatly localised to facilitate the government intervention in the reorganisation of listed companies in practice. This sort of liquidation group is neither impartial, nor can undertake civil liabilities or make independent decisions on matters such as soliciting eligible and suitable strategic investors for the bankrupt listed companies. It fails to adequately protect the interests of the stakeholders, especially the creditors. Hence, they should no longer be made the predominant type of administrator in the reorganisation of listed companies in China.

(b) ***Channels for Liquidation Group to Be Designated as Administrator***

Pursuant to Art 24 of the 2006 EBL, the role of the administrator could be assumed by (1) liquidation group; (2) social intermediary, such as law, accountancy and bankruptcy liquidation firms or (3) qualified individual affiliated with social intermediaries.

The 2006 EBL generally allows for the retention of the old liquidation system. Now that the lawmakers intend to make the administrator more independent, impartial and professional, why is the much-criticised liquidation group preserved in the 2006

[25] See UNCITRAL (n 9 above), p 174.

EBL? This is mainly out of the consideration of the connection between the old practice of the policy bankruptcy of SOEs, of the consistency between other laws that stipulate the formation of liquidation group, and of the special stipulation on the formation of liquidation group when dealing with the bankruptcy of special types of enterprises such as financial institutions and the new 2006 EBL. The formation and designation of liquidation group should be exceptionally provided in the Provisions of the Supreme People's Court (SPC) on Designating the Administrator during the Trial of Enterprise Bankruptcy Cases (Administrator Designation Provisions).[26] According to Art 18, liquidation group could be designated as the administrator only in four conditions:
(1) under relevant laws before the acceptance of the bankruptcy application;
(2) when dealing with the bankruptcy of SOEs under the policy bankruptcy system;[27]
(3) when relevant specific laws provide that a liquidation group shall be designated or
(4) other cases under which the people's court considers proper to designate a liquidation group as the administrator.
Moreover, Arts 16, 17 and 18 of Administrator Designation Provisions clearly states that social intermediary and qualified individuals have general priority over the liquidation group to be designated as the administrator.[28] Compared with the liquidation group, social intermediary and individual professionals are generally more independent, professional and impartial.
Although the liquidation group is preserved in the 2006 EBL, it is not intended to be the dominant form of the administrator mechanism. It is mostly an interim arrangement to make other laws and the 2006 EBL consistent and to allow more time for the administrative liquidation of some chosen SOEs under the regime of policy bankruptcy

[26] SPC, "最高人民法院关于审理企业破产案件指定管理人的规定/Provisions of the SPC on Designating the Administrator during the Trial of Enterprise Bankruptcy Cases" the *SPC* (12 April 2007), available at http://www.lawinfochina.com/display.aspx?lib=law&id=6018&CGid (visited 8 July 2015).

[27] The policy bankruptcy scheme deals with the bankruptcy of some special SOEs chosen by local governments. It consists of a number of administrative policies issued by the central government. It has several characteristics according to Professor Xianchu Zhang:

(1) resettlement of workers is the top priority in the bankruptcy of the chosen SOEs;

(2) the policies encourage mergers and acquisitions instead of bankruptcy of the SOEs;

(3) the central government allocates funds to help the state-owned banks write off their recoverable loans and

(4) the central government instigates annual SOE bankruptcy planning with the participation of state ministries and provincial governments. See Xianchu Zhang, "A Critical Analysis of China's Enterprise Bankruptcy Law", unpublished paper in the author's possession (2012).

[28] See Arts 16 and 17 of the Administrator Designation Provisions.

to facilitate the reform of SOEs.[29] It should not be made the dominant form of the administrator.[30]

In practice, 36 among the 45 listed companies designate the liquidation group as the administrator. All of them actually do not correspond to the conditions stipulated in Art 18 of the Administrator Designation Provisions. The liquidation group formed under Art 18(1) literally deals with the liquidation, voluntary or involuntary, of companies upon their dissolution under Art 183 of the Company Law;[31] commercial banks under Art 69 or termination by the government under Art 70 of the Commercial Bank Law;[32] insurance companies under Art 89 or termination in accordance with Art 150 of the Insurance Law;[33] financial institutions under the Regulations on the Cancellation of Financial Institutions;[34] and trust and investment companies or financial leasing companies under related regulations.[35] After examining all 36 listed companies, it is evident that they would neither be liquidated under the Company Law, nor would they comprise one of the specific types of companies listed above. Hence, Art 18(1) does not support the designation of a liquidation group as the administrator in the reorganisation of these companies. Article 18(2) deals with the designation of a liquidation group as the administrator in bankruptcy of SOEs under policy bankruptcy. However, none of these listed companies qualify under the terms of policy bankruptcy as it mainly deals with

[29] See Xiaoming Xi (ed) (n 13 above), p 74.

[30] *Ibid.*, p 69.

[31] See Art 183 of the Company Law:

> "Where any company is dissolved according to the provisions of Article 180(1), (2), (4), or (5) of this Law, a liquidation group shall be formed within 15 days after the occurrence of the cause of dissolution so as to carry out a liquidation. The liquidation group of a limited liability company shall be composed of the shareholders, while that of a joint stock limited company shall be composed of the directors or any other people as determined by the shareholders' assembly. Where no liquidation group is formed within the time limit, the creditors may plead the people's court to designate relevant persons to form a liquidation group. The people's court shall accept such request and form a liquidation group so as to carry out the liquidation in a timely manner".

[32] Commercial Bank Law of the People's Republic of China (PRC) was passed by the Standing Committee of the People's National Congress (NPCSC) on 10 May 1995 and amended on 27 December 2003.

[33] The Insurance Law of the PRC was passed by the NPCSC on 30 June 1995 and amended on 28 October 2002 and 28 February 2009, respectively.

[34] 金融机构撤销条例/Regulations on the Cancellation of Financial Institutions, issued by the State Council on 23 November 2001.

[35] 信托公司管理办法/Measures for the Administration of Trust Companies, issued by the China Banking Regulatory Commission on 23 January 2007; 金融租赁公司管理办法/Measures for the Administration of Financial Leasing Companies, issued by China Banking Regulatory Commission on 13 March 2014.

SOEs which are small and face the difficulties to reform. Art 18(3) coheres to the 2006 EBL and the laws passed and implemented before its promulgation.[36] These laws stipulate that a liquidation group should be organised upon the bankruptcy of special enterprises, mainly financial institutions, such as commercial banks and insurance companies as mentioned above. However, this article does not constitute the grounds for designating a liquidation group as the administrator in the reorganisation of these companies.

How then, does the liquidation group manage to dominate the reorganisation of listed companies after the promulgation of the 2006 EBL in China? There are generally two ways. The first is an informal summary (the Summary) of a conference jointly held by the Second Tribunal of the SPC, and the Legal Division and Initial Public Offering Division of China Securities Regulatory Commission (CSRC) in Kunshan, Jiangsu Province in December 2007. At this conference, a conclusion that the Administrator Designation Provisions were not applicable to the designation of the administrator in the reorganisation of listed companies was jointly made. According to the Summary, social intermediaries are not capable of reorganising listed companies due to their limited expertise and coordinating ability to address the highly complicated process of the reorganisation of listed companies.[37] The liquidation groups would instead, be the best option in this situation, and are to be designated as the administrator based on the current national situation of China pursuant to this Summary.[38]

If there is any legitimacy of this Summary, it may find its legal basis in Art 18(4) of the Administrator Designation Provisions: the people's court could designate a liquidation group as the administrator in enterprise bankruptcy if it deems it to be fair. Yet it is still debatable whether Art 18(4) is suitable to be the legal basis of designating liquidation group as the administrator in the reorganisation of listed companies, as this article itself is neither clear nor certain. To begin with, it is unclear as to which level of the people's court, that is, whether the SPC or the people's court hearing the bankruptcy case, has the right to make the decision on whether designating a liquidation group as the

[36] See Xiaoming Xi (ed) (n 13 above), p 76.

[37] See (n 21 above), p 3.

[38] *Ibid.*

administrator is considered to be fair and on what specific conditions for doing so. It is also ambiguous as to whether the SPC should issue a general interpretation to solve this problem or allow the people's court to make such decisions on a case-by-case basis. Furthermore, the effect of this Summary is uncertain. Although the liquidation group should be designated as the administrator in the reorganisation of listed companies in China following the Summary, some cases designate a social intermediary as the administrator, such as *ST Chaori[39] and *ST Chuangzhi.[40] As an informal conference summary, it should have no binding force on the people's court. However, it does bring about uncertainty to the application of the Administrator Designation Provisions in designating the administrator in the reorganisation of listed companies.[41]

The second method is some innovative actions taken by local governments. It has become a common practice for municipal governments or even provincial governments to establish interim groups which they call working groups,[42] special working groups,[43] groups that protect the stock-listing status of X Company[44] or liquidation group even before the listed companies entered into reorganisation. The interim working groups conduct the work that fall within the competence of the administrator, such as negotiating with bank creditors and potential investors.[45] Local governments establish these quasi-liquidation groups with various purposes, including appeasing the workers, checking assets and debts or maintain the operating order of a listed company.[46] They also help provide first-hand information of the overall condition of the listed company to the local governments. Local governments take the initiative to propose a list of candidates from the interim groups to the people's court. The people's court designated

[39] The information is available at http://www.cninfo.com.cn/finalpage/2014-06-27/1200011487.PDF (visited 8 July 2015).

[40] The information is available at http://www.cninfo.com.cn/finalpage/2010-08-19/58322473.PDF (visited 8 July 2015).

[41] See (n 21 above), p 21.

[42] It can be seen in reorganisaiton of *ST Dixian B, S*ST Guangming and *ST Chaori.

[43] This kind of group was seen in the reorgnisation of *ST Jinhua.

[44] This kind of group was seen in the reorganisation of S*ST Lanbao.

[45] The information is available at http://finance.ifeng.com/news/industry/20081013/176857.shtml (visited 8 July 2015).

[46] See the various working groups formed by the Yichun Municipal Government in the reorganisation of S*ST Guangming for example, available at http://epaper.stcn.com/paper/zqsb/html/2008-10/13/content_34937.htm (visited 5 January 2016).

these pre-organised working groups as the administrator in 36 cases, because they are more familiar with the overall situation of the listed company than social intermediaries. In order to reduce people's questioning on the legitimacy of the liquidation group, local governments do solicit some professionals, such as lawyers and accountants, and make them members of the liquidation group.[47]

The recommendation of candidates to be designated as the administrator by local governments is very informal and illegal. The people's court should generally appoint the administrator publicly from a roster of administrators by random means, such as taking turns, casting lots or applying lottery numbers as is required by the Administrator Designation Provisions.[48] These methods help to reduce black box operation in designating an administrator. It could also minimise the subjectivity of the people's court in selecting qualified candidates.[49] Article 22 of the Administrator Designation Provisions stipulates that the people's court may designate an administrator out of social intermediary institutions included on the roster of administrators recommended by the financial regulatory institution for bankruptcy of commercial banks, securities and insurance companies or any other financial institutions after administrative liquidation.[50] Three points are worth noting. First, concerning the eligible institutions, it is the financial regulatory institution, *not* the local governments that should make such a recommendation. Second, the recommendation can only be made in the bankruptcy of special types of enterprises, mainly financial institutions. Last but not the least, the administrator should be recommended from the roster of social intermediary agencies, *not* from the local government departments. According to Art 22 of the Administrator Designation Provisions, that is, the administrator recommended by the financial regulatory institution should be law, accountancy and/or liquidation firms but not government officials.

The recommendation method of the administrator is indeed efficient and convenient. The pre-organised quasi-liquidation groups are very familiar with the overall conditions

[47] As discussed, the mixed-type liquidation group accounts for 73.3% (33/45) of listed companies.

[48] Art 20 of the Administrator Designation Provisions.

[49] See Xiaoming Xi (ed) (n 13 above), pp 69, 81–84.

[50] Art 22 of the Administrator Designation Provisions.

of the listed companies that fall into financial distress and with preliminary reorganisation work that has been done. It therefore seems reasonable and more efficient for the people's court to designate such liquidation groups or working groups as the administrator rather than social intermediaries. The latter have little knowledge about the general situation of the listed companies as they are often excluded from participating in the prior-reorganisation work of the listed companies.

Such means to designate various working groups as the administrator in the reorganisation of listed companies is inappropriate. First, prior-intervention of local governments in dispatching various working groups into bankrupt listed companies deprives social intermediaries of the opportunity to be designated as the administrator after the people's court accepts the bankruptcy application of/against listed companies. The people's court in practice loses its authority in designating the administrator as it does not and cannot reject the recommendation of local governments on the candidates for administrator, even though the composition of the liquidation group violates the 2006 EBL. For example, both the leaders and members in the reorganisation of S*ST Pianzhuan are from local SASACs, and the group leader is the head or deputy head of local SASACs.[51] Obviously, they have close interest relations with the reorganisation of local listed SOEs—they are the representatives of the shareholders of local listed SOEs—the local governments or SOEs directly or indirectly controlled by them. Notwithstanding that the existence of the conflict of interests violates Art 24 of the 2006 EBL,[52] the people's court does accept all such recommendations from local governments. Furthermore, the means that the local governments apply to make such recommendations is ambiguous to the stakeholders of the listed companies. It adds the possibility that local governments and the people's court may collude together to protect the interests of local governments by sacrificing the interests of creditors.[53] It is also true

[51] See Appendix A for the leaders of the liquidation group in the reorganisation of listed companies, such as S*ST Changling, *ST Guangxia and *ST Pianzhuan.

[52] See Art 24 of the 2006 EBL:

> "… under any of the following circumstances, one shall not assume the post of bankruptcy administrator: (1) having been given a criminal punishment for deliberate crime; (2) having been deprived of the relevant practice qualification certificate or related specialty; (3) having any interest relation to the case; or (4) being under any other circumstance where the people's court deems it improper to act as a bankruptcy administrator".

[53] 钱丽红/Lihong Qian, "破产管理人选任相关问题探析 [Analysis on the Designation of Bankruptcy Administrators]" in 王欣新/Xinxin Wang and 尹正友/Zhengyou Yin (eds), *破产法论坛 [Bankruptcy*

that in most cases where the liquidation group is the administrator, the absolute priority rule is violated to give better protection to the shareholders, especially the controlling shareholders, SASACs or SOEs, at the expense of large creditors. It is further discussed in Section 4(b).

3. Creditors' Meeting and Committee Lacking Power to Protect Interests of Creditors

Creditors' meeting and creditor committee are also important bankruptcy institutions. Creditors have a primary economic stake in the outcome of the bankruptcy proceedings. They may lose confidence in the bankruptcy proceedings that alleged to protect their interests, when their participation in important decision-making processes in the reorganisation of listed companies to protect their own rights and interests cannot be secured.[54] Actually, big creditors—the banks or other financial institutions—are in a good position to provide professional advice and assistance as they possess more financial and operational information than other stakeholders concerning the debtor's business. They can better monitor the activities of the administrator. Their participation could provide a means of check and balance against possible abuse of the reorganisation proceedings by the people's court and the administrator, against excessive administrative costs, as well as act as the means to process and distribute information on the listed companies. The UNCITRAL encourages its member states to facilitate the participation of creditors in bankruptcy proceedings, provide a mechanism for the appointment of the creditors' committee, ensure the rights of creditors to access the bankruptcy information, and to specify the functions and responsibilities of the creditors' meeting and creditors' committee in their bankruptcy laws.[55]

In response to the UNCITRAL, the creditors' committee is introduced into the 2006 EBL for the first time and the power of the creditors' meeting has also been strengthened. Both institutions have a wide range of powers in the bankruptcy process of enterprises. According to Art 61 of the 2006 EBL, the creditors' meeting has the power

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Forum] (北京: 法律出版社/Beijing: Law Press, Vol 2, 2009), p 165.

[54] See UNCITRAL (n 9 above), p 182.

[55] *Ibid.*, p 200.

to examine and approve the rights of the creditors, file an application at the people's court to replace the administrator according to Art 22 of the 2006 EBL, and examine the expenses and remunerations of the administrator, supervise the administrator, decide on whether a reorganisation plan should be approved, as well as conciliation, management plans of the debtor's assets, conversion plan and distribution plan of the insolvent assets.[56] These functions of the creditors' meeting help to protect the core interests of creditors in the bankruptcy process. The functions and duties of the creditors' committee include supervising the management and disposal of the debtors' assets, supervising the distribution of the bankruptcy assets, proposing to hold creditors' meetings, and performing other functions and duties as entrusted at creditors' meetings.[57] Nevertheless, the two institutions turn into rubber stamps in practice as they fail to supervise the administrators or to decide on major reorganisation matters in the reorganisation of listed companies.

There are both legal and practical impediments that inhibit these two institutions from gaining a stronghold in the reorganisation process of listed companies in China. In the legal design of bankruptcy institutions, the administrator is placed at the centre of the bankruptcy system under the 2006 EBL.[58] Designed as a professional, impartial and fair institution, the administrator controls and conducts the whole reorganisation process of listed companies, including disposing the debtor's assets, confirming the claims of creditors, making reorganisation plans and distributing the proceeds from asset disposal of the debtor. The administrator has a wide range of powers which could produce direct impact on the interests of stakeholders, especially the creditors. The creditors' meeting and committee could check and balance the extensive powers of the administrator, and supervise and even may apply with the people's court to replace the administrator when it fails to perform or fulfil its duties and functions in lawful and impartial manner.[59] However, these powers as entrusted by the 2006 EBL are greatly restricted by the stronger authority of liquidation group in practice.

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[56] Art 61 of the 2006 EBL.

[57] Art 67 of the 2006 EBL.

[58] 邹海林/Hailin Zou, "新企业破产法与管理人中心主义 [The New Enterprise Bankruptcy Law and The Administrator Centrism]" (2006) 6 *华东政法学院学报/Journal of the East China University of Political Science and Law* 121, 122.

[59] Arts 22, 23, 61 and 69 of the 2006 EBL.

(a) ***Power of Creditors' Meeting to Replace Administrator***

According to Art 22(2) of the 2006 EBL, applications can be filed by the creditors to the people's court to replace the administrator at creditors' meetings due to the following reasons:

(1) the administrator either cannot perform its duties in accordance with the law or unable to impartially do so or
(2) other conditions result in the incompetence of the administrator to fulfil its duties.

With the bankruptcy process mainly protecting the interests of creditors, they should be allowed to express their opinions and have a role in this process as the designation of the administrator directly influences their interests.[60] The right of the creditors to apply for the replacement of the administrator is a check and balance on the possible abuse of the power of the administrator. However, in practice, the creditors' meeting does not have much say in the replacement of the administrator who does abuse its powers and prejudice the interests of creditors, especially the liquidation-group administrator.

Liquidation groups have been designated in the reorganisation of 75% (36/45) of the listed companies. Some of the liquidation groups consist of pure government officials or officials from the SASACs at various levels; the rest were mixed with officials both from local governments or SASACs and social intermediaries. Most of the group leaders were government officials or head of the local SASACs. In practice, they possess great decision-making powers in the reorganisation of listed companies. Yet this type of formation of the liquidation group violates Arts 22(2) and 24 of the 2006 EBL. The local governments are the shareholders of some of the bankrupt listed companies. They have direct interest relations with the reorganisation of the listed companies. According to Art 24 of the 2006 EBL, one shall not assume the post of the administrator if s/he has interest relations with the bankruptcy case because the impartiality of administrators would be under threat if designated as the administrator. However, in practice, the limitations on qualification of being designated as the administrator under the 2006 EBL does not prove to be a serious consideration for the people's court to

[60] 安建/Jian An (ed), *中华人民共和国企业破产法释义 [Interpretation of the PRC's EBL]* (北京: 法律出版社/Beijing: Law Press China, 2006), p 38.

reject the recommendation of government-official candidates by the local governments to be designated as the administrator. On the one hand, local governments often intervene in the bankruptcy proceedings of the listed companies before they enter into the reorganisation procedure. Creditors usually have little access to information about the possible composition of the liquidation group in the reorganisation of the listed companies before hand. And on the other hand, because of the prior-intervention of local governments through various interim working groups dispatched to the listed companies which fall into financial distress, quasi-liquidation groups then become the most appropriate candidate for the administrator. They have good knowledge of the overall conditions of the listed companies, including financial, operating, commercial relations and the like. In some cases, such as the reorganisation of *ST Huayuan and S*ST Lanbao, the working groups have even successfully reached primary investment intention with new investors and completed the preliminary reorganisation plans.[61] Therefore, it seems rational and reasonable to designate various working groups as the administrator to continue their work under such circumstances. The people's court does designate them as administrators although they are aware that such a composition of the liquidation group does not correspond to Art 24 of the 2006 EBL. At this time of period, it is objectively impossible for the creditors to oppose such a designation, as the creditors' meeting and committee have not yet been formed.[62]

During the reorganisation process of the listed companies, it is very difficult for creditors to exercise their rights at the creditors' meetings to replace the liquidation-group administrator who obviously has interest relations with the listed companies. Most of the creditors other than some big creditors are actually excluded from the drafting process of the reorganisation plan carried out by the liquidation-group administrator. Hence, they cannot bargain for the treatment of their claims in the plan. Their interests are most affected among all stakeholders. For example, in the reorganisation plan of *ST Dixian B, general creditors only received 2% of their claims back, while the

[61] See also 许美征/Meizheng Xu, "尽快制定上市公司管理人制度的司法解释 [Judicial Interpretations of the Administrator System Should be Made As Soon As Possible]" in 王欣新/Xinxin Wang and 尹正友/Zhengyou Yin (eds), *破产法论坛 [Bankruptcy Forum]* (北京: 法律出版社/Beijing: Law Press China, Vol 4, 2009), p 208.

[62] The creditors' meeting is convened after the end of the period of declaration of the creditor's rights according to the 2006 EBL. In most of the cases, the liquidation group is designated by the People's Court when it accepts the reorganisation application.

shareholders' equity were not reduced, a very unfair result for general creditors who should have enjoyed higher priority in terms of the distribution of the bankruptcy estate.

In the reorganisation process, the interests of creditors are more easily prejudiced in cases with liquidation group as the administrator. This does not mean that the interests of the creditors would be negatively affected in every case where the liquidation group was designated. There is a possibility that the liquidation group treats both creditors and shareholders fairly.[63] However, the interests of the creditors and shareholders directly conflict with each other in the reorganisation of listed companies whose reorganisation plans are crammed down by the people's court. There are 12 such cases among the 45 listed companies. Figure 6 shows that the average repayment rate of the cramdown cases is 13.58%,[64] far less than the average repayment rate of cases without cramdown, which is 27.97%.[65] As the repayment rates in these cases were too low, the creditors objected to the reorganisation plans. The liquidation-group administrators in these cases paid little heed to the objection of the creditors. Table 1 shows that the reorganisation plans that they drafted and proposed were not amended after being rejected by the creditors. The liquidation groups submitted such reorganisation plans to the people's court and the people's court confirmed all these plans[66] accordingly without further questioning their legality and fairness. Among these cases, the creditors in only one reorganisation case, *ST Guangxia issued a statement that requested the replacement of the liquidation group which was dominated by government officials.

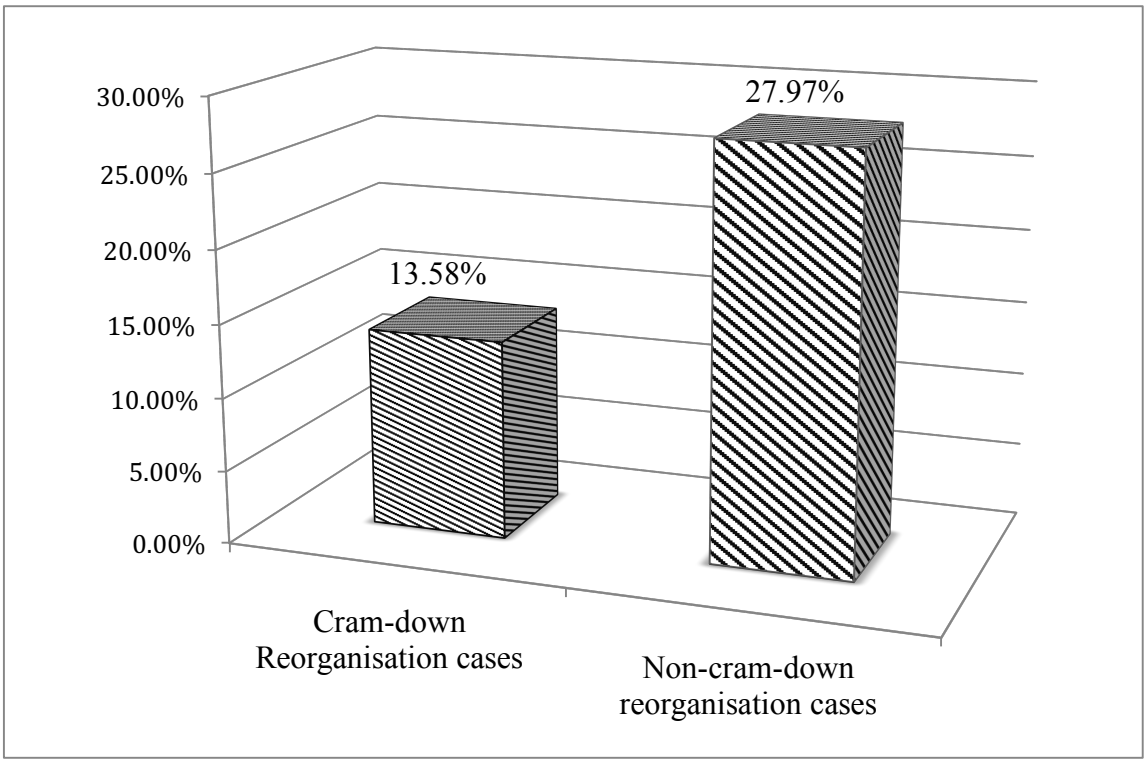
Figure 6: Comparison of Average Repayment Rate between Cramdown and Non-Cramdown Cases

[63] For example, the equity of the controlling shareholder, Baoji Municipal SASAC was cut by 80% and the repayment rate to the creditors of S*ST Changling was 18%. Similar treatments to controlling shareholders and creditors which is comparatively fairer could also be seen in the reorganisation of *ST Taibai and *ST Qinling. See Appendix A for more information.

[64] See works referred to in note 22.

[65] *Ibid*.

[66] All 12 cram down cases issued the announcements on the confirmation of the reorganisation plans after they received the rulings of the People's Court to confirm the plans. All such announcements could be found at the website of CNINFO.



Source: The data is calculated by the author based on the repayment rates of the 45 listed companies. For more information, please see Appendix A: General Information of Reorganisation of 45 Listed Companies.

From the above discussion, it can be concluded that the liquidation group fails to perform its duties impartially as stipulated in Art 22(2) of the 2006 EBL in terms of its formation and the preferential treatment to shareholders than to creditors. Creditors hence have a reason to make requests to the people's court to replace the liquidation-group administrator. However, three possible reasons may discourage the creditors to do so. One reason is that the formation of the liquidation group is approved and designated by the people's court. The court explicitly approved of the presence of local officials in the reorganisation of the listed companies although there exists conflict of interests. Furthermore, alternative options are lacking for the administrator and the cost to replace the administrator is high. Most of the reorganisation work has been conducted by the liquidation group already. Their effort and time spent in preparing the reorganisation plans would be in vain if they were to be replaced. As most of the listed companies had been marked with *ST to denote their delisting risks or their listing has already been suspended, they would either be delisted from the stock exchange or their listing would be terminated if they could not make a profit during their reorganisation within one year

from the day they were marked with delisting risks or would have their listing suspended. The local governments would therefore prohibit the people's court from replacing the incumbent liquidation group within such a limited time frame to save on time to implement reorganisation plans afterwards to avoid the listed companies' being delisted or marked with delisting risks. Last but not least, there is no other relief mechanism available in the 2006 EBL if the request of creditors to replace the administrator was rejected by the people's court.[67] Hence, there is little motive for creditors to make such a request to replace the liquidation group under current circumstances.

(b) ***Attitude of People's Court and Administrator towards Protection of Creditors' Rights***

In practice, the administrator intentionally sets up obstructions for the creditors to participate in important bankruptcy matters, such as the drafting of the reorganisation plans and soliciting strategic investors. It renders the role of the creditors' meeting and committees as merely a figurehead. The deep concern of the liquidation-group administrator is that the diligence of the creditors in reorganisation matters may procrastinate the reorganisation process of listed companies[68] as the time left is rather limited to rescue the listed companies, avoiding their listing status being suspended or even terminated. Some listed companies may be delisted if they are unable to produce profits in a specific period of time in accordance with the Stock Listing Rules of the Shanghai Stock Exchange (SSE) and Shenzhen Stock Exchange (SZSE),[69] as most of the listed companies that enter into the reorganisation process have been operating at a loss for three consecutive financial years. Accordingly, if reorganisation could be carried out faster and in due process, there is the greater possibility that they can make a profit to avoid being delisted. Hence, the liquidation-group administrator is reluctant to get the creditors involved under such time constraint. They intentionally create obstacles to the

[67] Neither the 2006 EBL nor the Administrator Designation Provisions stipulate what other reliefs to which the creditors could turn when their application of replacing the administrator was rejected by the People's Court. Neither is appeal procedure provided.

[68] For instance, in the reorganisation of S*ST Haina, the liquidation group had only two months of time to reorganise it. The liquidation group avoided any chances for the active participation of creditors during the process. The reorganisation plan was finally rejected by creditors and crammed down by the People's Court.

[69] See eg, r 14.3.1 of the Stock Listing Rules of SZSE.

creditors in the discussion of the details of the reorganisation.[70] In practice, it is very difficult for creditors to effectively discuss with the administrator when given short notice about the agenda of the creditor meeting and without much detail. In most cases, the creditors only obtain details of the reorganisation plan and arrangement of their claims a few hours before creditors' meeting.[71]

These obstacles have rendered the creditors' meeting and committee very weak. The 2006 EBL is expected to better protect the interests and legal rights of creditors, yet it does not work well in the reorganisation practice of listed companies in China. From the above discussion, it can be concluded that both substantial and procedural rights and interests of the creditors are prejudiced by the liquidation-group administrator. The power of the creditors to replace the liquidation-group administrator has no bite in practice. Its legal rights granted by the 2006 EBL to participate in the reorganisation of listed companies are also undermined by the administrator as well as by the people's courts in order to suppress the enthusiasm of the creditors to secure enough time to rescue the listed companies. Concerning their treatments in the reorganisation process, the liquidation-group administrator does care the interests of shareholders more than theirs.

4. Lack of Independence of the People's Court in Confirmation of Reorganisation Plans

The judicial system is at the heart of the insolvency infrastructure.[72] Smooth implementation of the bankruptcy law depends on an effective and independent judiciary system. The people's court is the institution that applies the bankruptcy law, and conclusively establishes the bankruptcy law in the cases that appear before them.

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[70] 李宝贵/Baogui Li and 王兆同/Zhaotong Wang, "错位与还原: 破产管理人、债权人会议与人民法院角色定位 [Malposition and Restoration: Correct Role of the Administrator, Creditors' Meeting and the People's Court]," in 王欣新/Xinxin Wang and 尹正友/Zhengyou Yin (eds), *破产法论坛 [Bankruptcy Forum]* (北京: 法律出版社/Beijing: Law Press China, Vol 5, 2010), p 243.

[71] Roman Tomasic and Zinan Zhang, "From Enterprise Bankruptcy Law Making to Implementation: Convergence and Divergence in Corporate Rescue and Reorganization Law and Practice in China", paper presented to the conference, *The Trend of Corporate Governance and Corporation Law Convergence in the Economic Globalization, the 21st Century Commercial Law Forum-Eleventh International Symposium*, Beijing, China, November 12–13, 2011, p 352.

[72] OECD, "Building Sound Insolvency Systems in the MENA Region", available at http://www.oecd.org/daf/ca/corporategovernanceprinciples/42551472.pdf (visited 8 December 2013), p 6.

The bankruptcy law can guide the parties only if the judges apply the law correctly.[73] The people's court in China has demonstrated great difference from its counterpart in the US in terms of the adjudication of bankruptcy reorganisation of listed companies. The role of the people's court in accepting the reorganisation applications and confirming the reorganisation plans of listed companies is discussed in this section.

(a) *Role of the People's Court and Government in Accepting Reorganisation Applications of Listed Companies*

In terms of the acceptance of reorganisation applications of listed companies, the courts in western countries can and should independently decide on the acceptance of such a case. The decision whether to accept the application or not should be based on whether the commencement standards of the bankruptcy procedures explicitly stipulated in bankruptcy law have been met. However, in China, the acceptance of reorganisation applications is neither decided according to the commencement standards of the reorganisation procedure, nor it is exclusively decided by the people's court in accordance with the 2006 EBL, as the government intentionally gets itself involved in the process.

The people's court cannot accept a reorganisation application without approval from the local governments by means of a "letter of commitment to maintain social stability" in practice. A complete and complex procedure for the acceptance of the reorganisation of listed companies centres on the approval of the government. In the new complex procedure that is different from that in the 2006 EBL, approval from the government is most critical in this complex procedure in practice. If the government refuses to issue a letter of commitment in that it supports the reorganisation of a listed company, the people's court will not accept the reorganisation application as it lacks necessary resources to deal with such problems. The SPC makes it clear that applicants, creditors, the debtor or shareholders, in addition to the materials set forth in Art 8 of the 2006 EBL, are to submit a report on the reorganisation feasibility of the listed company, briefing materials sent by the provincial government at the place of the domicile of the listed company to the securities regulatory authority, the opinion of the CSRC, and plans

[73] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979), p 219.

issued by the local government for the maintenance of stability.[74] The listed company is to submit a feasible plan for resettling workers when it files a voluntary reorganisation application.[75]

The requirements for a letter of commitment and stability-maintenance plan by local governments have many negative effects. They increase the difficulties of financially distressed or bankrupt listed companies to obtain access to reorganisation. The SPC has added many extra requirements, such as a pre-plan by the government to maintain social stability, which were not required under the 2006 EBL. Such requirements give the government greater means to become involved in the reorganisation of listed companies. First, these requirements increase the time and funds required for listed companies to prepare the materials, thus delaying their commencement of the reorganisation procedure in a timely manner. Secondly, support from the local governments becomes a key element or necessary condition for the people's court in order to accept the reorganisation application of a listed company. It is possible in theory that a bankrupt listed company that meets the standards to commence their application as stipulated in the 2006 EBL could be denied access if the government deems that it is inappropriate for them to be reorganised.

In the complex new procedure developed in practice that is different from that in the 2006 EBL, approval from the government is the most crucial factor for the acceptance of a bankruptcy application by the people's court. In essence, it is not the people's court that makes the decision. The power to decide on the acceptance of a bankruptcy application is actually transferred from the people's court to the local governments. If the local government does not issue a letter of commitment to show its support, the people's court will not accept the application, as the SPC will not provide subsequent approval based on the approval of local governments to maintain social stability.[76]

[74] See Art 3 of 最高人民法院印发《关于审理上市公司破产重整案件工作座谈会纪要》的通知 [Notice of the SPC to Print and Distribute Summary of the Colloquium on the Trial of the Bankruptcy Reorganisation of Listed Companies], available at http://www.chinainsol.org/show.aspx?id=6849&cid=6 (visited 29 April 2015).

[75] *Ibid*.

[76] *Ibid.*

(b) ***Influence of Government on the People's Court: Confirmation of Reorganisation Plans***

(i) *Prominent features of reorganisation of listed companies*

After eight years of practice since the taking into effect of the 2006 EBL, the confirmation of the reorganisation plans by the people's court in China presents prominent features in comparison with the US model, in terms of the length of time required to confirm a plan, the rate of confirmation and the consummation rate of the reorganisation plans.

With respect to the length of time to confirm reorganisation plans, it is much shorter for the people's court in China to confirm them as opposed to the US courts. According to the empirical study carried out by the author on the reorganisation of 45 listed companies in China, it takes 165.8 days (5 months) on average for listed companies to reach a confirmed plan.[77] In the US practice, the median time to reach a confirmed plan was about 9 months from 1994 to 2002, according to a study conducted by Warren and Westbrook on the practice of Ch 11.[78] It does appear that the reorganisation process is faster in China.

Furthermore, the confirmation rate of the reorganisation plans of listed companies in China is as high as 100%.[79] This means that all of the reorganisation plans are successfully confirmed by the people's court. Among the 45 listed companies, the reorganisation plans of 33 companies were approved by the creditors and confirmed accordingly by the people's court. The plans of the remaining 12 companies were rejected by the creditors and crammed down by the people's court. As a comparison, the respective confirmation rate was 30.3% in 1994 and 33.4% in 2002 in the US, according

[77] See Appendix B for detail.

[78] Elizabeth Warren and Jay Lawrence Westbrook, "The Success of Chapter 11: A Challenge to Critics" (2009) 107 *Michigan Law Review* 603, 629.

[79] See Appendix B for detail. Reorganisation plans of the 45 listed companies were all confirmed by the People's Court.

to Warren and Westbrook.[80] The confirmation rate of the reorganisation plans in China is therefore much higher than that in the US.

Last but not least, the consummation rate of confirmed plans is 95.6% in China.[81] It should be noted that the implementation of the reorganisation plans is divided into two stages: debt restructuring and asset restructuring. The consummation of confirmed plans actually means the accomplishment of debt restructuring only. In China, the debtor is responsible for implementing the confirmed plan and the administrator supervises its implementation.[82] The administrator would file a supervision report to the people's court when the debtor fulfils its obligation to repay all of its debts in accordance with the confirmed reorganisation plan. The people's court accordingly makes a ruling to confirm the accomplishment of the debtor in repaying its debt as contained in the plan. The debt reduced by the plan is hence exempted under such circumstances and the supervisory duty of the administrator accordingly comes to an end.[83] Among the 45 listed companies, only two cases, *ST Shentai and *ST Pianzhuan, completed debt repayment and asset restructuring during the implementation period as specified in their confirmed reorganisation plan.[84] In comparison, an empirical study showed that the consummation rate in the US was about 58% in the 1990s.[85] More updated empirical data are not available. The average time used for the consummation of reorganisation plans in China is 239.5 days,[86] which is comparatively shorter as the time for asset restructuring is not taken into account.

[80] *Ibid.*, pp 611–615.

[81] The reorganisation plans of *ST Xiake and *ST Hongsheng are in the implementation process.

[82] Arts 89 and 90 of the 2006 EBL.

[83] All 45 listed companies issued such public announcements on the completion of their reorganisation plans and the termination of administrators' supervisory duty.

[84] Information about consummation of the reorganisation plans of *ST Shentai is available at http://www.cninfo.com.cn/finalpage/2010-09-03/58395359.PDF and of *ST Pianzhuan is available at http://www.cninfo.com.cn/cninfo-new/disclosure/szse_main/bulletin_detail/true/57962076?announceTime=2010-05-18%2006:30 (visited 24 July 2015).

[85] Lynn M LoPucki and William C Whitford, "Patterns in the Bankruptcy Reorganization of Large, Publicly Held Companies, 1979–1988" (1993) 78 *Cornell Law Review* 597, 600.

[86] Please see Appendix B for detail.

The average time for the confirmation of reorganisation plans is quite short yet the rates of confirmation and consummation are very high in China. It is reasonable to expect that not all listed companies that enter reorganisation proceedings could come up with a feasible reorganisation plan and not all the confirmed plans would be completed within the implementation period. Considering that SOEs account for the largest proportion of listed companies that undergo reorganisation and the market is under the macroeconomic control of the government in the socialist market economy of China,[87] it would not be surprising that the government greatly impacts the people's court in confirming reorganisation plans as it has strong economic and political motives for doing so.

The primary and direct goal of the government is to preserve the listing status of bankrupt listed companies. As a large proportion of the listed companies entering into the reorganisation procedure have already been marked with *ST after making losses for two consecutive years or their listing had been suspended (see Appendix D), time is very limited for them to make efforts to meet the requirements of the SSE and SZSE to avoid being delisted or the compulsory termination of their listing.[88] They have to make a profit within the third or fourth year, among other requirements. Hence, in practice, the government intervenes to ensure that the reorganisation (debt-repayment) could be finished in the prescribed time so that these listed companies could confirm their income from debt-repayment and are exempted from any remaining repayment obligations. In fact, 69% of the listed companies chose to confirm their income from debt restructuring in the same year of their reorganisation.[89] Substantial income from this confirmation greatly improves their balance sheets as "net profits attributable to shareholders of listed companies" turned from negative to positive.[90] The people's court actually plays a crucial role in confirming their reorganisation plans. According to this empirical study, most of the reorganisation plans did not meet the requirements stipulated in the 2006

[87] See s 2.4.I.B, Ch II.

[88] See eg, r 14.4.1 on the Compulsory Termination of Listing of SZSE.

[89] 丁燕/Yan Ding, *上市公司破产重整计划法律问题研究——理念、规则与实证 [Legal Issues Concerning Reorganisation Plans of Listed Companies—Ideas, Rules and Empirical Study]* (北京: 法律出版社/Beijing: Law Press China, 2014), p 178.

[90] See the confirmation of such income in reorganisation of *ST Deheng for example, available at http://www.p5w.net/today/201108/t3788021.htm (visited 12 July 2015).

EBL. However, in practice, they all have been confirmed, especially non-consensual plans crammed down by the people's court.[91] This issue is discussed in Section 4(b)(ii).

(ii) *Confirmation of reorganisation plans of listed companies by people's court*

As discussed above, among the 45 listed companies, creditors in 33 cases consented to the reorganisation plans while in 12 cases vetoed them. The people's court crammed down the 12 reorganisation plans that did not receive consensus. In examining all of these plans, it appeared that most of them did not meet the requirements prescribed in the 2006 EBL. A total of 80% of the reorganisation plans[92] (36/45) lack feasible operation schemes. They actually protect the interests of shareholders more and prejudice the legal rights and interests of the creditors. Some of the plans should not have been confirmed by the people's court because their chances of successfully reorganising their company in accordance with the confirmed plans are slim.[93] For example, the asset restructuring of listed companies, such as S*ST Xingmei and *ST Guangxia, have not been finished even to the present day due to lack of feasible operation schemes. Notwithstanding the fact that it may be extremely difficult for listed companies to sustain themselves after reorganisation (debt restructuring in a narrow sense), the local government has placed a great amount of pressure onto all parties: the shareholders, the creditors and the people's court to reorganise them.

A. Lack of feasible operation schemes

According to Art 81 of the 2006 EBL, the draft of the reorganisation plan should have an operation scheme. An operation scheme is a whole set of measures that incur changes to the business of the debtor to rescue the business, ending the losses and restoring its profitability.[94]

[91] See Table 1 Reorganisation plans crammed down by the People's Court.

[92] See Appendix C for detail. Only nine listed companies among the 45 had concrete and clear operation schemes and 36 lacked such feasible schemes.

[93] For instance, reorganisation plans of *ST Guangxia and *ST Xinye were confirmed by the People's Court through cram down. Although the debt repayment was finished smoothly, their asset restructuring was extraordinarily difficult. Until present, *ST Guangxia has been marked with delisting risks.

[94] See Jian An (ed) (n 60 above), p 116.

The measures may include transferring part of the assets or businesses, changing the controlling rights of the company, merger and acquisition, changing the business strategy and managerial class and the like.[95] The operation schemes of these listed companies are necessarily different as their financial and business conditions vary. However, all schemes should be feasible. They should have detailed arrangements on fund raising, their usage and asset restructuring.[96] Article 1123 of the Bankruptcy Code of the US provides that, in principle, measures of plans should provide adequate means for the implementation of the plan so that the creditors and shareholders can make reasonable judgment on the feasibility of the plan when voting. Article 87 of the 2006 EBL also stipulates that the operation schemes in the reorganisation should be feasible, or the debtor or the administrator cannot submit the reorganisation plan rejected by the creditors to the people's court for confirmation. The reorganisation process usually takes a long time and costs a significant amount of money. Reorganisation plans should be detailed enough for creditors and shareholders to make rational decisions on whether they should approve them.[97] The reorganisation of enterprises has many risks. If the plans are detailed and feasible, then the success rate of the reorganisation will be greatly increased. It is necessary that the operation schemes in the reorganisation plans should be feasible under such circumstances.

There are many problems with the operation schemes of the listed companies in China. First and foremost, the operation schemes are very simple.[98] The reorganisation plan of S*ST Haina did not even have an operation scheme.[99] Appendix C shows that among the 45 listed companies, one has no operation scheme and 27 only have anticipated activities that *may* help the company. Typical comments about these types of schemes made by the administrators in the reorganisation plans are that the company had lost the ability to make profits, hence it needed to find a restructuring party to reorganise its assets and/or business; the restructuring party has to inject quality assets

[95] See Yan Ding (n 89 above), p 90.

[96] *Ibid*.

[97] 王卫国/Weiguo Wang, *破产法精义 [Essence of the Enterprise Bankruptcy Law]* (北京: 法律出版社/Beijing: Law Press China, 2007) p 244.

[98] See Appendix C for the characteristics of the operation schemes in the reorganisation plans of the 45 listed companies.

[99] The reorganisation plan of S*ST Haina is available at http://www.cninfo.com.cn/finalpage/2007-11-26/35533651.PDF (visited 12 July 2015).

into the debtor company to restore its profitability.[100] Listed companies with such schemes do not embark on finding restructuring parties at the time of submitting the reorganisation plan for the creditors' approval. The operation schemes of seven companies[101] confirmed the presence of a restructuring party, but they were simple and lacked concrete steps for the asset restructuring, such as the scheme of *ST Shengrun.[102] The operation schemes of nine companies[103] had concrete and clear steps for asset restructuring, such as the scheme of *ST Hailong.[104] A concrete and clear operation scheme does increase the chances for a bankrupt listed company to be successfully restructured.

However in China, the operation scheme has become a formality in practice. Stakeholders have found that it is difficult to vote on such unclear operation schemes, and the people's court is unable to examine their feasibility. It has greatly deviated from the original intention of the 2006 EBL.

Furthermore, Appendix C shows that 14 companies confirm the restructuring party in their operation schemes; 4 find parties with the intention of restructuring the debtor, 26 anticipate activities but did not confirm the restructuring party.[105] The necessity for the presence of a restructuring party in the operation scheme has been debated. Many Chinese academics have argued for its necessity and there are many reasons. First, it would be difficult for those who are drafting the reorganisation plans to coordinate debt-for-equity conversion of the listed companies if the restructuring party is not confirmed.[106] It is hence difficult for creditors to estimate the value and

[100] See the reorgansiation plan of *ST Jiufa, *ST Danhua, *ST Pianzhuan and *ST Huayuan for example and Appendix C for more information.

[101] The eight listed companies are S*ST Lanbao, S*ST Zhaohua, S*ST Xingmei, S*ST Changling, *ST Shengrun, *ST Guangxia and *ST Baoshuo.

[102] See the reorganisation plan of *ST Shengrun, available at http://www.cninfo.com.cn/finalpage/2010-10-28/58585719.PDF (visited 12 July 2015).

[103] They are S*ST Xin'an, *ST Shentai, *ST Jincheng, *ST Taibai, *ST Hailong, *ST Chaori, *ST Qinling, *ST Deheng and *ST Hongsheng.

[104] See the reorganisation plan of *ST Hailong, available at http://q.stock.sohu.com/gg/2012463110055.PDF (visited 12 July 2015).

[105] The information is collected from reorganisation plans of the 45 listed companies, available at http://www.cninfo.com.cn/.

[106] See Yan Ding (n 89 above), p 94.

appropriateness of the debt-for-equity conversion, and further make rational judgments on the appropriateness of the debt restructuring and repayment arrangements.

Moreover, if the restructuring party cannot be confirmed, those who are drafting the reorganisation plans cannot provide subsequent financing plans. This leads to the typical problem of reorganisation plans in China: most reorganisation plans have no financing plans, but only debt-reduction schemes. As mentioned above, the implementation of reorganisation plans consists of both debt-repayment and asset-restructuring stages. Although the administrator files their supervision report to the people's court and the latter has confirmed the completion of the reorganisation proceedings, the fact is that the confirmed completion refers only to the completion of debt-repayment—the asset restructuring is not included. The first reason is that the government is keen to maintain the listing status of listed companies within a limited period of time. The separation of these two steps could reduce the time for reorganisation and confirm income on the balance sheet from debt-relief schemes. Secondly, major asset restructuring of the listed companies needs to be approved by the CSRC.[107] The time required for the approval of the CSRC and its result is uncertain. In fact, 95.6% (43/45) of the listed companies[108] started their asset restructuring *after* completion of the debt-repayment.

The vagueness and oversimplification of the contents of the operation scheme, uncertainty of the restructuring party and separation of debt-repayment and asset restructuring mean that the operation schemes in the confirmed reorganisation plans are rather unfeasible. Reorganisation plans with such schemes fail to meet the requirements of the 2006 EBL. Most of the plans should not be confirmed by the people's court under normal conditions. However, under great pressure from the local governments to keep the listing status of the listed companies, they were all confirmed by the people's court. Such vagueness and uncertainty in the operation schemes have led to the failure of the reorganisation of listed companies in China, which is discussed in Section 5(b).

[107] "上市公司重大资产重组管理办法 [Measures for Administration of Material Assets Reorganisation of Listed Companies]", available at http://www.csrc.gov.cn/pub/zjhpublic/G00306207/200804/t20080429_22638.htm (visited 4 August 2015).

[108] *ST Pianzhuan and *ST Shentai conducted debt repayment and asset restructuring at the same time.

B. Government intervention in cramdown of reorganisation plans by people's court

The government plays a crucial role in the cramdown of reorganisation plans by the people's court in the reorganisation of 12 listed companies (see Appendix E). These reorganisation plans contradict the fundamental rules of the bankruptcy law, namely the absolute priority rule. This rule grants adequate protection to creditors in the reorganisation process of listed companies. Government intervention results in better protection of the shareholders than the general creditors.

The absolute priority rule requires payment in full to a senior class before any payment can be made to those who are more junior. This rule is only utilised when a court confirms a plan over the objection of a class/es that the plan is not fair and equitable. It is derived from Ch 11 of the Bankruptcy Code of the US and codified in Arts 82, 87 and 113 of the 2006 EBL. Creditors generally enjoy absolute priority over shareholders when liquidation takes place. Shareholders cannot be paid before creditors who enjoy higher priority and who are paid in full in enterprise bankruptcies. This rule is often applied in confirming the reorganisation plans by the court against the objection of a class/es. For non-cramdown cases, creditors, shareholders and other stakeholders have the option of negotiating how they are involved in the reorganisation process, as long as it does not violate compulsory provisions and principles of the bankruptcy law. For cramdown cases, the people's court has to conduct an absolute priority test to ensure that a senior class who enjoy higher priority should be paid in full before any junior class is paid.

Among the 45 reorganisation cases, the absolute priority rule was breached in 43 cases.[109] There are only two exceptional cases in which the general creditors were paid 100% of their claims, and that is in the reorganisation of *ST Pianzhuan[110] and S*ST Beiya.[111] As their rights have lower priority, shareholders have

[109] In reorganisation of only two listed companies, *ST Pianzhuan and S*ST Beiya, the principle of APR was observed. The general creditors were paid 100% of their credits.

[110] See the reorganisation plan of *ST Pianzhuan, available at http://www.cninfo.com.cn/finalpage/2010-05-18/57962076.PDF (visited 15 July 2015).

[111] The repayment rate to general creditors was 19% according to the reorganisation plan of S*ST Beiya. It was increased to 100% in the implementation of the reorganisation plan, for more information, please see "中航投资控股股份有限公司关于股票恢复上市的公告 [Announcement of Avic Capital Co Ltd on the Relisting of Company Stocks]", available at http://www.cninfo.com.cn/finalpage/2012-08-23/61464936.PDF (visited 15 July 2015).

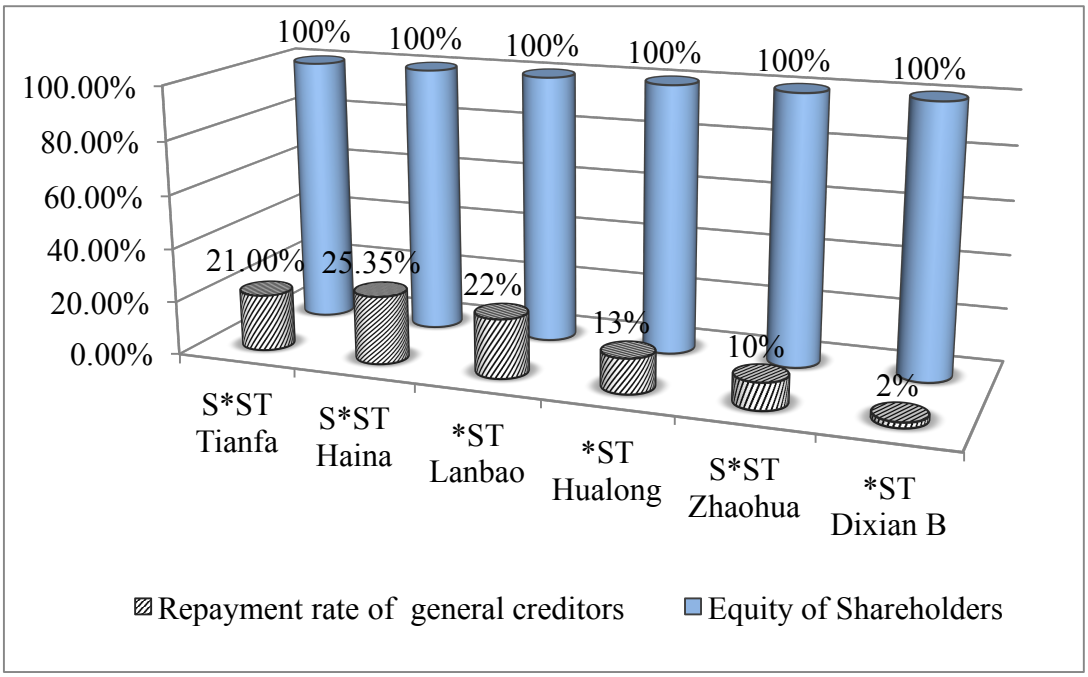
no rights left whatsoever when the debt of the listed companies exceeds their assets. They actually lose their control to the creditors over the company.[112] In that regard, the equity of shareholders should be greatly reduced or should be nil when the debtor company is insolvent. All 45 listed companies were substantially insolvent, and the debt to assets ratio was as high as 700%, such as in the case of S*ST Zhaohua and *ST Shentai.[113] Even so, the shareholder equity was not reduced at all in some listed companies, while the claims of the creditors were reduced as high as 90% in those cases.

Figure 7 shows that shareholder rights are not reduced in six of the cases, while creditors only obtained a very small proportion of their claims. It is clear that the interests of the shareholders were placed before those of the creditors. Among these six cases, the government is the controlling shareholder in S*ST Tianfa, S*ST Haina and S*ST Lanbao. The Cangzhou Municipal Government became the second largest shareholder of *ST Dixian B after the company entered the reorganisation process. Liquidation groups are designated as the administrator for *ST Hualong and S*ST Zhaohua. In these cases, shareholder rights are much better protected than those of the creditors in the reorganisation of listed companies where the state is a controlling shareholder or the liquidation group is designated as administrator, that is, when the interest of government gets involved in the reorganisation process.

Figure 7: Repayment Rates to General Creditors in Reorganisation of Listed Companies with Equity of Shareholders Unchanged

[112] *Manville Corp v Equity Security Holders Comm* (*In re Johns-Manville Corp*) 801 F2d 60 (2d Cir 1986).

[113] See the annual report of S*ST Zhaohua in 2007, available at http://www.cninfo.com.cn/cninfo-new/disclosure/szse_main/bulletin_detail/true/39119768?announceTime=2008-04-25%2006:30, and annual report of *ST Shentai in 2008, available at http://www.cninfo.com.cn/finalpage/2009-04-28/51875298.PDF (visited 13 August 2015).

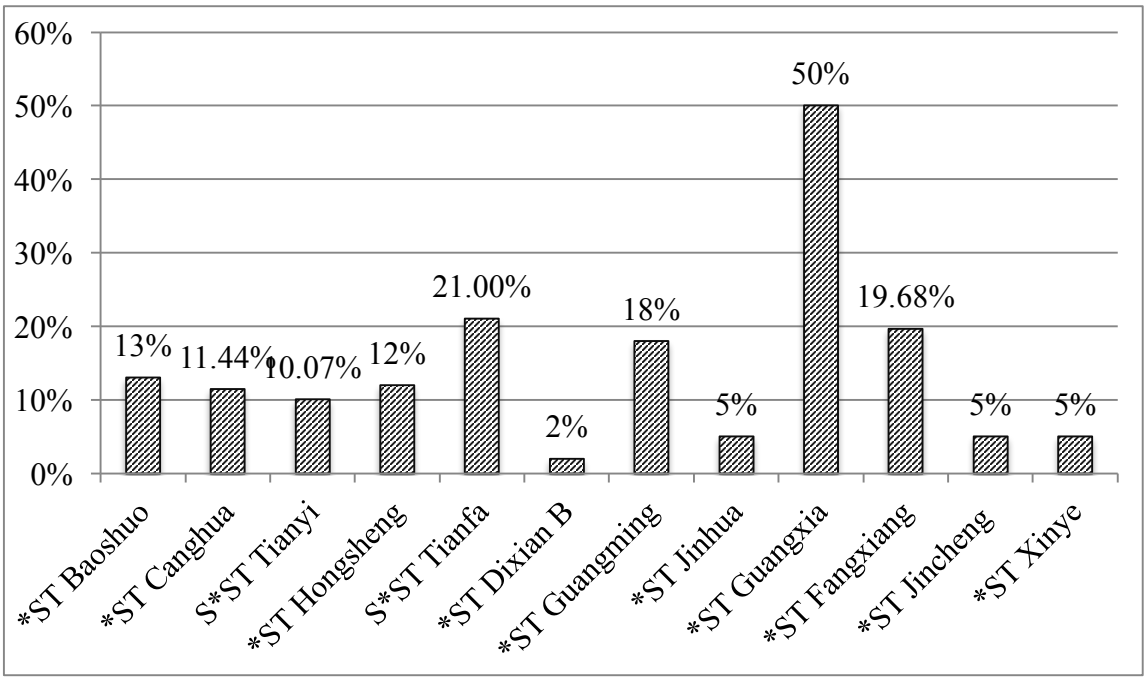


Source: The data is collected by the author from the reorganisation plans of the six companies.

In terms of repayment to the creditors, the average repayment rate was 27.97% in the non-cramdown cases, but 13.58% in the cramdown cases, which is half of the non-cramdown cases. The reorganisation plans of the 12 listed companies were rejected by their creditors or both the creditors and shareholders.[114] The creditors do not consider that they are treated fairly and equitably. For example, in the reorganisation plans of S*ST Tianfa and *ST Dixian B, the shareholders, who comprised the junior class in the distribution of the bankruptcy assets, were paid in full while the creditors only got repayment of their claims as low as 2% (see Figure 8).

Figure 8: Repayment Rates to Creditors in Cramdown Cases

[114] See Table 1 of Reorganisation plans crammed down by the People's Court for more details.



Source: The data is collected by the author from reorganisation plans of the 12 listed companies.

According to Art 87 of the 2006 EBL, the administrator can submit the reorganisation plan to the people's court for its confirmation only if: (1) the repayment rate to the general creditors is no less than the liquidation value and (2) the voting group that does not agree to the reorganisation plan refuses to vote again or rejects the reorganisation plan upon re-voting.[115]

In terms of the first requirement, the valuation of the assets of the listed companies was ambiguous and not made known to the general creditors. The liquidation-group administrator may instruct government-affiliated evaluating agencies to provide a lower liquidation assessment. It then becomes easier to meet this requirement. In fact, the creditors have questioned about the assessment process in several cases.[116] In terms of payment to creditors with the debtor's shares,[117] the valuation of the shares is rather crude and simple in comparison with the more

[115] See Art 87 of the 2006 EBL.

[116] Creditors and scholars questioned the assessment of value of the bankruptcy assets in the reorganisation of *ST Jinhua and *ST Dixian B. For more information, see (n 21 above), pp 9–11.

[117] Such a debt repayment method could be seen in cases such as *ST Jiufa, *ST Huayuan and *ST Qinling.

sophisticated and complex US practice. Some of the listed companies, such as *ST Jiufa and *ST Qinling, chose the closing price of their shares on the day before the suspension of their share trading.[118] Some, such as *ST Xiaxin and *ST Shentai, applied the average of the share price within a certain period near the date of the confirmation of the reorganisation plans. However, they failed to state the reason for choosing such an appraisal method. They apparently neglected the difference between the share price before and after the reorganisation, as the price after the reorganisation is often higher. This is also unfair to the creditors.

Concerning the second requirement, in practice, most liquidation groups do not consult with creditors who have rejected the draft of the reorganisation plans to save time or avoid any trouble. Table 1 shows that the liquidation group is designated as the administrator in 11 cases except for *ST Hongsheng. All reorganisation plans were rejected by the creditors at the first voting. It is unclear whether the liquidation group negotiated with the creditors for the second time in two of the cases, namely S*ST Tianfa and S* ST Tianyi. Among the remaining nine, the liquidation group in four of the cases; that is, *ST Baoshuo, *ST Canghua, *ST Dixian B and *ST Jincheng, submitted the rejected reorganisation plans directly to the people's court without any consultation or negotiation with their creditors. The liquidation groups conducted further negotiation with their creditors and shareholders in five cases: *ST Guangxia, *ST Jinhua, S*ST Guangming, *ST Xinye and *ST Jincheng. However, the negotiation requirement as per the 2006 EBL was only treated as a formality. The reorganisation plans were neither amended nor was the priority given to creditors any different. Such reorganisation plans were vetoed by the creditors again.

Table 1: Reorganisation Plans Crammed Down by the People's Court

Listed company	**Administrator**	**Rejection of the reorganisation plan**	**Further negotiation after the veto**	**Replacement of the administrator**

[118] See the reorganisation plans of * ST Jiufa, available at http://file.ws.126.net/quotes/pdf/sh/2008/2008-12/2008-12-16/381350.pdf and *ST Qinling, available at http://file.ws.126.net/quotes/pdf/sh/2009/2009-12/2009-12-17/491606.pdf (visited 1 August 2015).

			of the plan?	
S*ST Tianfa	Liquidation group[119]	Rejected by general creditors[120]	Unclear	No
S*ST Tianyi	Liquidation group[121]	Rejected by general creditors[122]	Unclear	No
*ST Guangxia	Liquidation group[123]	Rejected by creditors and investors twice[124]	Yes[125]	Creditors issued a declaration to replace the administrator[126]
*ST Jinhua	Liquidation group[127]	Rejected by creditors twice[128]	Yes[129]	No
S*ST	Liquidation	Rejected by	Yes[132]	No

[119] It is available at http://www.cninfo.com.cn/finalpage/2007-08-17/30812970.PDF (visited 14 August 2015).

[120] See Yan Ding (n 89 above), p 154.

[121] It is available at http://www.cninfo.com.cn/finalpage/2007-08-17/30847383.PDF (visited 14 August 2015).

[122] It is available at http://www.dhl.com.cn/pageview.php?newsid=1340 (visited 14 August 2015).

[123] It is available at http://www.cninfo.com.cn/finalpage/2010-09-17/58449567.PDF (visited 14 August 2015).

[124] (2011-061) "广夏（银川） 实业股份有限公司管理人关于第二次债权人会议召开情况的公告 [Announcement of the Administrator of *ST Guangxia on the Second Creditors' Meeting]", available at http://www.cninfo.com.cn/finalpage/2011-07-21/59704864.PDF (visited 15 August 2015).

[125] "法学泰斗批银广夏重组猫腻, 提请强裁违背破产法 [Leading Law Professors Criticise Illegal Tricks in Reorganisation of *ST Guangxia, Submission of Cram Down Application Violating the Bankruptcy Law]", available at http://finance.sina.com.cn/stock/s/20111108/182910776873.shtml (visited 12 September 2014).

[126] "*ST 广夏重整进程突变, 债权人发声明提出更换管理人 [Sudden Change of the Reorganisation Process of *ST Guagnxia: Creditors Issued a Statement to Replace the Administrator]", available at http://www.eeo.com.cn/2011/0715/206269.shtml (visited 15 August 2015).

[127] (2010-018) "锦化化工集团氯碱股份有限公司关于公司进入重整程序的公告 [Announcement of *ST Jinhua on Entering into Reorganisation Procedure of the Company]", available at http://www.cninfo.com.cn/finalpage/2010-03-22/57709426.PDF (visited 16 August 2015).

[128] It is available at http://www.cninfo.com.cn/finalpage/2010-07-27/58220307.PDF (visited 16 August 2015).

[129] *Ibid.*

Guangming	group[130]	secured creditors and general creditors twice[131]		
*ST Xinye	Liquidation group[133]	Rejected by secured creditors and general creditors twice[134]	Yes[135]	No
*ST Baoshuo	Liquidation group[136]	Rejected by general creditors[137]	No[138]	No
*ST Canghua	Liquidation group[139]	Rejected by general creditors[140]	No[141]	No

[132] *Ibid.*

[130] (2009-052) "光明集团家具股份有限公司管理人关于公司进入破产重整程序的公告 [Announcement of the Administrator of *ST Jinhua on Entering into Bankruptcy Reorganisation Procedure of the Company]", available at http://www.cninfo.com.cn/finalpage/2009-11-10/57273202.PDF (visited 16 August 2015).

[131] It is available at http://www.cninfo.com.cn/finalpage/2010-08-07/58273939.PDF (visited 16 August 2015).

[133] (2013-022) "葫芦岛锌业股份有限公司关于法院指定公司管理人的公告 [Announcement of *ST Xinye on the Designation of the Administrator]", available at http://www.cninfo.com.cn/finalpage/2013-02-07/62120088.PDF (visited 16 August 2015).

[134] (2013-110) "葫芦岛锌业股份有限公司关于法院批准重整计划的公告 [Announcement of *ST Xinye on the Confirmation of the Reorganisation Plan]", available at http://www.cninfo.com.cn/finalpage/2013-12-07/63350229.PDF (visited 16 August 2015).

[135] *Ibid.*

[136] (2007-035) "河北宝硕股份有限公司第一次债权人会议情况公告 [Announcement of *ST Baoshuo on the First Creditors' Meeting]", available at http://www.cninfo.com.cn/finalpage/2007-06-26/29349087.PDF (visited 16 August 2015).

[137] "*ST 宝硕重整计划获法院批准 [Reorganisation Plan of *ST Baoshuo was Confirmed by the People's Court]", available at http://www.p5w.net/today/200802/t1484589.htm (visited 16 August 2015).

[138] *Ibid.*

[139] "清算组将接管*ST 沧化, 沧州国资委副主任任组长 [Liquidation Group Will Take Over *ST Canghua, Deputy Director of Cangzhou Municipal SASAC being the Group Leader]", available at http://finance.sina.com.cn/stock/t/20070625/03001494467.shtml (visited 17 August 2015).

[140] It is available at http://www.cninfo.com.cn/finalpage/2008-01-02/36386038.PDF (visited 17 August 2015).

[141] *Ibid.*

*ST Dixian B	Liquidation group[142]	Rejected by secured and general creditors[143]	No[144]	No
*ST Fangxiang	Liquidation group[145]	Rejected by secured and general creditors[146]	No[147]	No
*ST Jincheng	Liquidation group[148]	Rejected by creditors and shareholders twice[149]	Yes[150]	No

[142] (2008-046) "承德帝贤针纺股份有限公司管理人关于公司进入重整程序的公告 [Announcement of the Administrator of *ST Dixian B on Entering into Bankruptcy Reorganisation Procedure of the Company]", available at http://www.cninfo.com.cn/finalpage/2008-11-11/46204155.PDF (visited 17 August 2015).

[143] (2008-066) "承德帝贤针纺股份有限公司管理人关于法院批准重整计划的公告 [Announcement of the Administrator of *ST Dixian B on the Confirmation of Reorganisation Plan by the People's Court]", available at http://www.cninfo.com.cn/finalpage/2008-12-31/47916378.PDF (visited 17 August 2015).

[144] *Ibid.*

[145] (2011-01) "四川方向光电股份有限公司关于法院指定本公司管理人及风险提示的公告 [Announcement of *ST Fangxiang on the Designation of the Administrator and Risk Warning]", available at http://www.cninfo.com.cn/finalpage/2011-01-04/58854859.PDF (visited 17 August 2015).

[146] (2011-22) "四川方向光电股份有限公司关于破产重整第三次债权人会议情况的公告 [Announcement of *ST Fangxiang on the Third Creditors' Meeting Concerning the Bankruptcy Reorganisation of the Company]", available at http://www.cninfo.com.cn/finalpage/2011-06-04/59514823.PDF (visited 17 August 2015).

[147] (2011-26) "四川方向光电关于法院批准重整计划的公告 [Announcement of *ST Dixian B on the Confirmation of Reorganisation Plan by the People's Court]", available at http://www.cninfo.com.cn/finalpage/2011-06-25/59595402.PDF (visited 17 August 2015).

[148] (2008-046) "金城造纸股份有限公司关于公司进入重整程序的公告 [Announcement of *ST Jincheng on Entering into Bankruptcy Reorganisation Procedure of the Company]", available at http://www.cninfo.com.cn/finalpage/2012-05-23/61033388.PDF (visited 17 August 2015).

[149] (2012-076) "金城造纸股份有限公司关于破产重整第二次债权人会议情况的公告 [Announcement of *ST Jincheng on the Second Creditors' Meeting Concerning the Bankruptcy Reorganisation of the Company]", available at http://www.cninfo.com.cn/finalpage/2012-09-25/61605113.PDF (visited 17 August 2015).

[150] (2012-084) "金城造纸股份有限公司关于出资人组会议再次表决情况的公告 [Announcement of *ST Jincheng on the Revoting of the Reorganisation Plan by the Group of Contributor]", available at http://www.cninfo.com.cn/finalpage/2012-10-13/61651319.PDF (visited 17 August 2015).

*ST Hongsheng	Social intermediary[151]	Rejected by general creditors twice[152]	Yes[153]	No

The confirmation of these reorganisation plans rejected by the violated the substantial as well as procedural requirements under Art 87 of the 2006 EBL. Such plans should not be confirmed by the people's court. However, the people's court in fact was not independent in confirming the reorganisation plans. Table 1 shows that reorganisation plans of 11 listed companies were drafted by the liquidation group. As members of the liquidation groups are appointed by the people's court upon recommendation of local governments and the interests of local governments are involved in the reorganisation of these listed companies, the people's court followed the instructions of the local governments to facilitate the preservation of the listing status of the listed companies and protection of state-owned assets.

The fundamental justification for the people's court to cramdown reorganisation plans rejected by creditors (and investors) should be protecting the public interest. The reason for creditors to reject the reorganisation plans is that the creditors and debtors cannot reach an agreement on their priority, and the treatments of their claims and equity in reorganisation negotiations (it is doubtful, however, whether there *is* any negotiation between creditors and debtors with the liquidation group as the administrator in some cases). It is much easier for the debtor to be connected with public interest, because the debtor as a company is often a job supplier, tax payer and contributor to the local economy. Jobs, taxes and the development of local economy are regarded as public interests closely associated with the debtor company.

Protecting the public good provides the government with a sufficient reason to intervene in the reorganisation of listed companies. However, the cramdown of

[151] (临 2011-028) "西安宏盛科技发展股份有限公司关于法院指定本公司管理人及风险提示的公告 [Announcement of *ST Hongsheng on the Designation of the Administrator and Risk Warning]", available at http://www.cninfo.com.cn/finalpage/2011-11-29/60256166.PDF (visited 17 August 2015).

[152] "债权人未通过重整计划 *ST 宏盛重整步上强裁之路 [With the Reorganisation Plan Being Rejected by Creditors, the Reorganisation Plan of *ST Hongsheng Will Be Crammed Down by the Court]", available at http://www.cs.com.cn/oldfiles/15/201204/t20120410_3309229.html (visited 17 August 2015).

[153] *Ibid.*

reorganisation plans may affect the interests of some private parties while protecting those of other private parties in the name of protecting public good.[154] This is particularly true in the reorganisation of listed companies in China. All reorganisation plans, whether they have been rejected by creditors or not, are confirmed by the people's court. In some cases, such as the six listed companies with shareholder rights unchanged, confirmation by the people's court is obviously unjust as it greatly affects the interests of the creditors.[155] For local governments, any listed company is worth rescuing and reorganisation plans deserve confirmation by the people's court as long as the repayment rate to creditors is higher than the liquidation value. No government expects to see the first liquidation case of listed companies to take place in its own jurisdiction, which greatly impairs the image of local government and may entail the deterioration of local economy. In the eyes of the people's court and local governments, rescuing listed companies is equivalent to protecting public interest. Whether the treatments to creditors are fair are not as important as saving the listed company.

It should be noted that the intention of the Chinese lawmakers was not to abuse the cramdown power of the people's court in the bankruptcy of enterprises,[156] listed or non-listed, SOEs or non-SOEs. As cramdown triggers greater expense and more concern over its fairness, it is intended to be used rarely.[157] The SPC requires that the people's court shall strictly examine the reorganisation plan, comprehensively consider the public interests and exercise discretion in a prudential way.[158] The threat of cramdown is intended to get the parties to negotiate under the shadow of confirming the reorganisation plans over the rejection of creditors when the prescribed conditions are

[154] 王建平/Jianping Wang (2011) "论破产重整中的利益平衡/On Balance of Interests in the Bankruptcy Reorganization", China University of Political Science and Law, PhD Dissertation, p 71.

[155] See also 王佐发/Zuofa Wang, "上市公司重整中对债权人强裁的公平原则 [The Principle of Fairness in the Cram Down Procedure against the Creditors in the Reorganisation of Listed Companies]," (2013) 2 *政治与法/Political Science and Law* 34, 38–40.

[156] Art 87 of the 2006 EBL lists many conditions for the cramdown of the reorganisation plans rejected by the creditors. When the prescribed conditions are not satisfied, no compulsory approval can be made in the name of saving enterprises.

[157] See UNCITRAL (n 9 above), pp 226–229.

[158] SPC, "最高人民法院关于正确审理企业破产案件为维护市场经济秩序提供司法保障若干问题的意见[Opinions of the SPC on Several Issues Concerning Correctly Trying Enterprise Bankruptcy Cases to Provide Judicial Protection for Maintaining the Order of Market Economy]", the *SPC* (6 December 2009), available at http://en.pkulaw.cn.eproxy2.lib.hku.hk/display.aspx?cgid=118100&lib=law (visited 5 January 2016).

satisfied. However, in the practice of the reorganisation of listed companies, the cramdown mechanism has been made use of by the liquidation group to force creditors to accept some unfair treatments compared with the treatments of shareholders as discussed above.