THE CORPORATE BANKRUPTCY SUBSTITUTE IN CHINA

Dr. Zhang Zinian[*]

I. INTRODUCTION

As the second largest economy besides the United States, China's recent unprecedented economic growth has shaken the world.[1] However, it is fair to say that China's state institutions in general, and its judicial system in particular, behave rather inadequately in protecting investors,[2] especially when it comes to the implementation of its corporate bankruptcy law so as to provide creditors with legal certainty.[3]

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[*] Lecturer of Business Law, School of Law, University of Leeds, England. This article mainly benefits from a conversation around the year 2013 with Professor Roman Tomasic, my PhD supervisor at Durham University, who suggested that I investigate the alternative bankruptcy regime that is in China and how it operates. The author is deeply indebted to Professor Tomasic. This article would also be impossible without financial support from the British Economic & Social Research Council (ESRC) under the grant ES/P004040/1, as the ESRC funding makes the fieldwork in China possible. Professor Gerard McCormack read the early drafts of this paper and offered valuable comments. This paper was presented at a number of conferences, and the author wishes to thank conference participants such as Professor Rebecca Parry, Professor Roger Halson, and the Right Hon. Lord Sales, the Justice of the Supreme Court, UK, for their helpful comments. My daughter Zhang Yuhe helped correct many pinyin names of the Chinese companies investigated here, and her linguistic excellence should be acknowledged. The opinions expressed in this article belong solely to the author, and not necessarily to the funding agency. All errors in this paper remain the author's personal liabilities. The author can be reached by email at z.zhang2@leeds.ac.uk or by post at School of Law, University of Leeds, Liberty Building, Leeds, West Yorkshire, England, LS2 9JT United Kingdom.

1 *How China Runs the World Economy*, THE ECON. (July 28, 2005), https://www.economist.com/leaders/2005/07/28/how-china-runs-the-world-economy (arguing that "global wages, profits, prices and interest rates are increasingly being influenced by events in China").

2 *See World Bank Group, Doing Businesses 2019, Training for Reform, Economy Profile: China*, WORLD BANK GROUP, 3 (2019), https://www.worldbank.org/content/dam/doingBusiness/media/AnnualReports/English/DB2019-report_web-version.pdf (ranking China at a very low position in terms of the efficiency of resolving insolvency in China)

3 *See* Wojciech Maliszewski et al., *Resolving China's Corporate Debt Problem*, (IMF Working Paper No. 16/203, 2016), https://www.imf.org/external/pubs/ft/wp/2016/wp16203.pdf (noting the very limited use of the China Enterprise Bankruptcy Law 2006 in China following the promulgation of this law since 2006).

But China has made progress. Shortly after joining the World Trade Organisation in 2001,[4] probably because of awareness of the correlation, if not causation, between establishing a sound legal system and economic growth,[5] or possibly because of a desire to impress the outside world,[6] China amended many of its commercial laws,[7] including those related to bankruptcy. China revised its out-of-date Enterprise Bankruptcy Law 1986 (For Trial Implementation) (the EBL 1986)[8] into a modern corporate bankruptcy statute, the China Enterprise Bankruptcy Law 2006 (the EBL 2006), [9] which embraced many international best practices and received acclaim both domestically[10] and abroad.[11] The EBL 2006 came into effect on June 1, 2007.

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4 *See Ten Years of China in the WTO: Shades of Grey*, THE ECON. (Dec. 10, 2011), https://www.economist.com/leaders/2011/12/10/shades-of-grey (recording that China officially joins the WTO on 11 December 2001).

5 There is abundant literature analyzing the relationship between economic growth and the rule of law. *See, e.g.*, Edward L. Glaeser et al., *Do Institutions Cause Growth?* 9 J. ECON. GROWTH 271, 279 (2004), https://scholar.harvard.edu/shleifer/publications/do-institutions-cause-growth (noting the correlation between the quality of the rule of law and economic growth in surveyed countries).

6 Campbell Korff & Xinhong Liu, *Why China's Insolvency Regimes Must Improve*, 21 INT'L FIN. L. REV. 33, 35 (2002) (sharply commenting that "the whole process (of revamping China's bankruptcy law) has been little more than window-dressing to appease the WTO").

7 *See* Penelope B. Prime, *China Joins the WTO: How, Why, and What Now?*, 37 BUS. ECON. 26, 32 (2002), http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.488.581&rep=rep1&type=pdf (noting China's efforts in revising its commercial laws to comply with the WTO rules).

8 *See* Michael Minor & Karen J Stevens-Minor, *China's Emerging Bankruptcy Law*, 22 INT'L L. 1217, 1225 (1988), https://scholar.smu.edu/cgi/viewcontent.cgi?article=2613&context=til (noting many shortcomings of the Chinese Enterprise Bankruptcy Law 1986).

9 For a comprehensive analysis of this law, see Charles D. Booth, *The 2006 PRC Enterprise Bankruptcy Law: The Wait Is Finally Over*, 20 S. AC. L.J. 275 (2008).

10 *See* Li Shuguang, Lun Xin Pochanfa Di 30 Tiao Zhong de Zhaiwuren Caichan Zhidu (论新破产法第 30 条中的债务人财产制度) [*Asset Scope Under Article Thirty of the New Enterprise Bankruptcy Law*], 20 Wuhan Ligong Daxue Xuebao Shehui Kexue Ban (武汉理工大学学报 (社会科学版)) [J. WUHAN U. TECH. (SOC. SCI. ED.)] 7, 7 (2007), http://www.commerciallaw.com.cn/index.php/home/business/info/id/882.html (stating that the enactment of the EBL 2006 is a milestone for the Chinese commercial law development).

11 *See* David L Eaton et al., *China's New Enterprise Bankruptcy Law*, 2 PRATT'S J. BANKR. L. 543, 543 (2007) (asserting that the EBL 2006 "provides creditors and investors with more certainty, transparency, and protection"); Rakhi I. Patel, *A Practical Evaluation of the People's Republic of China's 2007 Enterprise Bankruptcy Law*, 10 U.C. DAVIS BUS. L.J. 109, 124 (2009) (stating that the EBL 2006 is "a sure sign of progress in the modernization of China's corporate law regime); Steven J.

The reality, however, is that, as many commentators predicted,[12] the implementation of the EBL 2006 has been even worse than that of the previous 1986 law. The annual number of corporate bankruptcy cases handled by Chinese courts declined, rather surprisingly, from its peak at around 7,000 in 1997 under the old law to some 2,000 per year in 2015 under the new law.[13] Chinese courts, as a whole, continue to unlawfully shun corporate bankruptcy petitions, in violation of Article 10 of the EBL 2006, which obliges courts to either accept a corporate bankruptcy filing or reject it within fifteen days after receiving the filing. The reality is that most courts simply ignore the filing so as to avoid making an order, depriving the petitioner of the chance to even appeal under Article 11 of the EBL 2006.[14]

In 2016, persuaded by the Chinese central government, likely acting under WTO-rule-compliance pressure from the international community, especially from the U.S.,[15] the annual number of corporate bankruptcy cases recovered to 5,665 a year in 2016[16] and 9,542 in

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Arsenault, *The Westernization of China's Bankruptcy: An Examination of China's New Corporate Bankruptcy Law through the Lens of the UNCITRIAL Legislative Guide to Insolvency Law*, 27 PENN ST. INT'L L. REV. 45, 87 (2008), https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1239&context=psilr (acknowledging that "in many respects, the new law (the EBL 2006) is in accord with the suggestions and recommendations of the UNCITRAL Legislative Guide to Insolvency Law"); Emily Lee & Karen Ho, *China's New Enterprise Bankruptcy Law – A Great Leap Forward, but Just How Far?*, 19 INT'L INSOLV. REV. 145, 155 (2010) (praising many innovative provisions in the EBL 2006).

12 *See, e.g.*, Terence C. Halliday, *The Making of China's Corporate Bankruptcy Law*, FOUND. FOR L. JUST. & SOC., 8 (2007), https://www.fljs.org/sites/www.fljs.org/files/publications/Halliday.pdf (noting some challenges ahead in affecting how the EBL 2006 will operate in China); Donald C. Clarke, *China: Creating a Legal System for a Market Economy*, ASIAN DEV. BANK (2007) (stating the author's cautious optimism regarding the implementation of the EBL 2006 in the years to come).

13 The statistics are quoted in a recent study. Shaowei Lin, *The Empirical Studies of China's Enterprise Bankruptcy Law: Problems and Improvements*, 27 INT'L INSOLV. REV. 77, 85 (2018).

14 *See China: Zombie Firms Will Drag Down Economic Growth*, OXFORD ANALYTICA DAILY BRIEF SERV. (June 2, 2016), https://search.proquest.com/docview/1793300610/E15C3B43865C4274PQ/1?accountid=147016 (reporting that Chinese courts often ignore bankruptcy petitions, especially of private businesses).

15 *See 2016 Report to Congress on China's WTO Compliance*, U.S. TRADE REPRESENTATIVE, 33 (Jan. 2017), https://ustr.gov/sites/default/files/2016-China-Report-to-Congress.pdf (reporting that the United States asks China to vigorously implement its corporate bankruptcy law to protect investors).

16 Tom Hancock, *Zombie Cull Fuels China Bankruptcy Rise*, FIN. TIMES (Feb. 27, 2017), https://www.ft.com/content/35fa6886-fcc9-11e6-96f8-3700c5664d30 (reporting the annual number of bankruptcy cases of 2016 in China at 5,665).

2017.[17] Notwithstanding this mild recovery, the big picture is that an estimated 96 per cent of Chinese companies that are bankrupt do not enter into the required court-sanctioned corporate bankruptcy procedure to solve unpaid debts and to orderly exit the market, rendering them unable to use the current bankruptcy law.[18] This situation is very unlikely to change as long as the current Chinese judicial system remains unaltered.[19]

Criticism of China's hesitation to fully honour its corporate bankruptcy law abound.[20] But for corporate bankruptcy scholars, focusing on why China should more vigorously implement its official bankruptcy statute might miss the point, since China, to a great extent, does not use its formal bankruptcy law to solve corporate

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17 *See* Li Wanxiang, Quanguo Fayuan 2017 Nian Shenjie Qiye Pochan An 6,257 Jian (全国法院 2017 年审结企业破产案 6257 件) [*Chinese Courts Concluded 6,257 Corporate Bankruptcies in 2017*], Jinji Ribao (经济日报) [CHINA ECON. DAILY] (Mar. 6, 2018), http://www.ce.cn/xwzx/gnsz/gdxw/201803/06/t20180306_28368370.shtml (reporting that Chinese courts opened 9,542 new corporate bankruptcies in 2017 and concluded 6,257 cases that year).

18 See the estimate at an early study in Zinian Zhang & Roman Tomasic, *Corporate Reorganization Reform in China: Findings from an Empirical Study in Zhejiang*, 11 ASIAN J. COMP. L. 55, 69 (2016). According to a recent report released by the China National Company Registration Authority, in 2017, there are 29,072,300 registered enterprises in China, excluding around 59,300,000 sole-trader businesses, and given that the bankruptcy rate is at some 1 per cent annually, there should be around 290,723 enterprise bankruptcy cases opened in China as a whole. The contrast between the existing 10,000 bankruptcies and the expected 290,723 cases suggests the limited extent to which the current corporate bankruptcy law has been implemented in China. *See also* The China National Company Registration Authority, Dang de Shiba Yilai Quanguo Qiye Fazhan Fengxi (党的十八以来全国企业发展分析) [*A Report on China's Enterprise Development Following the 18th Party Congress*], Zhongguo Gongshang Bao (中国工商报) [THE CHINA INDUSTRY & COM. NEWS] (Oct. 26, 2017), http://www.cicn.com.cn//2017-10/26/cms101464article.shtml (noting that in 2017, there are 29,072,300 registered enterprises in China nationally).

19 *See* Carl Minzner, *China after the Reform Era*, 26 J. DEMOCR. 129, 132 (2015) (noting that China has limited institutional reforms and has no fundamental political change).

20 *See, e.g.*, Sally Chen & Joong Shik Kang, *Credit Booms – Is China Different?* 15 (IMF, Working Paper No. 18/2, 2018), https://www.imf.org/~/media/Files/Publications/WP/2018/wp1802.ashx+&cd=1&hl=en&ct=clnk&gl=us; Zou Hailing, Gongjice Jiegouxing Gaige yu Pochan Chongzheng Zhidu de Shiyong (供给侧结构性改革与破产重整制度的适用) [*The Chinese Supply-Side Reform and the Use of the Company Bankruptcy Reorganization Regime*], 3 Falü Shiyong (法律适用) [J. OF L. APPLICATION] 57, 60 (2007).

bankruptcies.[21] Instead, in the event of company bankruptcy, i.e., the company's assets cannot fully meet the payment of its debts, Chinese courts may use fair distribution, i.e. the pari passu principle, in judgment execution as a bankruptcy substitute to seek equal treatment of the interests of competing creditors.[22]

From the perspective of creditors, this is probably the real, accessible Chinese bankruptcy law, which unfortunately, does not bear the proper title and is not written in the bankruptcy statute.[23] It would not be an exaggeration to say that the formal bankruptcy statutes, including the EBL 1986 and EBL 2006, are essentially legal tools for the Chinese government to either close down money-losing state-owned enterprises ("SOEs"), as was overwhelmingly practised before,[24] or to get rid of so-called zombie companies,[25] especially after the year

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21 Professor Charles Booth calls to pay more attention to the real Chinese corporate bankruptcy law used in practice, since the formal law is hardly applied in China. *See Corporate/Debt Restructuring: Japan, the Hong Kong SAR & the People's Republic of China, a Roundtable Discussion*, 10 AM. BANKR. INST. L. REV. 1, 23 (2002). *See also* Perry Keller, *Sources of Order in Chinese Law*, 42 AM. J. COMP. L. 711, 711 (1994) (noting that "it is quite often to see the irrelevance of laws to the resolutions of disputes in China").

22 Yong Zhang, Canyu Fengpei yu Pochan zai Qiye Faren Zhaiwu Qingchang Zhong de Xuanze Shiyong (参与分配与破产在企业法人债务清偿中的选择适用) [*The Choice Between Fair Distribution and Bankruptcy in Dealing with Corporate Debts*], 11 Renmin Sifa (人民司法) [PEOPLE'S JUDICATURE] 49, 52 (2015). *See also* Donald C. Clarke, *Execution of Civil Judgments in China,* 141 CHINA Q. 65, 73 (1995) (noting that many execution debtors are bankrupt but remain in a judgment execution procedure in China).

23 *See* Xu Shanghao & Ou Yuanjie, Zhixing Fenpei yu Pochan Huanzhai de Gongneng Fenli: Canyu Fenpei Zhidu de Xianshi Chonggou (执行分配与破产还债的功能分离：参与分配制度的现实重构) [*Separation between Judgment Execution and Bankruptcy: Restructuring Fair Distribution in Judgment Execution*], 17 Renmin Sifa (人民司法) [THE PEOPLE'S JUDICATURE] 102, 104 (2014) (noting that fair distribution in judgment executions is actually the bankruptcy substitute in China).

24 *See* Li Shuguang, *Bankruptcy Law in China: Lessons of the Past Twelve Years*, 1 HARV. ASIA Q. 1, 1 (2006) (noting that the majority of companies in the formal bankruptcy procedure are state-owned or collectively owned in China under the EBL 1986).

25 The Editorial Board, *China's Zombie Problem*, N. Y. TIMES, June 9, 2016, at A22 (noting that China's zombie enterprises are bankrupt state-owned companies that rely on bank loans to stay afloat, which is unsustainable).

2016.[26] The EBL 2006 and its predecessors, arguably, were not enacted for businesses to seek fairness and justice.[27]

Fair distribution in judgment execution generally served as the de facto bankruptcy substitute from the 1980s[28] to 2015, a time when the China Supreme People's Court partially abolished this regime in an effort to nudge more commercial judgment executions into formal bankruptcy procedures.[29] As will be reported later in this article, in view of the insurmountable barriers to commence corporate bankruptcy procedures,[30] even after 2015, courts still use fair distribution to pragmatically solve equal treatment between competing creditors.

However, there is little research on fair distribution in judgement execution as a bankruptcy substitute in China, although there has been significant academic study of China's commercial judgment execution system *per se*, notably by Professors Donald Clarke,[31] Randall

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[26] *See* W. Raphael Lam et al., *Resolving China's Zombies: Tackling Debt and Raising Productivity* 13 (IMF, Working Paper No. 17/266, 2017) (noting that China has strengthened its campaign of culling zombie companies, especially since 2016).

[27] *See* Zhang Lingyun, Chongsu Pochan Chongzheng Zhidu Jili, Peiyu Pochan Shichang Zhili Jiegou (重塑破产重整制度激励，培育破产市场治理结构) [*Incentivize Businesses to Use China's Corporate Reorganization Law*], Pochan Fa Chazuo (破产法茶座) [BANKR. L. TEAHOUSE] 153, 160 (Xu Yangguang & Zhang Ting eds., 2017).

[28] Minshi Susong Fa (Shixing) (中华人民共和国民事诉讼法（试行）) [Civil Procedure Law 1982 (For Trial Implementation)] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 8, 1982, effective Oct. 1, 1982), art. 180 (stating that in the event of the execution debtor's bankruptcy, pari passu applies for unsecured creditors).

[29] Guanyu Shiyong "Zhonghua Renmin Gonghe Guo Minshi Susong Fa" de Jieshi (关于适用《民事诉讼法》的解释) [The Judicial Notice on the Implementation of Civil Procedure Law (promulgated by the Sup. People's Ct., Jan. 30, 2015)], art. 516, http://www.court.gov.cn/fabu-xiangqing-13241.html.

[30] Apart from courts often refusing corporate bankruptcy filings, the ambiguity of the bankruptcy statutes in China is also a factor hampering the use of the new bankruptcy law. *See generally* Mike Falke, *China's New Law on Enterprise Bankruptcy: A Story with a Happy End?*, 16 INT'L INSOLV. REV. 63, 74 (2007) (noting that the EBL 2006 has many gaps left which may hinder the use of the new corporate bankruptcy system in China).

[31] Donald C. Clarke, *The Execution of Civil Judgments in China*, 114 CHINA Q. 65 (1995); Donald C. Clarke, *Power and Politics in the Chinese Court System: The Enforcement of Civil Judgments*, 10 COLUM. J. ASIAN L. 1 (1996).

Peerenboom,[32] and He Xin.[33] To fill this gap, this article generally asks one simple question: Is fair distribution in judgment executions effective in filling the gap left by the virtual absence of bankruptcy law in China? Under this general question, there are many specific questions that need to be answered. For example, how often is fair distribution used in the event of the bankruptcy of execution debtors? Are execution creditors treated well under the fair distribution scheme? And if not, what factors hamper the application of fair distribution? Is it the lack of bankruptcy filings, as argued by many court officials in China, the cause of the meagre use of the corporate bankruptcy law?

To untangle these questions, a local law court in an eastern Chinese city with a population of nine million will be used as a case study, with all judgment execution cases concluded in the year 2014 having generously been made available for the author to inspect. To gain an in-depth understanding, in addition, while conducting fieldwork in 2017 in China, the author interviewed twenty-five professionals, including twelve judges and thirteen lawyers who dealt with fair distribution in the city. To avoid potential inconvenience, the law court, the interviewees and all companies covered have been anonymised in this article.[34]

Apart from the data directly collected from the court and the practitioners, the author derived information concerning most judgement executions investigated here from two official websites: the China Judgment Online (https://wenshu.court.gov.cn), which publishes law court judgments/decisions nationwide and is managed by the China Supreme People's Court, and the China National Enterprise Information Database (http://www.gsxt.gov.cn), which provides general information for all enterprises/businesses registered in China and is run by China's business registration authorities.

This article proceeds in three major parts. Part I outlines the legal framework of the fair distribution rule in judgment execution, and sheds light on the laws regulating the interaction between judgment execution and bankruptcy in China. Part II reports and analyses findings made based on fieldwork conducted in 2017, unravelling the challenges due

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[32] Randall Peerenboom, *The Evolving Regulatory Framework for Enforcement of Arbitral Awards in the People's Republic of China*, 1 ASIA PAC. L. & POL'Y. J. 1 (2000); Randall Peerenboom & Xin He, *Dispute Resolution in China: Patterns, Causes and Progresses*, 4 EAST ASIA L. REV. 1 (2009).

[33] *See* Xin He, *Enforcing Commercial Judgments in the Pearl River Delta of China*, 57 AM. J. COMP. L. 419 (2009).

[34] All original and pre-anonymity data sheets and interview materials have been confidentially shared with the Columbia Journal of Asian Law.

to the virtual absence of formal corporate bankruptcy law and unfolding the intrinsic flaws of fair distribution in judgement execution. Part III presents findings on whether the abolition of fair distribution in judgment execution against company debtors has achieved the goal of promoting the use of corporate bankruptcy law in China after 2015. To conclude, the key findings of this study will be summarized and some policy recommendations will be made.

II. THE LEGAL FRAMEWORK ON THE INTERACTION BETWEEN FAIR DISTRIBUTION IN JUDGMENT EXECUTION AND CORPORATE BANKRUPTCY IN CHINA

Judgment execution is generally governed by the civil procedure law in China. Unlike the diverse execution methods/terminologies used in Anglo-American jurisdictions,[35] the Chinese judgment enforcement law uses a unified judgement execution order empowering the execution officer, who is an officer of the court and has the same status as a judge, to seize and sell any assets of the judgment debtor.[36] For competing execution creditors, they are in principle, served under the first-past-the-post rule.[37] But the problem is that when the execution officer cannot seize sufficient assets to meet the judgment debt, i.e., the debtor is bankrupt or, even worse, if the judgment debtor's assets cannot fully

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[35] See the landmark articles on the judgment executions in the U.S. David Gray Carlson, *Critique of Money Judgment Part One: Liens on New York Real Property*, 82 ST JOHN'S L. REV. 1291 (2008); *Critique of Money Judgment Part Two: Liens on New York Personal*, 83 ST JOHN'S L. REV. 43 (2009); *Critique of Money Judgment Part Three: Restraining Notices,* 77 ALB. L. REV. 1489 (2013). *See also* Jeffrey Davis, *Fixing Florida's Execution Lien Law Part Two: Florida New Judgment Lien on Personal Property*, 54 FLA. L. REV. 119 (2002). As for the English judgment execution, see Peter Walton, *Execution Creditors – (Almost) the Last Right in Insolvency*, 32 C. L. W. R. 179 (2003); Lord Chancellor's Department, *Effective Enforcement: Improved Methods of Recovery for Civil Court Debt and Commercial Rent and a Single Regulatory Regime for Warrant Enforcement Agents*, Command Paper, (Cm 5744, 2003), https://www.publicinformationonline.com/uk-parliament/command-papers/2002-2003/9780101574426 (a comprehensive UK government report at the Lord Chancellor's Department).

[36] Minshi Susong Fa (民事诉讼法) [Civil Procedure Law] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 9, 1991, effective Apr. 9, 1991), arts. 221–27.

[37] Guanyu Renmin Fayuan Zhixing Gongzuo Ruogan Wenti de Guiding (Shixing) (关于执行工作若干问题的规定（试行）) [Judicial Notice on Judgment Execution] (promulgated by the Sup. People's Ct., July 8, 1998), art. 88 (highlighting the first-past-the-post principle in judgment execution).

meet the payment of more than one judgment creditor, it can be challenging to provide justice.

In the U.K. and the U.S., this scenario would generally trigger a bankruptcy procedure. Both these jurisdictions arguably have a pro-bankruptcy legislative attitude with the aim of prioritising fairness between creditors. For example, in England, the execution officer, a high court sheriff or a county bailiff, is obliged to hold the proceeds realised from selling the judgment debtor's assets for 14 days, pending a potential bankruptcy petition; in the event that a bankruptcy procedure is initiated before the 14-day period expires, the execution officer must hand the proceeds to the bankruptcy liquidator who will generally serve the creditors of the debtor as a whole.[38]

Similarly, in the U.S., the execution officer, a supreme court sheriff or a county marshal, must divert the proceeds realised from execution to the bankruptcy trustee where, prior to the completion of the judgment execution, the execution debtor enters into a bankruptcy procedure.[39] Federal bankruptcy law authorises the bankruptcy trustee to nullify any transactions taking placing within 90 days of the bankruptcy being filed, supporting the view that in the U.S., bankruptcy trumps judgment execution.[40]

In the Anglo-American jurisdictions, many may take the conversion from judgment execution to bankruptcy for granted. But in China, due to the obstacles of moving from judgment execution into formal bankruptcy procedures, Chinese lawmakers and the judicial system have had to create a practical solution as a workaround, even before there was a formal bankruptcy law in 1986.

A. THE LEGAL RULES OF FAIR DISTRIBUTION IN JUDGMENT EXECUTION AND BANKRUPTCY BETWEEN 1982 AND 1998

Before 1982, presumably because of the planned economy, all factories/businesses in China operated based on orders from the government, and potential disputes were solved through administrative channels[41] so that there was virtually no role played by law courts in

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[38] The Insolvency Act 1986, Sec. 184. *See also* ANDREW KEAY & PETER WALTON, INSOLVENCY LAW: CORPORATE AND PERSONAL 557–70 (4th ed. 2017).

[39] 11 U.S.C. §547.

[40] *Id. See also* Carlson, *Critique Part One*, *supra* note 35, at 1356.

[41] *See* Fu Lunbo, Guanyu Hetong de Falu Xiaoli Wenti (关于合同的法律效力问题) [*The Enforceability of Commercial Contracts in China*], 4 Hubei Caijin Xueyuan Xuebao (湖北财经学院学报) [J. HUBEI U. FIN.& ECON.] 100, 105–6 (1981).

enforcing contracts.[42] It was not until 1982 that the Chinese legislature, the China People's Congress, enacted its first civil procedure statute, the China Civil Procedure Law 1982 (For Trial Implementation) ("Civil Procedure Law 1982"), which contained the rules of judgment execution and fair distribution.[43] The Civil Procedure Law 1982 took effect on October 1 that same year.

It is worth noting that when Civil Procedure Law 1982 was promulgated, China had no bankruptcy statute, let alone any judicial practice on bankruptcy.[44] Therefore the issue of conversion from judgment execution to bankruptcy was categorically off the table at that time. To handle potential conflicts between execution creditors chasing the same debtor, Article 180 of Civil Procedure Law 1982 stipulated that in the event that the judgment debts exceeded the debtor's assets – the debtor was bankrupt – the proceeds from selling the debtor's assets should be used to pay employees at first (the first class), and that if there was a surplus, tax creditors (the second class) were paid, followed by bank creditors (the third class);[45] other creditors (the forth class, unsecured creditors actually, since there was no security law then) were placed at the bottom of the repayment hierarchy; but this Article added a critical clause at the end: pari passu applied in the case that the proceeds could not fully meet the payment of the execution creditors ranked in any one of these four classes.[46]

To a large extent, Article 180 of the Civil Procedure Law 1982 is prototypical of the Chinese contemporary bankruptcy practice, although it does not appear in a bankruptcy statute.[47] It is worth noting

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42 *See generally* BIN LIANG, THE CHANGING CHINESE LEGAL SYSTEM, 1978-PRESENT (2008) (chapter 6 especially).

43 *See* Tang Weijian, *The Evolution of the Civil Procedure System of China*, 7 FRON. L. CHINA 190, 193 (2012).

44 Xianchu Zhang & Charles D. Booth, *Chinese Bankruptcy Law in an Emerging Market Economy: The Shenzhen Experience*, 15 COLUM. J. ASIAN L. 1, 5 (2001) (noting that there was little bankruptcy practice in China at that time).

45 Bank loans are treated as a kind of priority debt because at that time banks are government agencies, not business entities. *See* He Yi, Dui "Minshi Susong Fa" Xiugai Caichan Qingchang Zhaiwu Shunxu de Tantao (对《民事诉讼法》修改财产清偿债务顺序的探讨) [*Amending Article 180 of the China Civil Procedure Law 1982 (For Trial Implementation) on the Debt Repayment Order re the Status of Bank Loans*], 7 Sichuan Jingrong (四川金融) [SICHUAN FIN.] 64, 64 (1991) (noting why bank loans are treated differently from trading debts under the old law in China).

46 China Civil Procedure Law 1986 (For Trial Implementation), art. 180, http://www.npc.gov.cn/wxzl/wxzl/2000-12/06/content_4411.htm.

47 *See* Ronald Harmer, *Insolvency Law and Reform in the People's Republic of China*, 64 FORDHAM L. REV. 2563 (1996).

that judgment debtors under the Civil Procedure Law 1982 include a wide range of business entities, including SOEs, as well as individuals who are subject to this bankruptcy rule. However, little is known about how this provision was implemented in reality.[48]

Four years later, for the first time, China enacted an enterprise bankruptcy statute[49] the EBL 1986, which exclusively applied to the bankruptcy of SOEs. It became effective on November 1, 1988.[50] Under Article 37 of EBL 1986, pari passu applied to unsecured claims.

Hence, from November 1, 1988 onwards, at least for an SOE judgment debtor, if its assets could not fully meet the execution payment, a bankruptcy procedure could be opened and pari passu can be invoked - thereby all unsecured creditors including execution creditors would be treated equally. By contrast, for a non-SOE judgment debtor, such as a private business or an individual, rather than opening a bankruptcy procedure, the competing creditors had no option but to remain in the judgment execution procedure and to rely on the pari passu principle embedded in Article 180 the Civil Procedure Law 1982 for fairness.

Understanding that enacting a bankruptcy law only for SOEs might be theoretically inadequate, the Chinese lawmakers added a chapter of bankruptcy for non-SOE businesses when the Civil Procedure Law 1982 was repealed and revised in 1991 ("Civil Procedure Law 1991"). Chapter 19 of the revised law dealt with bankruptcy of non-SOE enterprises, and unsurprisingly pari passu was the principal distribution rule for unsecured claims under Article 204 of Civil Procedure Law 1991.

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48 The main trouble would have been the difficulty to enforce money judgments rather than how to distribute execution proceeds between competing creditors. *See* Hu Kangshen, Lun "Minshi Susong Fa (Shixing)" de Xiuding (论《民事诉讼法（试行）》的修订) [*An Analysis of Amending the China Civil Procedure Law 1982 (For Trial Implementation)*], 3 Zhongguo Faxue (中国法学) [CHINESE LEGAL SCI.] 15, 19 (1991).

49 *See* Cao Siyuan, Shilun Shixing Qiye Pochan Fa de Biyaoxing (试论实行企业破产法的必要性) [*The Necessity of Having an Enterprise Bankruptcy Law in China*], 5 Gaige (改革) [REFORM] 25, 25 (1985) (arguing that the communist ideology is not incompatible with a bankruptcy law that is to solve business failures taking place in any economies).

50 The China Enterprise Bankruptcy Law 1986 (For Trial Implementation) became effective three months after the China State Owned Enterprise Law 1988 took effect, with the later coming into force on August 1, 1988, so that the 1986 bankruptcy law took effect on November 1, 1988. *See* Cao Siyuan, Shinian Lai Zhongguo Pochan Fa de Lifa yu Shishi (十年来中国破产法的立法与实施) [*The Chinese Bankruptcy Law Making and Implementation in the Past Ten Years*], 2 Dangdai Zhongguo Yianjiu (当代中国研究) [MOD. CHINA STUD.] 1 (1997).

But it should be emphasized that under both EBL 1986 and the bankruptcy chapter (Chapter 19) of the Civil Procedure Law 1991, only business enterprises having an independent legal status were eligible for a formal bankruptcy procedure, and businesses/enterprises that did not have independent legal status and individuals were excluded from the use of bankruptcy law. Even though EBL 1986 has been replaced by EBL 2006, the legal position remains the same.[51]

As for non-legal-person enterprises, in general, the vast majority of them are small businesses registered as sole-owner entities. According to a recent government report, in China, around 75 percent of registered businesses do not have independent legal status.[52] If they are in financial difficulty and are unable to pay debts, their owners must personally bear the ultimate responsibility, and these enterprises cannot access the formal bankruptcy law; in other words, investors in this kind of businesses cannot enjoy the benefit of limited liability, which seems to be exclusively reserved for those of legal-person businesses.[53]

Given that the China Civil Procedure Law 1991 repealed the Civil Procedure Law 1982,[54] Article 180 of the old law providing fair distribution in judgment execution was also revoked. But this gives rise to a technical vacuum, if not a legislative error.

When the Civil Procedure Law 1982 was in effect, faced with an execution debtor who was a non-legal-person enterprise or an individual, the execution creditors could rely on Article 180 of the 1982 law to seek fairness if the debtor was bankrupt. But after the 1982 law was repealed in 1991, the execution creditors had no way to access fairness. The 1982 law allowing fair distribution in judgment execution stood repealed, and under the new regime, which included the new bankruptcy laws and Civil Procedure Law 1991, debtors who were

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51 Wang Qin, Zhuanjia: Shishi Geren Pochan Zhidu Keguan Tiaojian Riyi Chengshu (专家：实施个人破产制度客观条件日益成熟) [*Experts: Time is Ripe for Enacting a Personal Bankruptcy Law in China*], Fazhi Ribao (法制日报) [LEGAL DAILY] (June 29, 2018) (reporting that China is still debating whether there should be a personal bankruptcy law in China in 2018).

52 *See* THE CHINA NATIONAL BUSINESS REGISTRATION AUTHORITY, THE 2006 YEARBOOK OF CHINA'S BUSINESS REGISTRATION MANAGEMENT 652–74 (2007).

53 Geren Duzi Qiye Fa (个人独资企业法) [The China Sole-Owner Enterprise Law 2000] (promulgated by the Sup. People's Ct., Aug. 30, 1999, effective Jan. 1, 2000), art. 31, SUP. PEOPLE'S CT. GAZ., May 1, 1999, 150 (China), http://www.npc.gov.cn/wxzl/wxzl/2000-12/05/content_4750.htm. (stating that where the sole-owner enterprise's assets cannot meet the payment of the debts at the time of dissolution, the owner must pay the balance).

54 Civil Procedure Law of 1991, *supra* note 36, art. 270, http://www.people.com.cn/zixun/flfgk/item/dwjjf/falv/9/9-1-1-01.html.

either a non-legal-person enterprise or an individual could not enter into a bankruptcy procedure. This unwitting gap remains to be filled.

On July 14, 1992, the China Supreme People's Court released a comprehensive judicial notice (the 1992 judicial notice) on how to properly implement the Civil Procedure Law 1991,[55] highlighting two major relevant issues. First, to fill the vacuum mentioned above, Article 297 of the 1992 judicial notice states that where an execution debtor, that is a non-legal-person enterprise or an individual, does not have sufficient assets to meet the judgment payment of more than one execution creditor, fair distribution can be conducted at the request of any execution creditors or creditors who have not obtained a final judgment but have already sued the debtor in court.[56] Put simply, to join fair distribution in the execution, the joining creditor must either have obtained a final judgement against the common execution debtor and have triggered an execution procedure or have registered litigation in court against the debtor.

But Article 297 of the 1992 judicial notice created a new difficulty. It allowed the creditor that has not obtained a money judgement in its favor but only has filed litigation against the debtor to join fair distribution, while there is still uncertainty over whether this creditor can ultimately win the case. The probable solution is that the execution officer holding the assets of the debtor has to reserve a certain proportion of the proceeds for this creditor pending the final result of the ongoing litigation.

The second major issue clarified by the 1992 judicial notice was that, according to Article 276, if a legal-person execution debtor does not have enough assets to pay execution creditors – the debtor is bankrupt – the judgement execution procedure should be converted into the bankruptcy one, and in principle, if the bankruptcy procedure is opened, all executions against the debtor must be closed.[57] It is worth repeating an SOE can use EBL 1986 to enter into a court-involved

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[55] Guanyu Shiyong "Zhonghua Renmin Gonghe Guo Minshi Susong Fa" Ruogan Wenti de Yijian (关于适用《民事诉讼法》若干问题的意见) [Judicial Notice on the Implementation of the Civil Procedure Law 1991] (promulgated by the Sup. People's Ct., July 14, 1992), 22 SUP. PEOPLE'S CT. GAZ., Sept. 20, 1992, 70 (China), http://www.people.com.cn/zixun/flfgk/item/dwjjf/falv/9/9-1-1-08.html.

[56] Han Changyin & Zhu Chunhe, Canyu Fenpei Zhidu he Pochan Lifa (参与分配制度和破产立法) [*Fair Distribution in Judgment Executions and Bankruptcy Regimes*], 1 Dangdai Faxue (当代法学) [CONTEMP. L. REV.], 54 (2000).

[57] Qiye Pochan Fa (Shixing) (企业破产法（试行）) [The China Enterprise Bankruptcy Law 1986 (For Trial Implementation)], art. 11, http://www.npc.gov.cn/wxzl/wxzl/2000-12/06/content_4475.htm.

bankruptcy procedure and that a non-SOE enterprise with an independent legal status may alternatively choose Chapter 19 of the Civil Procedure Law 1991 to enter into a formal bankruptcy procedure.

Therefore, after the 1992 judicial notice was released, on paper at least, the general principle is that, where the execution debtor is bankrupt, a formal bankruptcy procedure can be opened if the debtor is a legal-person enterprise. By contrast, if the execution debtor is a non-legal-person enterprise or an individual, there is no available formal bankruptcy procedure and the execution creditors can resort to the fair distribution regime under the 1992 judicial notice for fairness.[58]

But the real challenge is that the Chinese bankruptcy law, including the EBL 1986 and Chapter 19 of the Civil Procedure Law 1991, is largely a paper tiger.[59] In the absence of a functional bankruptcy law system, creditors pursuing a legal-person execution debtor that is bankrupt were trapped in judgment execution and could only be repaid on a first come, first served basis. This is a blatant violation of fairness. It should be emphasized that the default first come, first served principle is not made by the EBL 1986 or Chapter 19 of the Civil Procedure Law 1991; instead it is a natural consequence of the absence of a collective bankruptcy system, and it is finally confirmed in the judicial notice made by the China Supreme People's Court in 1998.[60] Such unfairness cannot be ascribed to the bankruptcy law itself but rather to its poor implementation.[61] This commercial ordeal lasted until 1998.

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58 *See* Yang Lixing, Minshi Zhixing Chengxu Zhong de Canyu Fenpei Zhidu (民事执行程序中的参与分配制度) [*Fair Distribution in Civil Judgment Executions*], 1 Falü Kexue (法律科学) [LEGAL SCI.], 66, 88 (1994).

59 *Bankruptcy of State Enterprises in China – A Case and Agenda for Reforming the Insolvency System*, THE WORLD BANK GROUP (Sept. 20, 2000), http://documents.shihang.org/curated/zh/167691468024327448/pdf/332670REPLACEM00Box0304405B0PUBLIC0.pdf (noting that the Chinese bankruptcy law was only occasionally used in the 1990s).

60 Guanyu Renmin Fayuan Zhixing Gongzuo Ruogan Wenti de Guiding (关于执行工作若干问题的规定（试行）) [Judicial Notice on Judgment Execution], (promulgated by the Sup. People's Ct., July 8, 1998, effective July 8, 1998), 3 SUP. PEOPLE'S CT. GAZ., 91–98 (1998), http://www.people.com.cn/zixun/flfgk/item/dwjjf/falv/9/9-1-5-03.html.

61 The scarce implementation of the China corporate bankruptcy law is well recorded in literature. *See* Lin Shaowei, *The Empirical Studies of China's Enterprise Bankruptcy Law: Problems and Improvements*, 27 INT'L INSOLV. REV. 77, 85 (2018).

B. FULL COVERAGE OF FAIR DISTRIBUTION IN JUDGMENT EXECUTION BETWEEN 1998 AND 2015

In realizing that the Chinese corporate bankruptcy law was very unlikely to be effectively implemented in the near future, and that many societal issues arose due to intense conflicts between competing execution creditors, the China Supreme People's Court pragmatically expanded fair distribution in judgment execution to legal-person execution debtors.[62] This appears in the judicial notice on judgment execution made by the Court and released on July 8, 1998 (the 1998 judicial notice).[63] The new judicial notice comprises two critical points concerning fair distribution.

First, probably to artificially comply with the legislative principles enshrined in the two bankruptcy statutes, Article 89 of the 1998 judicial notice reiterates that a formal bankruptcy petition may be suggested by the execution officer if a legal-person execution debtor does not have sufficient assets to meet its liabilities. This is politically correct but practically obsolete; however, Article 96 of the 1998 judicial notice adds a significant related provision, stating that if a legal-person execution debtor, which is closed, deregistered or has terminated business operation without going through a formal bankruptcy procedure, does not have enough assets to pay all its debts, the fair distribution regime previously tailored for non-legal-person execution debtors could also be used in the interest of fairness between execution creditors. Therefore, finally, fair distribution in judgment execution now covers execution debtors of all kinds, regardless of whether the execution debtor is a legal-person enterprise, a non-legal-person entity or an individual. Some argue that the 1998 judicial notice officially confirmed fair distribution in judgment execution as a full bankruptcy substitute in China.[64]

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62 *See* Liu Guixiang & Huang Jinglong, Pingdeng Fenpei Zhidu yu Pochan Zhidu de Fengong (平等分配制度与破产制度的分工) [*The Boundary Between Fair Distribution in Judgment Executions and Bankruptcy*], Renmin Fayuan Bao (人民法院报) [THE PEOPLE'S COURT DAILY], Apr. 30, 2014, at 8 (noting that the making of the1998 judicial notice on judgement execution is largely because the poor implementation of the formal bankruptcy law in China).

63 *See supra* note 60 and accompanying text.

64 *See* Qi Shujie & Chen Hongjie, Pochan Chengxu yu Zhixing Chengxu de Chongtu ji Qi Xietiao (破产程序与执行程序的冲突及其协调) [*The Conflicts between Bankruptcy and Judgment Execution*], 3 Xiamen Daxue Xuebao (厦门大学学报) [J. XIAMEN U.] 107, 108 (2007).

Second, the 1998 judicial notice narrows down the potential fair distribution beneficiaries. Under Article 90 of this notice, the creditor wishing to apply for fair distribution by joining in an existing execution procedure, in which the key assets of the debtor have been seized, must have already obtained a final money judgement in its favor. The 1992 judicial notice had allowed for a second group of creditors that had sued the same debtor but not obtained a final judgment to take part in fair distribution;[65] this group of creditors ended up deprived of this right by the 1998 judicial notice. The China Supreme People's Court does not explain the justification for this change. This is probably another policy error, or can be explained by the possibility that the Court tends to favor creditors taking early actions.

A careful reading of the said rules reveals that fair distribution in judgment execution is regulated *only* by the two judicial notices issued by the China Supreme People's Court, rather than by any statutes promulgated by the China People's Congress.[66] The Civil Procedure Law 1982 which provided the initial basis was repealed in 1991.

For some legal idealists, however, it seems to be a constitutional offense committed by the China Supreme People's Court, in usurping upon the domain of the China People's Congress. They reason that if a legal-person enterprise is bankrupt amid a judgment execution procedure, creditors should be allowed to seek fairness by changing execution into a formal bankruptcy procedure, and that providing limited fairness by using the fair distribution rule in judgment execution according to the 1998 judicial notice is a violation of both the spirit and the letter of the two formal bankruptcy statutes, i.e., EBL 1986 and the Civil Procedure Law 1991.[67] The critics are right. But they did not account for what was happening on the ground.

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[65] *See* Enterprise Bankruptcy Law, *supra* note 57, art. 297.

[66] *See* Chen Zhixing, Minshi Zhixing Canyu Fenpei Zhidu de Kunjing yu Jinlu (民事执行参与分配制度的困境与进路) [*Fair Distribution in Judgment Executions: Problems and Prospects*], 29 Shanghai Zhenfa Xueyuan Xuebao (上海政法学院学报) [J. SHANGHAI U. POL. SCI. & L.], 82 (2014).

[67] The leading figure criticizing fair distribution in judgment execution is Professor Wang Xinxin, a prominent bankruptcy law authority in China. *See* Wang Xinxin, Canyu Fenpei Zhidu Buying yu Puochan Fa Chongtu (参与分配制度不应与破产法冲突) [*Fair Distribution in Judgment Executions Must Not Contradict the Bankruptcy Law*], Renmin Fayuan Bao (人民法院报) [THE PEOPLE'S COURT DAILY], Apr. 30, 2014, at 8 (advocating the abolition of fair distribution in judgment executions for legal-person debtors). *See also* Zhu Lianghao, Dui Woguo Minshi Zhixing Canyu Fenpei Zhidu de Fansi (对我国民事执行参与分配制度的反思) [*Some Reflection on Fair Distribution in Judgment Execution*], 2 Shehui Kexue (社会科学) [J. SOC. SCI.],

Nevertheless, partly because of the China Supreme People's Court's campaigns to solve the judgment execution conundrum in recent years, the fair distribution regime in judgment execution against legal-person execution debtors was, in principle at least, ultimately repealed in 2015. But judicial notices apply in judgment execution where the execution debtor is a non-legal-person business or an individual.

For the remainder of this article, judgment execution means that against legal-person debtors, unless stated otherwise.

C. FAIR DISTRIBUTION IN JUDGMENT EXECUTION FROM 2015 ONWARDS

The fair distribution regime was originally designed to deal with bankrupt judgment execution debtors that were non-legal-person entities or individuals mainly because of the absolute absence of a formal bankruptcy law for them, and was later pragmatically extended to bankrupt legal-person execution debtors in 1998 because of the weakness in the implementation of the formal corporate bankruptcy law on this group of business entities in China.

It is worth noting that, in 2006, China promulgated EBL 2006, which replaced both EBL 1986 applying to SOEs and Chapter 19 of the Civil Procedure Law 1991 applying to non-SOE legal person enterprises. As noted in the introduction, the EBL 2006 remains scarcely implemented as well.[68]

On January 30, 2015, the China Supreme People's Court released an updated judicial notice (the 2015 judicial notice) facilitating the implementation of the newly-amended China Civil Procedure Law 2012.[69] Surprisingly, the 2015 judicial notice terminated the fair distribution in judgment execution against legal-person execution

52, 56 (2003) (insisting to abolish fair distribution in judgment execution against legal-person debtors); Wu Xiaojing, Xianxing Canyu Fenpei Zhidu Genben Quexian yu Gaijin Jianyi (现行参与分配制度根本缺陷与改进建议) [*The Current Fair Distribution Rule in Judgment Executions: Deep-Rooted Flaws and Prospects*], 1 Falü Shiyong (法律适用) [J. LEGAL APPLICATION] 115, 118 (2008) (calling the revocation of fair distribution in judgment execution).

[68] *See* Booth, *supra* note 9, at 275; Zhang & Tomasic, *supra* note 18, at 69; *See also* Stacy Steele et al., *Trends and Developments in Chinese Insolvency Law: The First Decade of the PRC Enterprise Bankruptcy Law*, 66 AM. J. COMP. L. 669 (2018).

[69] Guanyu Shiyong "Minshi Susong Fa" de Jieshi (关于适用《民事诉讼法》的解释) [The Judicial Notice on the Implementation of Civil Procedure Law], (promulgated by the Sup. People's Ct., Dec. 18, 2014, effective Feb. 4, 2015), SUP. PEOPLE'S CT. GAZ., 3 (2015), http://www.court.gov.cn/fabu-xiangqing-13241.html.

debtors[70] in the hope of boosting the use of the formal corporate bankruptcy law, the EBL 2006. This judicial notice took effect on February 4, 2015.[71] The 2015 judicial notice, however, retains fair distribution in judgement execution against non-legal-person and individual execution debtors, because there is still no formal bankruptcy law for them.[72]

More specifically, Article 513 of the 2015 judicial notice stipulates that in the course of a judgment execution procedure against a legal-person debtor, which is usually a limited liability company, the execution court should suspend the execution procedure in the event that the execution debtor is bankrupt under Article 2 of the EBL 2006 and should, following the consent of any execution creditor or of the execution debtor, send an execution-to-bankruptcy request to the court that has the jurisdiction over the bankruptcy of the execution debtor. The court that has the jurisdiction over the bankruptcy of the execution debtor will assess whether to open a formal bankruptcy procedure under EBL 2006. This arrangement should be understood in the context that, under one of the China Supreme People's Court policies, the corporate bankruptcy procedure can only be opened in the court where the execution debtor has the domicile.[73] Article 514 of the 2015 judicial notice adds that the requested court should make a decision within 30 days of receiving the request.

Article 515 of the 2015 judicial notice envisages two scenarios: first, if the bankruptcy court responds positively and decides to open a bankruptcy procedure - a happy outcome - the execution court will close the execution. This implies that the levied assets will also be handed to the bankruptcy trustee and are to form part of the bankruptcy estate of the debtor. And second, if declined, the execution court must resume the execution, highlighting that, under Article 516 of the 2015 judicial notice, the execution creditors will be paid out of the realized assets of the debtor on a first come, first served basis. This suggests that fair distribution is not available in judgment execution against legal-person execution debtors any longer. This pronounces, on paper at least, the

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[70] *Id.* at art. 516.

[71] *Id.* at preface.

[72] *Id.* at arts. 508–12.

[73] Guanyu Shenli Qiye Pochan Anjian Ruogan Wenti de Guiding (关于审理企业破产案件若干问题的规定) [The Judicial Notice on Several Issues of Corporate Bankruptcy Trials] (promulgated by the Sup. People's Ct., July 18, 2002, effective Sept. 1, 2002), SUP. PEOPLE'S CT. GAZ., 155 (2002), http://gongbao.court.gov.cn/Details/35856530187aef46213241d72a3c94.html?sw=%e4%bc%81%e4%b8%9a%e7%a0%b4%e4%ba%a7%e6%a1%88%e4%bb%b6.

end of the fair distribution regime in judgment execution against legal-person enterprises from February 4, 2015 in China onward.

But, to what extent has the 2015 judicial notice been successful in influencing the actual proceedings before courts? That answer will be reported later in the findings.

After all, fair distribution in judgment execution mingles with bankruptcy, mainly because the Chinese formal bankruptcy law system remains underdeveloped. For creditors, one thing is certain: seeking fairness through a formal bankruptcy procedure is largely unrealistic, since opening a bankruptcy procedure under the Chinese bankruptcy law is practically insurmountable; the problem is whether fairness can be obtained by resorting to fair distribution in judgment execution. This is what this study aims to investigate.

III. THE FINDINGS OF THE USE OF FAIR DISTRIBUTION IN JUDGMENT EXECUTION AGAINST COMPANY DEBTORS AND OF ITS CHALLENGES

To untangle the extent to which the fair distribution mechanism replaces corporate bankruptcy law, one would need to identify how often the fair distribution regime is adopted in judgment execution. The findings below will highlight observations of practitioners concerning the challenges they face when using the fair distribution approach.

A. THE METHODS OF CHOOSING ELIGIBLE JUDGMENT EXECUTION CASES AND EXECUTION DEBTORS

Before presenting the data, the court providing the basic statistics should be briefly introduced. The court is in the Yangtze delta region in eastern China and is located in its provincial capital city with a population of 9 million. Within the hierarchy of the Chinese court system, the court is a prefecture intermediate court handling many first instance large-claim commercial disputes, and also dealing with appeals from the 14 county courts under its jurisdiction.[74] This court is somewhat similar to the London High Court in status and in function.[75]

During the whole of 2014, the court concluded a total of 876 judgment executions. A five-step analysis was conducted to identify the

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74 Veron Mei-Ying Hung, *China's WTO Commitment on Independent Judicial Review: Impact on Legal and Political Reform*, 52 AM. J. COMP. L. 77, 100 (2004) (examining the Chinese court system in great details).

75 GARY SLAPPER & DAVID KELLY, THE ENGLISH LEGAL SYSTEM 167 (13th ed. 2012).

judgment executions involving fair distribution for the purpose of review.

First (step one), the chosen judgement execution should be commercial in nature, which means that criminal judgment execution must be excluded. Of the total 876 judgment executions, there are 44 criminal ones, 15 of them enforcing criminal fines and 29 enforcing criminal victim compensation awards.[76] With these 44 criminal cases removed, there are 832 judgment executions left.

Second (step two), the executions to collect court fees should also be discarded, since these cases are not a proper concern for fairness between competing creditors. The legality over the executions to collect court fees aside, in 2014, there are 201 judgment executions initiated by the court itself to recover the court fees, and following the removal of these cases, there are 631 judgment executions remaining.

Third (step three), the eligible judgment execution must have at least one execution debtor that is an enterprise and is subject to the EBL 2006 if bankrupt, because this study is to investigate the extent to which fair distribution replaces the EBL 2006.[77] To meet this criterion, there are 166 judgment executions that lack qualified enterprises as execution debtors and must be removed. After going through the third step, there are 465 executions left on the list.

All these 465 judgment executions have at least one execution debtor as an enterprise that is subject to the EBL 2006. If the enterprise debtor is bankrupt before or during the execution procedure, the EBL 2006 can, in theory, be used to open a formal bankruptcy procedure. If the bankruptcy procedure cannot be accessed, then the fair distribution regime, the bankruptcy substitute, can apply to serve competing execution creditors with fairness, at least in principle.

Among these 465 cases, if the execution debtor, a legal-person enterprise, is unable to pay the execution debt in full, the EBL 2006 can be used to address the insolvency of the debtor in the interest of fairness for creditors. And it is equally true that if the execution claim has been fully paid, irrespective of whether the execution debtor voluntarily paid the claim or has been forced to pay, this execution should be removed from the eligibility list. This is because the execution outcome does not

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[76] Bingzhi Zhao, *Outline of Reforming China's Penal System*, 4 FRONTIERS L. IN CHINA 376, 381 (2009) (anecdotally noting the difficulty of enforcing criminal fines in China).

[77] To be precise, it should be the EBL 2006 and its predecessors, including the EBL 1986 and Chapter 19 of the China Civil Procedure Law 1991. But for simplicity, this article uses the EBL 2006 to generally represent the Chinese corporate bankruptcy law, unless stated otherwise.

provide evidence proving the bankruptcy of the debtor. This is the fourth step (step four) taken to remove irrelevant executions. After checking the court's 2014 concluded judgment execution list, of the 465 judgment executions against legal person enterprises, the execution claim was fully recovered in 223 cases (47.96%).

However, in the course of searching for complementary information from the China Judgment Online, there are another 11 executions in which the execution claim was fully satisfied mainly because the execution debt was secured, but the court's 2014 judgment execution list, for unknown reasons, recorded them as zero recoveries. Hence, this list should be objectively updated. In light of this revision, the total number of the full recovery executions is increased to 234; with these 234 cases removed, there are 231 executions remaining on the list that should be further examined.

In these 231 executions, the execution creditor was either partially paid or got a zero recovery. But an additional action should be taken in the fourth step. Among the 231 executions, there are 44 executions that should be taken off on the grounds that although the execution creditor was not fully paid, these cases, for different reasons, did not end up using either bankruptcy law or fair distribution to tackle fairness concerns; these 44 executions cases either ended with a settlement or were sent to other courts for execution.

With the removal of these 44 executions, there are 187 ones remaining on the list. These 187 executions were carried out against legal-person enterprise debtors that were not able to fully pay judgment debts and were financially bankrupt. In principle, all of them should have gone through a formal bankruptcy procedure under the EBL 2006, but the reality is that most of them were not able to do so.

The next step (step five), distinct from the first four steps identifying the individual execution procedures as cases, moves to identifying execution debtors with the aim of assessing whether fair distribution should apply if the formal bankruptcy procedure against a particular debtor was not opened. On the final list of 187 executions, there are a total of 182 execution debtors that are subject to the EBL 2006. It is worthwhile to note that all individuals and non-legal-person enterprises involved in these 187 executions were simply dropped and were not investigated, since as noted before, these parties are not subject to the EBL 2006.

Although technically these debtors were bankrupt in both legal and financial terms, this still does not mean that fair distribution should be used in this situation. To apply the fair distribution regime, there

should be at least two execution creditors pursuing the same execution debtor, which usually suggests that there are at least two execution procedures opened against one debtor. If there is only one execution creditor chasing the debtor, fair distribution is unnecessary, since there is no conflict between different execution creditors, in spite of the justification of using a formal bankruptcy procedure.

The analysis for gleaning whether there were at least two judgment executions against each of these 182 debtors involved in the total of 187 executions occurred in two stages:

- The first stage was quite simple and easy, since checking the final list of these 187 executions provided by the court could give a solid answer. The first stage comfortably identified 35 enterprise debtors that are listed as execution debtors more than once by different execution creditors in this court, 24 enterprise debtors taken action against twice or more but by the same execution creditor, and 123 that were only chased once. The remaining two categories, for a total of 147 debtors, should be further investigated at the second stage.
- In contrast to the easy and quick first stage, the second stage was considerably more time-consuming. The second stage heavily relied on the official information disclosure website, the China Judgment Online.[78] This website was used to search whether each of these 182 execution debtors had been forced to pay other judgment debts in this court before or in other courts. It is fair to say that, without accessing this website, this study would have been considerably weakened. But the caveat is that this study could be a more accurate estimate because court judgments and orders from this website are still far from complete.[79]

  After going through the labour-intensive second stage, along with the 35 debtors identified during the first stage, another 119 execution debtors meet the criteria and should be retained on the list on the basis that these debtors were bankrupt and were subject to more than one judgment

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[78] Xinhua, *Chinese Courts Publish Judgment Documents Online*, CHINA DAILY (Nov. 27, 2013), http://www.chinadaily.com.cn/china/2013-11/27/content_17136289.htm.

[79] Benjamin L. Liebman et al., *Mass Digitization of Chinese Court Decisions: How to Use Text as Data in the Field of Chinese Law*, 13 (Colum. Pub. L. and Theory, Working Paper No. 14-551) https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3585&context=faculty_scholarship (reporting that around 50-70% of court decisions are uploaded online and that in some county courts there are probably only up to 20% of court decisions uploaded as required).

> execution by different execution creditors. For example, Herui Modern Power Facilities Limited appears once on the 2014 execution debtor list of this court and was forced to pay the judgment debt of RMB 3,407,435.53 (US$ 507,549.71),[80] but only a payment of RMB 23,121.36 (US$ 3,443.96) was made; however, the China Judgment Online shows that, during the same year 2014, Herui was asked by another court to pay another execution debt of RMB 3,414,575.00 (US$ 508,264.95), but paid nothing. Technically, the executions against Herui should have considered fair distribution, so it is retained on the final list to be examined in further detail. All these 119 debtors fall into this category.

In fact, during the second stage, some of the 35 execution debtors identified in the first stage were also found to be subject to execution by other courts. For instance, Shanda Garment Limited appears four times as the execution debtor in the four executions in this court in the Yangtze Delta Region, but the China Judgment Online reveals that actually, in 2014, the company was called three times by other courts to pay execution debts.

Up until now, 154 execution debtors exist on the survey list, and the remaining 28 debtors should be removed. These 28 debtors were only subject to judgment execution once, and since there were no contesting execution creditors, it is unnecessary to use fair distribution in such circumstances.

With these 28 debtors gone, after the five steps have been undertaken, there are now 154 eligible debtors left, 153 of them companies and the final one a private school.

B. KEY FINDINGS ABOUT THE USE OF FAIR DISTRIBUTION

On the final list of 154 execution debtors, 18 debtors, all of them companies, ultimately entered into the formal bankruptcy procedure. Three of them proceeded in this court and 15 in others.

After the removal of these 18 companies, there are now 136 entities remaining, 135 of which are companies and one of which is a private school. It is worth highlighting that these 136 debtors were

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[80] The amount of debt in US dollars is an estimate by using the exchange rates published by XE Currency Converter at www.xe.com, a popular website for foreign exchanges. All subsequent estimates use this method to help the reader to better appreciate what happens in these cases.

bankrupt, were chased by more than one execution creditor for the payment of judgment debts, and were supposed to be subject to the alternative fair distribution scheme since a formal bankruptcy procedure was not opened.

The collected data show that fair distribution, as shown in Table 1, was only applied in the execution of 15 debtors.

No.	Company	Venue	Assets	EBL 2006 Procedure Triggered?	Fair Distribution Materialised?	Creditor from this Court Included?
1	Guogang Industry	This Court	Real Property	Yes	Missing	Yes
2	Guogang Hotel	This Court	Real Property	Yes	Yes	Yes
3	Wang Yi Tourism	A Third Court (outside province)	Real Property	Yes	Yes	No
4	Taitai Water	A Third Court (outside province)	Real Property	Yes	Yes	No (finally rejected)
5	Jianzhen Construction	A Third Court	Real Property	Yes	Yes	No
6	Shanda Fashion	A Third Court	Real Property	Yes	Yes	No
7	Keheng Machinery & Electronics	This Court	Real Property	Yes	Yes	Yes
8	Tai Yuan Xing Microelectronics	This Court	Real Property	Yes	No (Nothing Left after Meeting the Secured Claim)	No
9	Jialan Energy	A Third Court	Real Property	Yes	Yes	Yes
10	Wester Technology	A Third Court	Real Property	Yes	Yes	Yes
11	Chuanzhong Construction	A Third Court	Real Property	Yes	No (Nothing Left after Meeting the Secured Claim)	No
12	Longchen Textile	A Third Court	Real Property	Yes	Yes	Yes
13	Hangda Science	A Third Court	Cash	Yes	Yes (only for employees)	No
14	Xing Tian Di Industry	A Third Court	Real Property	Yes	Yes	Missing

No.	Company	Venue	Assets	EBL 2006 Procedure Triggered?	Fair Distribution Materialised?	Creditor from this Court Included?
15	Yadi Science	A Third Court	Real Property & Vehicles	Yes	Yes	No

Table 1 The Fifteen Fair Distribution Events
Source: The Author's Data Collection

Given that fair distribution was supposed to be used in the execution of all these 136 debtors, fifteen fair distribution events mean that only 11 per cent replace bankruptcy in providing, albeit limited, fairness for execution creditors. Apparently, it is implausible to reach the conclusion that fair distribution adequately fills the gap left by the virtual absence of bankruptcy law in China.

This finding may also suggest that the notion that bankruptcy law has been usurped by fair distribution lacks evidence to support it and is largely untrue.[81] Resorting to fair distribution is meant to alleviate the unfairness due to the weak implementation of the formal bankruptcy law.

The typical use of fair distribution would be execution against the company, for example in the case of Keheng Precision Machinery & Electronics Limited ("Keheng"). Between 2012 and 2014, Keheng was sued at least 44 times by different creditors,[82] and there were six judgment execution cases that proceeded in this court and 38 ones handled in other courts. This court seized Keheng's most valuable asset, the company's plant and its use rights of the occupied land. The court eventually managed to sell, by auction, the seized assets for RMB 69,400,000.00 (US$ 10,265,815.00) in 2014; provided that the court duly received the fair distribution requests from its fellow courts on behalf of other 38 execution creditors, fair distribution was carried out to equally protect all of them; 44 execution claims involving 42 different creditors (one creditor has three separate execution claims against Keheng) were paid at 13 cents in yuan each; for example, the execution creditor, Sanlu Bearing Fittings Factory, had an execution claim of RMB 566,216.19 (US$ 83,581.71) and was paid RMB 75,279.14 (US$ 11,112.27).

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81 Wang, *supra* note 51, at 8.

82 China Judgment Online, http://zxgk.court.gov.cn/zhongben/ (shows that Hengke was forced to pay judgment debts at least 75 times before the end of 2014.)

As for the venue of these 15 fair distribution cases, four took place in this court and 11 in other fellow courts, nine of which are from the same province and two from outside (see Table 1 above). In principle, since all these 136 debtors were bankrupt, fair distribution was assumed to be used in their judgment executions; the fact that 15 cases took place in practice raises the question: why is it rarely used?

C. WHY IS FAIR DISTRIBUTION SELDOM APPLIED?

Among many reasons, the first and most fundamental reason that fair distribution is seldom applied would be the difficulty, or the lack, of communication between different execution procedures.

Generally speaking, each execution is an independent and separate case, as it should be. Once the execution application has been registered and the court execution fees are duly paid, the court will allocate it to an individual execution officer to handle. The routine practice is that apart from relying on the execution creditor providing the information of the debtor's assets, the execution officer will, often on request, visit the local real property registration authority to search whether the debtor has real properties like building, offices and houses to seize, go to the local vehicle registration authority to check whether the debtor has cars or trucks to levy upon, and occasionally ask for information from the local business registration authority as to whether the company owes shares in other companies. Of course, the quickest and most effective solution is that if there is sufficient cash in the debtor's bank account, the execution officer can immediately seize and forcefully transfer it to the court's special execution account, which will be later paid to the execution creditor, but this depends on both whether the execution creditor can provide an accurate bank account as well as the financial state of the execution debtor.

In practice, the execution creditor must also check its own accounting records; if by luck the execution debtor had previously used the formal banking system to make a payment, examining the historic transfers usually can provide information in the debtor's bank account, such as the account number and the name of the bank. This sounds easy, but the problem is that some companies may have numerous bank accounts, most of which the execution creditor does not know. Sometimes, the execution creditor does not have any information about the debtor's bank accounts at all. For a healthy execution debtor company, in most cases, the court's simple action of levying on the debtor's bank account would fully meet the execution claim, and this is

probably why, as reported earlier, almost half of the judgment executions against enterprises in this court were entirely successful.[83]

But the challenge is that for bankrupt execution debtors, as examined in this study, this easier way of execution is often unrealistic. To make matters worse, when dealing with a bankrupt execution debtor, if the only assets of the debtor were seized by one execution court, how can a second execution court be informed so as to make fair distribution possible? The lack of coordination/communication between different executions is likely a major hurdle hampering the use of fair distribution.

Also, it should not be forgotten that, of the 136 execution debtors that were bankrupt and should have been subject to fair distribution to fairly protect execution creditors, the claims were not fully met. In the most ideal world, for the execution court that took the first action and found that the debtor did not have sufficient assets to pay the judgement and was bankrupt, if a formal bankruptcy procedure could have been immediately opened, first, the coordination between the first court and other courts is redundant, since all enforcements will be channelled into the bankruptcy procedure. Second, the following repeated execution efforts could be avoided, which would make the Chinese judicial system as a whole considerably more efficient.[84] But it is unknown why the Chinese judicial system did not choose to do this.[85] One explanation may be that accepting a bankruptcy case for a court behind the back of the local government is, rather bizarrely, treated as political stigma, and that the local government sees a rising number of corporate bankruptcy

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83 *See* Hu Zhiguang (胡志光), Jiben Jiejue Zhixing Nan de Difang Shijian (基本解决执行难的地方实践) [*Local Practice of Solving Judgment Execution Conundrums*], 5 Zhongguo Yingyun Faxue (中国应用法学) [CHINA REV. ADMIN. JUST.] 133, 139 (2018) (In the Shenzhen Intermediate People's Court, it is reported that for around 10 per cent of judgment executions, the execution officer seizes enough cash from the debtor's bank account, and that another 10 per cent sees the voluntary full payment by the execution debtor.)

84 Liu & Huang, *supra* note 62, at 8 (arguing that it is a huge waste for there to be repeated executions against the same company when the company does not have assets to be levied); *see also* Lin Zupeng & Li Hao, Jianyi zai Sifa Zhixing Zhong Jianli Qiangzhixing Pochan Zhidu (建议在司法执行中建立强制性破产制度) [*Compulsory Conversion from Judgment Execution to Bankruptcy*], 5 Zhengzhi yu Falü (政治与法律) [J. POL. SCI. & L.] 7, 8 (1998) (lamenting the similar waste caused by the lack of bankruptcy procedures).

85 *See* Elizabeth M. Lynch, *China's Rule of Law Mirage: The Regression of the Legal Profession since the Adoption of the 2007 Lawyers Law*, 42 GEO. WASH. INT'L L. REV. 535, 535 (2010) (revealing the hypocrisy of the Chinese law-making process and its implementation, which are to enhance state interests under the guise of protecting citizens).

cases as a political failure, meaning that the court system does whatever it can to shun corporate bankruptcy filings. This may appear irrational, but it works well for self-serving local politicians who can control local courts.[86]

Expecting an execution officer to advertise what she or he has seized from the execution debtor, even in the context of bankruptcy, would be awkward, and this ironically suggests that it is naïve for some to argue that execution officers have a moral obligation to disclose.[87]

A classic example of the lack of communication between courts is the executions against the company Li Hui Jia Engineering Technology Limited (Li Hui Jia). The company was the execution debtor in this court in 2014, but it was subject to at least 11 judgment executions in total; regarding the execution in this court, the execution creditor China Construction Bank Limited got nothing, but one of the company's execution creditors, Da Long Construction Materials Firm, successfully obtained a RMB 443,190 (US$ 65,936.17) payment by informing its execution court, the Qingshan County People's Court, Baotou, Inner Mongolia, that the debtor had an uncollected receivable worth more than the execution claim from Xiaohang Steel Structure Limited, a financially healthy company. The Qingshan Court seized the receivable from Xiaohang and paid Da Long in full. A happy ending for Da Long, but not for other execution creditors, including the execution creditor, China Construction Bank Limited, in this court, who got nothing; in theory, such a receivable should be subject to fair distribution in the interests of all execution creditors, but due to the absence of communication, most execution creditors missed the chance for their share, since they even did not know what happened in the Qingshan Court. There is no coordinated action between courts, and there should not be any.

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86 *See* Cao Siyuan (曹思源), Shinian Lai Zhongguo Pochan Fa de Lifa yu Shishi (十年来中国破产法的理发图实施) [*The Enactment and Implementation of the Bankruptcy Law in China in the Recent Decade*], 2 Dangdai Zhongguo Yianjiu (当代中国研究) [MOD. CHINA STUD.] (1997), http://www.modernchinastudies.org/cn/issues/past-issues/57-mcs-1997-issue-2/400-2011-12-29-17-45-11.html.

87 Liu Pengju & Li Fenghua, Lun Woguo Zhixing Chenxu Zhong de Canyu Fenpei Zhidu (论我国执行程序中的参与分配制度) [*Fair Distribution in Judgment Executions in China*], 191 Shandong Shenpan (山东审判) [SHANDONG JUST.] 54, 56 (2009). *See also* Shuangling Tang, Shilun Minshi Zhixing Canyu Fenpei Zhidu (试论民事执行参与分配制度) [*The Fair Distribution Regime in Judgment Execution*], 25 Xinjiang Guangbo Dianshi Daxue Xuebao (新疆广播电视大学学报) [J. XINJIANG RTVU] 57, 59 (2004).

Execution officers carry out their jobs independently from each other and from court to court. The isolation of one execution from another against the same debtor makes fair distribution a rare event. Moreover, execution officers also have no incentive to see fair distribution take place, since whether the execution claim can be realised or not will not affect their personal performance assessment, suggesting there is no relation between promotions and bonuses of individual execution officers and execution outcomes.[88] As a result, execution officers may never proactively seek communication with other courts to increase the likelihood of fair distribution.

However, the benefit of the lack of personal incentives regarding the execution recovery rate is also obvious. When a fair distribution request is received from a fellow court, three interviewed execution officers admitted that they tend to entertain such a request, especially the request from a nearby court with which they have friendly relationships.[89] But one thing is certain: commencing a fair distribution procedure is not what execution officers proactively seek, and this must be, procedurally and substantially, activated by joining execution creditors themselves.

The second reason hampering the use of fair distribution would be that many execution procedures are commenced too late. When the execution officer tries to search for the debtor's assets in such cases, the

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[88] It is confusing since many journal articles suggest that execution officers in China are still assessed based on execution recovery rates, but when interviewing execution officers in this court and in the city in May 2017, the author was told that execution recovery rates did not affect their internal performance assessment. Further investigation is needed. *See* Guanyu Kaizhan Anjian Zhiliang Pinggu Gongzuo de Zhidao Yijian (Shixing) (关于开展案件质量评估工作的指导意见(试行)) [*Guidance on Court and Judge Performance Assessment (For Trial Implementation)*], (promulgated by the Sup. People's Ct., Jan. 11, 2008), art. 10 (requiring that judgment execution recovery rates should be one of the court performance assessment criteria in China); *see also* Zhang Yonghong (张永红), Zhixing Biaodi Daoweilü de Zhong Ying Bijiao yu Sikao (执行标的到位率的中英比较与思考) [*Judgment Execution Recovery Rates: A Comparison between China and England*], 28 Renmin Sifa (人民司法) [PEOPLE'S JUDICATURE] 105, 105 (2016) (noting that judgment execution recovery rates are still a significant factor for court performance assessment in China); *see also* Liu Jianzhou & Zhang Wei, Huifu Zhixing Anjian Canyu Fenpei de Chuli (恢复执行案件参与分配的处理) [*Fair Distribution in Resumed Judgment Executions*], 18 Renmin Sifa (人民司法) [PEOPLE'S JUDICATURE] 52, 53 (2011) (noting that judgment execution recovery rates are a soft assessment criterion for execution officers and courts).

[89] Interview 2017-3 (May 7, 2017); Interview 2017-4 (May 8, 2017); Interview 2017-5 (May 5, 2017).

officer will often discover that other courts have already taken earlier actions and that no assets are left. In fact, as to whether it is too late, it is a relative judgment and appears in two ways.

The first is that, from the point of view of the execution creditor in this court, the execution action was behind others. One example is the execution against Xingming Ratchets Manufacturing Limited. In 2014, at the request of the execution creditor, Ping An Bank Limited, this court took action and searched for Xingming's assets, and not surprisingly, nothing was found; however, months before in 2013, another court successfully seized several cars owned by Xingming so as to make that execution claim at least partially paid. From the perspective of the execution creditor, Ping An, in this court, apparently the disappointment was mainly caused by the action being commenced too late. With the benefit of hindsight, if Ping An had sued the debtor several months earlier and had taken the execution action accordingly, at least it could have received something rather than nothing. But it is worth noting that Ping An was not the only victim, since around 2014 there were at least 27 completely failed execution efforts against Xingming.

The second is that the execution creditor in this court is relatively better off than other creditors on the grounds that at least part of its execution claim has been met. Alternatively, actions of other execution creditors taken months, if not years, later obtained nothing. In this situation, the victims are those taking action after the execution creditor in this court has received a judgment.

An example is useful to explain this phenomenon. The debtor company He San Environment Technology Engineering Limited was chased by this court in 2014 to pay the execution claim of RMB 309,919.49 (US$ 46,209.67) in the interest of the execution creditor Guwei Erosion Engineering Limited, and finally only RMB 99,541.00 (US$ 14,841.80) of the claim was met, suggesting a 32.12 per cent repayment rate. However, in 2015, another creditor Liangchen Facility Engineering Limited won a lawsuit against He San for a judgment debt of RMB 1,700,000.00 (US$ 253,307.89) but recovered only in the subsequent execution procedure. From the perspective of Liangchen, ironically Guwei was an early-bird creditor.

To some extent, the second reason might be one of the symptoms of the first reason concerning the lack of communication between different execution courts. Again, it is worth reemphasizing that judgment execution is not designed to coordinate with other peer executions and that expecting execution to adequately fulfil the role of bankruptcy is largely unrealistic.

The third reason for the scarcity of fair distribution is the bureaucracy of conducting fair distribution by courts of law. Under Article 91 of the 1998 judicial notice, for the joining execution creditor, the fair distribution request must be sent by its own execution court to the execution court disposing of the seized assets; the joining creditor is not allowed to apply directly to the distributing court. This Article is vigorously complied with in practice. One interviewed execution officer stated that a fellow execution court must make the fair distribution request, and that the application from an execution creditor is illegitimate and will be simply ignored, indicating that it is business between courts rather than between court and execution party.[90] This hurdle, it seems, cannot be logically justified; the joining creditor has a direct interest in the prospective fair distribution operation. Why is a straightforward application not permitted?

Another senior execution officer added that, apart from a written fair distribution request, the requesting court should also send the final judgment proving that the joining creditor has won the case.[91] This is also corroborated by an interviewed lawyer who lamented that the fair distribution application is treated as non-existent by the distributing execution officer if the final judgement is not provided,[92] which means that the creditor will be excluded if its litigation against the debtor is still ongoing. This suggests that Article 90 of the 1998 judicial notice, which requires that the joining creditor has to provide a final judgment and has initiated an execution procedure, is strictly followed in practice. This may appear overly tough for those creditors who have not taken timely action. The upside of such a system is it provides arguably greater efficiency and certainty, but sacrifices fairness to do so.

A successful fair distribution effort must jump through two hoops. The first is that the joining creditor must persuade its own execution officer to send the request. The second requirement is that the joining creditor can only pray for its acceptance by the distributing court. Going through these two hoops is fraught with uncertainty.

One interviewed lawyer said that he is always worried about whether his own execution officer will end up sending the fair distribution request, and whether the requested court will accept it, since execution officers have considerable latitude and there are no specific rules to hold execution officers to account.[93] Many interviewed lawyers

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[90] Interview 2017-2 (May 10, 2017).
[91] Interview 2017-5 (May 5, 2017).
[92] Interview 2017-13 (May 5, 2017).
[93] Interview 2017-12 (May 7, 2017).

expressed similar worries.[94] However, such anxiety seems to be unfounded, since the fact is that most interviewed lawyers have successfully initiated the fair distribution procedure and made it a reality. There was only one interviewed lawyer offering his one failed attempt in which his client's fair distribution application was rejected by its own execution officer on the basis that the judgment creditor was not the original creditor of the debtor and purchased the debt; although such fact was irrelevant to the legality of the judgment and of the fair distribution application, it was still arbitrarily refused. This lawyer complained that since the execution officer's decision was given verbally, there was no formal order in writing, which meant that there was no appeal or review and that there was no legal remedy.[95]

But it must be remembered that such a failed attempt is rare, and in most cases execution officers tend to entertain such an application. It is equally true that whether fair distribution can be carried out is almost entirely at the hands of execution officers and that the voices of execution creditors are considerably weaker. One lawyer asserted that despite the lack of legal remedies under the existing rules, she never hesitates to urge her client to lodge a general complaint against the execution officer personally if a fair distribution application is unreasonably rejected, indicating that taking revenge is the only option.[96]

However, it would be unfair to accuse execution officers of being rogue players. Instead, it seems that they are somewhat lenient in assessing fair distribution applications. One key question asked is whether the joining execution creditor must convince the distributing court that the execution debtor, as required by Article 96 of the 1998 judicial notice, had been officially closed, deregistered or stopped operation and that the execution debtor's assets were not enough to meet its liabilities. To this question, all interviewed execution officers unequivocally replied that they had never asked creditors to provide such evidence, because it was impractical for them to produce and because it was a plain fact that the execution debtor did not have sufficient assets to meet the judgment debts, let alone all of its debts.[97] One execution officer said that in practice the execution court tends to broadly interpret Article 96 of the 1998 judicial notice and to

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[94] Interview 2017-13 (May 5, 2017); Interview 2017-9 (May 7, 2017); Interview 2017-8 (May 9, 2017); Interview 2017-6 (May 10, 2017).

[95] Interview 2017-14 (May 5, 2017).

[96] Interview 2017-9 (May 7, 2017).

[97] Interview 2017-5 (May 5, 2017); Interview 2017-2 (May 10, 2017); Interview 2017-1 (May 11, 2017); Interview 2017-3 (May 7, 2017); Interview 2017-4 (May 8, 2017).

automatically accept fair distribution requests from fellow courts.[98] In fact, Article 96 of the 1998 judicial notice, which requires the joining creditor to prove the execution debtor has been officially closed, deregistered or stopped business operation, in addition to the fact that the debtor's assets cannot meet its entire liabilities, is pragmatically ignored by execution officers, though it is politically incorrect for the interviewed to frankly say so. This also suggests that many academic debates on this issue in China seems to be out of touch with reality.[99]

Overall, the lack of communication between executions is the main factor hindering the use of fair distribution. The bureaucracy of the fair distribution procedure compounds its scarcity. Although fair distribution is expected to offer some degree of fairness, compared to all-inclusive bankruptcy procedures, its weaknesses are fully exposed.

D. MAJOR FLAWS OF THE USE OF FAIR DISTRIBUTION

First, there is a very limited range of the debtor's assets that can be subject to fair distribution. To a large extent, the only asset that can be used for fair distribution appears to be real property. In 14 out of these 15 fair distribution events, it is the debtor's building and the affiliated land use rights that were realised by the court and shared by participating creditors. In only one of these 14 fair distribution cases, which was against the debtor, Yadi Science and Technology Limited, apart from selling the debtor's plant and land, one vehicle of the company was also seized and auctioned. Except buildings and land, generally speaking, it seems that no other assets can be covered by fair distribution, which considerably undermines its effectiveness. Of these 15 fair distribution events, there is only one case in which it is not real property, but cash, used to meet the fair distribution demands.

The key reason for this would be that, on one hand, buildings and land are the most visible, in both physical and legal terms, and on the other hand, compared to the company's other assets, it is far more difficult for the debtor, on the eve of the company's bankruptcy, to secretly transfer these assets out of the sights of creditors. For the most liquid asset, bank deposits, presumably, long before the execution actions, the debtor has already hid the deposits in secret locations so as

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98 Interview 2017-4 (May 8, 2017).

99 *See* Xingquan Cao & Yanqing Shang, Minshi Zhixing Zhong Canyu Fenpei Chenxu de Shiyun Tiaojian (民事执行中参与分配程序的适用条件) [*An Examination of the Conditions for Fair Distribution in Judgment Executions*], 5 Zhenfa Luncong (政法论丛) [J. POL. SCI. & L.] 73, 75 (2017).

to evade responsibilities. A senior lawyer interviewee corroborated this idea, observing that in most cases the company's controlling shareholders tend to move as many moveable assets away as possible. As a result, when creditors take legal action, the only assets left are more likely to be real property because transferring the ownership of such assets always involves government registration and official confirmation and is not easily abused by unscrupulous businessmen.[100] Such business malpractice is frequently reported in China, but Chinese state institutions, including law courts, it seems, are unable, or unwilling to, effectively tackle them.[101]

Practice suggests that some bankrupt execution debtors may have another valuable source of assets, which cannot be easily reached by both execution officers and creditors. These assets are the debtor's uncollected receivables of its debtors. If these assets can be collected, the effectiveness of fair distribution would be considerably enhanced. For execution officers, since they are not bankruptcy trustees, they do not – and are not required to – fully investigate the debtor's assets by examining the company books, meaning they have little information about these assets. One senior lawyer discussed the bankruptcy case of a local paper-manufacturing company in which he was involved and the bankruptcy trustee finally recovered the receivables worth around RMB 30,000,000.00 (US$ 4,460,502.00), increasing the unsecured debt recovery rate to 18%. He stated that if there had not been a bankruptcy procedure, it would have been impossible for the creditors to benefit from such assets.[102]

For execution creditors, as noted above, it is largely unrealistic for them to access information regarding the debtor's receivables. Therefore, it is highly unlikely for creditors to inform execution officers to seize them in order to widen the base of fair distribution. However, in exceptional circumstances, some creditors having inside information on the debtor's receivables, as was reported earlier in the Li Hui Jia case, do take advantage of the secretly acquired information and, ironically, avoid fair distribution.

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100 Interview 2017-13 (May 5, 2017).

101 *See* Fran Wang, *P2P Bosses Warned: Don't Take the Money and Run*, CAIXIN (July 18, 2018), https://www.caixinglobal.com/2018-07-18/p2p-bosses-warned-dont-take-the-money-and-run-101306130.html; *see also* Wang Xinxin, Pochan Fa Ke Chenwei Zui Qiang Youli de Qiye Zhenjiu Fa (破产法可成为最强有力的企业拯救法) [*Bankruptcy Law Would be the Most Powerful Company Rehabilitation Law*], Guangming Ribao (光明日报) [GUANGMING DAILY], June 15, 2017, at 15 (arguing that effectively implementing bankruptcy law could curb such business malpractice).

102 Interview 2017-13 (May 5, 2017).

Second, mainly due to the lack of information disclosure and of effective communication between execution courts, the number of execution creditors able to join fair distribution is also very limited. It was argued earlier that it might be unfair since fair distribution is only available for creditors that have won the case and have initiated judgment executions, but in reality, only some of these diligent creditors can join, suggesting that the reality is far more unfair than envisaged. From the standpoint of execution creditors in this court, as shown in Table 1, at least in five fair distribution events against the execution debtors Wang Yi, Jianzhen, Shanda, Chuanzhong and Yadi carried out in other courts, the execution creditors from this court did not or were unable to join.

Worse, these execution creditors from this court were not the only victims; instead, there are far more victims, and it would not be an exaggeration to say that being an outsider to the fair distribution process seems to be the norm rather than the exception in many cases. For example, the fair distribution scheme against Wang Yi Tourism Development Limited was conducted in 2015 by the Nanping Intermediate People' Court, Fujian Province, and the execution creditor Ronghua Financial Leasing Limited from this court was not able to participate in it. But in fact, as reported by the China Judgment Online, there are at least 11 more execution creditors commencing executions in 2016 and 2017 who missed the chance and got nothing.[103]

In other words, as for fair distribution beneficiaries, only some execution creditors are actually able to join, and some, if not most, execution creditors remain excluded for various reasons. Of course, fair distribution is both out of reach and out of sight for the creditors who did not take legal action and who did take action but have not obtained a final judgment prior to the commencement of fair distribution. Namely, the effect of fair distribution is far more limited than anticipated.

The reaction of commercial lawyers to the fact that only a limited number of execution creditors can join fair distribution is mixed. One lawyer said that "I believe fair distribution only open to execution creditors is fair, since if you (the creditors that did not take legal action) do not actively take action to claim your own debts in a timely manner, how can you expect others to look after your interests?"[104] The second lawyer appeared to be more rational and commented that "absolute fairness is difficult to reach and fair distribution only for the benefits of

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[103] *Wang Yi Tourism Development Limited* (旺亿旅游发展有限公司), THE CHINA JUDGMENT (EXECUTION) ONLINE, http://zxgk.court.gov.cn/shixin/.

[104] Interview 2017-11 (May 7, 2017).

a limited number of execution creditors is fair," adding that if the creditor who has sued the debtor but has not obtained a final judgment is allowed to join, it will give rise to some uncertainties, since on the one hand, it is unknown whether the litigating creditor can finally win the case in the near future, and on the other, the whole execution procedure will be delayed.[105]

The third lawyer responded that if the execution debtor is still solvent, having fair distribution only be available for even a limited number of execution creditors would be fair, but if insolvent, it is absolutely unfair. However, he addressed that in practice "I have never seen the solvency of an execution debtor when fair distribution was used."[106] The fourth lawyer stated that "fair distribution in favour of a limited number of execution creditors is relatively fair, and to achieve ultimate fairness opening a formal bankruptcy procedure is the only solution."[107]

The fifth lawyer made the most insightful comment, asserting that if a formal bankruptcy procedure were opened, three key issues could be immediately solved. First, all creditors, including execution creditors and their peers that have not taken legal action, would be equally protected, which would categorically eliminate the unfairness arising from the use of fair distribution. Second, for execution courts, any repeated executions against the company could be avoided, which would prevent judicial resources from being wasted. Third, employees would be better protected, because employee entitlements are given priority in a formal bankruptcy procedure.[108]

Overall, all interviewed lawyers agree that the limited fairness gleaned from fair distribution is better than the entire deprivation of fairness due to the absence of both fair distribution and bankruptcy, and that the real scourge of the current situation is the ineffective implementation of the formal bankruptcy law in China.[109]

In addition, many fair distribution events raise concerns about transparency, mainly as a result of the skeletal nature of the rules in the 1998 judicial notice regulating fair distribution.[110] The most complained of issue is the way the final fair distribution plan is made. Many interviewed lawyers said that the plan was made by the execution officer

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105 Interview 2017-9 (May 7, 2017).
106 Interview 2017-12 (May 7, 2017).
107 Interview 2017-14 (May 5, 2017).
108 Interview 2017-11 (May 7, 2017).
109 Interview 2017-14 (May 5, 2017); Interview 2017-8 (May 9, 2017); Interview 2017-12 (May 7, 2017).
110 *See generally* Wu, *supra* note 67, at 115.

behind closed doors, and that, for joining execution creditors, they had no option but to accept what was offered.[111]

This would be mainly because Article 94 of the 1998 judicial notice only states that when fair distribution applies, after fully meeting the claims of securities, if any, all unsecured execution creditors will share what is left under the pari passu principle, without clarifying whether the distribution plan should get the consent of participating creditors or whether execution creditors, if unsatisfied, could lodge an appeal or review motion.

However, the lawyers' complaint about the lack of transparency should be treated with caution, because in the course of fieldwork, the author was given by two execution officers hard copies of two fair distribution plans which clearly show that all participating execution creditors that signed on the file not only complied with pari passu but also agreed in advance on the distributing plan. Moreover, at least the four fair distribution events against the execution debtors Wang Yi, Keheng, Wester, and Hangda (included in Table 1) demonstrate that pari passu was well respected. Therefore, to a large extent, the substantial rights of participating creditors are protected, although execution officers should do much more to better inform joining creditors.

Obviously, some execution officers behave very well when it comes to transparency and respecting creditors. One senior execution officer said that he usually exercises his discretion by convening a meeting of all participating creditors in which they would be well informed of the distribution plan, although the law does not explicitly require him to do so.[112] One lawyer echoed this perspective, saying that some responsible execution officers hold a meeting of execution creditors before the distributing plan is finalised.[113] However at least two interviewees insisted that the execution officer made the distribution plan without consulting execution creditors in advance.[114] Arguably, the ambiguity of the rules and execution officers' personal preference more or less upset many lawyers.

In particular, lawyers are perhaps unhappy with the lack of transparency for two reasons. First, several execution officers clarified that if a fair distribution request was straightforwardly made by the creditor that had not finished the lawsuit and had not obtained a final

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111 Interview 2017-6 (May 10, 2017); Interview 2017-7 (May 9, 2017); Interview 2017-11 (May 7, 2017).
112 Interview 2017-4 (May 8, 2017).
113 Interview 2017-6 (May 10, 2017).
114 *Id.*; Interview 2017-14 (May 5, 2017).

judgment, the request would be definitely dismissed but without giving any written response.[115] This may irritate lawyers since it makes it more difficult for clients to claim their rights, resulting in resentment. Second, what may further irk lawyers is the question of how to decide the deadline for a legitimate fair distribution request to arrive at the distributing execution court, because Article 90 of the 1998 judicial notice vaguely states that the fair distribution request should be received before the end of the execution action on the seized assets. This does not specify whether the end of the execution is when the assets were seized or sold or when the proceeds were handed to other execution creditors.

Two execution officers stated that in their province the deadline is, according to a memorandum of its provincial supreme court, set up at the point when the fair distribution plan was made, which means that the execution creditors whose fair distribution requests arrived after that would not be allowed to join and to share the proceeds.[116] But one senior lawyer disputed that in practice this deadline is very easy to be manipulated, because if the distributing execution officer is well bribed, he could silently postpone the making of the final distribution plan and give plenty of time for the bribing execution creditor to comfortably join fair distribution; this lawyer was vocal and said that there are too many chances for execution officers to take bribery.[117]

After all, fair distribution is problematic in nature, so its flawed implementation should surprise no one. At its maximum, it only fills the gap left by the almost absence of bankruptcy law in China 11 per cent

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115 Interview 2017-4 (May 8, 2017); Interview 2017-2 (May 10, 2017); Interview 2017-1 (May 11, 2017). A provincial supreme court also reiterates this in its judicial note guiding the courts under its jurisdiction. *See* [Guidance on Multiple Execution Creditors against the Common Execution Debtor (2012-5), art. 6] (promulgated by the ABC (anonymized name) Provincial Sup. People's Ct.).

116 Interview 2017-4 (May 8, 2017); Interview 2017-3 (May 7, 2017).

117 Interview 2017-13 (May 5, 2017). For an insightful discussion on China's judicial corruption, see Chenglin Liu, *Risks Faced by Foreign Lawyers in China*, 35 ARIZ. J. INT'L & COMP. L. 131, 153–55 (2018). *See generally* Stanley Lubman, *Bird in a Cage: Chinese Law Reform after Twenty Years*, 20 NW. J. INT'L L. & BUS. 383 (2000). In recent years, there were two deputy presidents of the China Supreme People's Court arrested and convicted on corruption, and these two corruption cases are largely the tip of an iceberg. *See, e.g.*, *Life Sentence Upheld for China Supreme Court Judge*, ASSOCIATED PRESS ONLINE, Mar. 18, 2010 (reporting the conviction of Justice Mr. Huang Songyou, the deputy president of the China Supreme People's Court, on corruption in 2010 in China); Sui-Lee Wee, *China to Prosecute Former Senior Judge for Corruption – Watchdog*, REUTERS, Sept. 29, 2015 (reporting the criminal trial of Justice Mr. Xi Xiaoming, the deputy president of the China Supreme People's Court, in 2015).

of the time, suggesting that it fails to adequately serve as a bankruptcy law substitute. But the abrupt abolition of fair distribution in judgment execution against legal person enterprises in 2015 did upset the legal communities, especially commercial lawyers. The following section discusses whether abolition is fit for the purpose of increasing execution-to-bankruptcy conversions and how execution creditors seek fairness afterwards.

IV. ABOLISHING FAIR DISTRIBUTION LEADS TO THE INCREASING USE OF BANKRUPTCY LAW, DOESN'T IT?

By closing the fair distribution regime in judgment execution against company debtors, the China Supreme People's Court aims to force the execution creditor that takes action behind its fellow creditor(s) to file for the bankruptcy of the execution debtor, expecting that more bankruptcy applications will lead to more bankruptcy cases. However, this effect does not seem to be as pronounced as expected.

Table 2 below demonstrates three columns of figures: the first is the numbers of corporate bankruptcies accepted by this court and by its 14 subordinate county/district courts during the period from 1 June 2007, a time when the EBL 2006 took effect, to 31 December 2016, a time shortly before the fieldwork of this study was conducted; over the period of almost ten years (nine years and seven months exactly), 15 courts accepted 304 corporate bankruptcy filings, and on average one court handled about two corporate bankruptcies a year, which is not much.

In Table 2, the second column of figures shows the successful execution-to-bankruptcy conversions taking place in this court and in its 14 subordinate courts during the whole of 2016 following the abolition of fair distribution in 2015. Ironically, in this court, there was only one execution-to-bankruptcy conversion, and in the five inferior courts no execution-to-bankruptcy conversion occurred in 2016 at all. The overall picture is fairly bleak. The third column is the execution-to-bankruptcy conversions happening in the first quarter of 2017, the latest data on this issue, and in nine of the 15 courts, there was, unfortunately, no execution-to-bankruptcy conversion at the beginning of 2017.

Court	**Corporate Bankruptcies Accepted (1 Jun 2007 – 31 Dec 2016)**	**Execution-to-Bankruptcy Conversions (1 Jan 2016 – 31 Dec 2016)**	**Execution-to-Bankruptcy Conversions (the First Quarter of 2017)**
This Court	75	1	0
Subordinate County Court 1	4	1	0
Subordinate County Court 2	3	2	0
Subordinate County Court 3	6	2	1
Subordinate County Court 4	16	1	1
Subordinate County Court 5	7	0	0
Subordinate County Court 6	9	0	0
Subordinate County Court 7	62	0	7
Subordinate County Court 8	3	1	0
Subordinate County Court 9	33	9	3
Subordinate County Court 10	7	1	1
Subordinate County Court 11	42	2	4
Subordinate County Court 12	32	9	0

Subordinate County Court 13	4	0	0
Subordinate County Court 14	1	0	0
In Total	304	29	17

Table 2 Execution-to-Bankruptcy Conversions in the Surveyed Court after 2015
Source: The Author's Data Collection from the Court's Execution Chamber

These figures suggest that execution-to-bankruptcy conversion is a rare phenomenon, at least in this city, since overall the total number of such conversions is negligible. Specifically, in this court, if the 2014 number of execution-to-bankruptcy candidate companies can be extrapolated to the year 2016, and if the new regime can be fully implemented, there should have been, at the very least, 136 corporate bankruptcy cases converted from previous judgment executions; however, there was only one case (0.74%), demonstrating that there is something seriously wrong with the current regime. In fact, the reality in this city is also echoed by the national picture of the numbers of corporate bankruptcy cases, as mentioned in the introduction.

To further test this notion, one question over whether execution-to-bankruptcy conversion is easier than before was asked to the interviewees. One senior lawyer observed that there was no substantial change after 2015. Although some county courts in his city tried to promote its use,[118] which is true: the county courts 9 and 12 in this city (included in Table 2) accepted nine execution-to-bankruptcy conversions each in 2016, this lawyer further lamented that his team advised their clients to apply for execution-to-bankruptcy several times, but all were arbitrarily rejected.[119]

The other three lawyers gave the same answer: they had not observed any real differences since the 2015 judicial notice took effect, [120] which means that commencing a corporate bankruptcy procedure in court is as difficult as before. Another senior lawyer said that it is supposed to be easier than before but he had not heard any real occurrence of execution-to-bankruptcy conversions, adding that sometimes some junior lawyers in his firm submitted corporate

[118] Interview 2017-14 (May 5, 2017).
[119] *Id.*
[120] Interview 2017-9 (May 7, 2017); Interview 2017-8 (May 9, 2017); Interview 2017-12 (May 7, 2017).

bankruptcy applications to courts but all were declined verbally.[121] This suggests that courts avoid accountability by not giving any written evidence proving that the application was officially made.

Compared with commercial lawyers, execution officers are repeat players and may have more insightful observations. One senior execution officer from this court said that "up until now (when the interview was conducted in May 2017), none of the judgment executions handled by myself has been converted into bankruptcy procedures."[122] This execution officer dealt with 91 judgment executions in 2014, and the whole court had 876 executions in total, as noted earlier. An execution officer from subordinate court 4 (included in Table 2) shook his head when asked whether it was easier than before, explaining that it may take longer for the new regime to be fully studied by the court system and to be adequately implemented.[123]

The director of the execution chamber of the subordinate court 3 (included in Table 5) recalled that he had been working in his court for almost 20 years since 1998 and only knew of one execution-to-bankruptcy conversion case in his court, but he remained less pessimistic, saying that since the middle of 2016 such conversions became relatively easier than before and his chamber did send two such requests to other fellow courts for consideration, both of which were successful.[124] In other words, there was progress made, but the problem is that the progress is too little to make a real difference.

The key reason for the rare use of execution-to-bankruptcy conversion would, as was pointed out by an execution officer,[125] be that the requested court tends to simply decline the request by remaining silent. This is exactly what was worried about regarding Article 514 of the 2015 judicial notice, since it failed to add a clause to hold the requested court to account. In many cases, the requested court is actually the same court as the execution court, namely the potential conversion happens between the execution chamber and the second civil chamber, with the latter in charge of corporate bankruptcies.

One execution officer explained that, from the perspective of the execution chamber, all executions against bankrupt companies should be, in principle and under the current law, handed to the second civil chamber to open a formal corporate bankruptcy procedure, but the key

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121 Interview 2017-7 (May 9, 2017).
122 Interview 2017-5 (May 5, 2017).
123 Interview 2017-1 (May 11, 2017).
124 Interview 2017-2 (May 10, 2017).
125 *Id.*

problem is that the second civil chamber refuses to accept, which is a deadlock within the court system itself.[126] To a large extent, this is an old, rather than new, problem: the hesitation of law courts in accepting corporate bankruptcy filings is the issue.

Unable to enter into a formal corporate bankruptcy procedure, under Article 516 of the 2015 judicial notice, the execution creditors must be paid on a first come, first served basis. One lawyer was still excited, when interviewed, saying that his client unexpectedly received the execution payment of RMB 13,000,000.00 (US$ 1,929,040.88) recently in an execution case, where there was a surplus after the security was fully met following an auction of the debtor's assets, since his client was the first party to place the asset freezing order on the debtor's real property, albeit via the execution officer. This lawyer could not stop his excitement and gloated that there were seven execution creditors queuing behind who were paid nothing and were very upset but could do nothing, because they were unable to commence a bankruptcy procedure.[127] This lawyer continued to boast about this serendipitous result, saying that the senior managers of his client, a bank, were shocked but happy when told of this outcome.[128]

Regarding the abolition of fair distribution and the reversal to the first come, first in right principle, the interviewed lawyers opposed it in near-unison: at least three interviewed lawyers condemned that it is absolutely unreasonable for the China Supreme People's Court to do so.[129] One managing partner of a local big law firm commented with composure that the intent of the China Supreme People's Court is to promote more execution-to-bankruptcy conversions and this is understandable, but given that such conversions could not get support from courts in practice, the real consequence is to switch back to the first-past-the-post norm. This is in effect a step backwards and backfires, reflecting the misjudgement of the decision makers at the China Supreme People's Court.[130]

One lawyer asserted that the practical ramification of this is that the new regime encourages creditors to sue the debtor and to sue fast at the first sight of the debtor's vulnerability, which may expedite company failures, and he could not understand why the China Supreme

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126 *Id.*
127 Interview 2017-16 (May 6, 2017).
128 *Id,*
129 Interview 2017-12 (May 7, 2017); Interview 2017-8 (May 9, 2019); Interview 2017-13 (May 5, 2017).
130 Interview 2017-14 (May 5, 2017).

People's Court is out of touch to such a degree that it is simply exacerbating unfairness.[131]

One execution officer recounted an execution procedure in which he applied the first come, first in right principle by distributing the execution proceeds to the execution creditor that took the first action, and received many bitter responses from the lawyers who represented the execution creditors queuing behind, because they could not open a bankruptcy procedure for the execution debtor, although the law gives them such a right. This senior execution officer, who was approaching his retirement when interviewed, said that he could only pacify the disgruntled lawyers by saying that "next time, you will become a beneficiary if you represent an execution creditor that takes action by first placing an asset freezing order." However, he confessed that given that it is impractical to materialise execution-to-bankruptcy conversion, the old practice, fair distribution, is relatively fairer.[132]

Another execution officer admitted that "using the formal bankruptcy procedure is, everyone knows, the best option, but since it is very unlikely to open a bankruptcy procedure, given the denial of the bankruptcy procedure, fair distribution under the previous judicial notice is definitely less evil." But he anticipated that "at least in the five years to come, I remain sceptical (about the effective use of execution-to-bankruptcy conversions)."[133]

However, although the 2015 judicial notice revoked fair distribution, at least in this court it is still occasionally used, probably to pragmatically solve the related social stability troubles arising from the bitterness of some execution creditors.

In 2017, the execution chamber of this court auctioned the assets, the shares at a large local company, of the execution debtor Nenhua Oil Industry Limited, [134] and realised RMB 15,800,000.00 (US$ 2,344,526.00). On March 20, 2017, there were another two execution creditors whose executions were handled in court 2 (included in Table 2) and lodged a written request to this court asking for an execution-to-bankruptcy conversion. Actually, before asking this court for a bankruptcy request, these two execution creditors had already filed for the bankruptcy of the debtor in court 2 under which jurisdiction the debtor was domiciled; as anticipated, there was no response from court 2.

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131 Interview 2017-8 (May 9, 2017).
132 Interview 2017-5 (May 5, 2017).
133 Interview 2017-2 (May 10, 2017).
134 All parties are under the assumed names for anonymity.

It is unknown what happened behind the scenes. Most likely because of a protest or a bribery, the court organised a fair distribution settlement between the three execution creditors, each of them paid 56 cents on the yuan; the execution creditor Chenchang Asset Management Limited in this court was paid RMB 9,017,041.35 (US$ 1,338,018.00), and the two execution creditors from court 2 were paid RMB 4,723,761.81 (US$ 700,948.00) and RMB 1,789,572.34 (US$ 265,550.00) respectively. It was a peaceful end for these three creditors.

But the China Judgment Online shows that there were at least another 11 failed execution procedures against Nenhua Oil Industry Limited, and unfortunately the execution creditors in those cases were unable to join the fair distribution event conducted in this court and they probably did not even know what took place in this court. Again, the lack of communication almost paralyses fair distribution.

Obviously, further research is needed to investigate the extent to which the old fair distribution regime is still used in practice. What this study reveals is that the fair distribution regime is still alive, despite the fact that it was officially terminated. One interviewed lawyer disclosed that some of his execution officer friends told him that many courts tend to ignore the abolition of fair distribution and to continue to apply it, because the new regime creates more troubles.[135]

After all, the fair distribution regime has been formally abolished, but it is still used because it can pragmatically solve unfairness problems. Unless and until the corporate bankruptcy law in China can be fully implemented, the judicial response to its abolition may continue to be mixed.

CONCLUSION

In light of the data collected and presented in this article, it seems clear that fair distribution in judgment execution is not effective in filling the gap left by the inefficient implementation of the corporate bankruptcy law in China. It can be tentatively concluded that fair distribution as a bankruptcy substitute with Chinese characteristics is largely a failure. It is no exaggeration to say that the fair distribution regime was never a real alternative to the EBL 2006 and its predecessors before and after its official abolition in 2015.

Apart from the aforementioned major discovery, there are at least another five key findings of this study worth summarising here.

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[135] Interview 2017-13 (May 5, 2017).

First, in most real fair distribution events, it is only the debtor's real property that can be seized for distribution, which considerably undermines the effectiveness of this regime.[136] Second, the data reveals that the inclusiveness of fair distribution is far worse than feared, since while some may have worried that only execution creditors rather than creditors as a whole would benefit,[137] the reality is that even many execution creditors miss the chance and are unable to join the distribution, meaning that not all execution creditors benefit from this regime.

Third, many execution officers are actually very lenient and broadly interpret the conditions of fair distribution; in particular, execution officers in practice do not need fair distribution applicants to prove that the execution debtor is closed, deregistered or has terminated business operation without going through a formal bankruptcy procedure and that the debtor is balance-sheet bankrupt. It is hardly a stretch to say that execution officers have, in effect, abandoned this official condition in practice, which suggests that the many academic debates on this topic are out of touch with reality and are a waste of time.

Fourth, although the China Supreme People's Court terminated the use of fair distribution in judgment executions against company debtors in 2015, because of the insurmountable barriers of opening a formal bankruptcy procedure, fair distribution continues, though less often, to be used to solve practical troubles in China.[138]

Fifth, it is the courts' hesitation, rather than the lack of bankruptcy applications to the courts, which results in the limited use of the bankruptcy law in China. The policymakers in China may need to discipline courts to conform to bankruptcy law in the first place. In addition, this study discovers that among legal practitioners, especially commercial lawyers, there is a strong appeal for the full implementation

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136 Yong Zhang (张勇), Canyu Fenpei yu Pochan zai Qiye Faren Zhaiwu Qingchang Zhong de Xuanze Shiyong (参与分配与破产在企业法人债务清偿中的选择适用) [*Choice between Fair Distribution and Bankruptcy When Company Debtors Could Not Pay Debts*], 11 Renmin Sifa (人民司法) [PEOPLE'S JUDICATURE] 49, 52 (2015) (noting the value of bankruptcy procedures in collecting more assets for the benefits of creditors).

137 *See* Han Changyin (韩长印) & Zhu Chunhe (朱春和), Canyu Fenpei Zhidu he Pochan Lifa (参与分配制度和破产立法) [*Fair Distribution in Judgment Executions and Bankruptcy Regimes*], 1 Dangdai Faxue (当代法学) [CONTEMP. L. REV.] 54, 56 (2000).

138 Zhang, *supra* note 27, at 160 (this is also observed by this judge from the China Supreme People's Court); *see generally* JOHN RAWLS, A THEORY OF JUSTICE 11 (rev. ed. 1999) (arguing justice as fairness).

of the corporate bankruptcy law in China. But unfortunately, due to institutional constraints and a lack of political will, the Chinese state in general and its judicial system in particular behave rather inadequately in delivering fairness and justice for the Chinese business community, which dampens the business community's confidence in the rule of law and may hamper sustainable economic growth in China.

The Chinese corporate bankruptcy law, arguably, may have no future unless and until the current heavily court-centred corporate bankruptcy system can be substantially reformed. This is because at the moment, on the one hand, most bankruptcy judges feel overwhelmed, and on the other hand, they micromanage every detailed issue of bankruptcy cases.[139] Moreover, China may nurture the newly-established insolvency practitioner profession by allocating more work to them so as to build an effective and competitive insolvency service market.[140]

Finally, the findings of this study suggest that, given the largely failed bankruptcy substitute in practice, China has no option but to face and tackle the structural defects of its current corporate bankruptcy system, which will test the political will and legislative wisdom of the Chinese ruling class.

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[139] For instance, under Article 62 of the EBL 2006, it is even the duty of bankruptcy judges to convene the first creditors' meeting, which is obviously unnecessary and unjustified. Enterprise Bankruptcy Law, *supra* note 57, art. 62.

[140] *See* The United Nations Commission on International Trade Law (UNCITRAL), *Legislative Guide on Insolvency Law*, Part 2 III B (United Nations, New York, 2005) (suggesting the role of insolvency representatives/practitioners). *See also* The World Bank, *Principles for Effective Insolvency and Creditor Rights Systems*, D8 (rev. draft, Dec. 21, 2005) (highlighting the role of insolvency practitioners).