Reflecting on China's Crisis Management and Market Exit Mechanism for Insurers – Based on or Independent of the General Bankruptcy System?

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Abstract

Due to the special business nature, insurers are under prudential regulation, subject to a series of statutory and regulatory requirements. From time to time, there are crises where insurers fall below the requirements they should conform to. In order to address these crises effectively and efficiently, it is important to have a well-designed crisis management and market exit mechanism for insurers (the CMME mechanism). However, the CMME mechanism has not been well formed in China. The current mechanism is comprised of the regulatory intervention system and the bankruptcy system, but there is a lack of consideration of the special features of insurers. As a consequence, it would not be feasible or efficient to apply many of the arrangements therein when crises of insurers occur. Since many incompatible arrangements are basic elements inherent in the general bankruptcy system, this paper argues that it would be more desirable to have a CMME mechanism which is independent of the general bankruptcy system. To achieve this, a radical overhaul is needed to detach the CMME mechanism from the general bankruptcy system. In this way, the whole CMME mechanism can be specifically designed to accommodate the special features of insurers, without containing any elements in the bankruptcy system which are arguably not fit for insurers.

1 Introduction

Insurers are legal entities effecting and carrying out insurance contracts (ie policies). As important intermediaries between the real economy and the financial market, insurers collect premiums from policyholders and then invest the accumulated funds into the financial market as well as real economy sectors. In each jurisdiction, the insurance business is specially regulated, and insurers are subject to prudential regulation. From time to time, there are cases where insurers run into trouble and thus fall below the statutory or regulatory requirements they should conform to, with their sound operation being threatened. Due to the special business nature, crises of insurers may not only harm the interests of policyholders, but also pose a threat to financial stability.[1] It is important that the legal mechanism dealing with troubled insurers, which will be referred to as the crisis management and market exit mechanism for insurers (the CMME mechanism) in this paper, should be designed in a way that may lead to crises of insurers being addressed effectively and efficiently.

However, the CMME mechanism has not been well formed in China. Generally speaking, the current CMME mechanism is based on the bankruptcy system for ordinary companies. Due to the lack of consideration of the special features of insurers, few modifications or complements have been made to the general bankruptcy system

[1] See, for example, Financial Stability Board (FSB), 'Developing Effective Resolution Strategies and Plans for Systemically Important Insurers' (June 2016) <www.fsb.org/wp-content/uploads/Final-guidance-on-insurance-resolution-strategies.pdf> accessed 15 July 2021; International Association of Insurance Supervisors (IAIS), 'Holistic Framework for Systemic Risk in the Insurance Sector – Public Consultation Document' (November 2018) <www.iaisweb.org/page/consultations/closed-consultations/2019/holistic-framework-for-systemic-risk-in-the-insurance-sector> accessed 15 November 2018.

for insurers. As a consequence, it would not be feasible or efficient to apply many of the arrangements in the general bankruptcy system to insurers. In fact, there has not been any case involving a bankruptcy procedure of an insurer in practice.

In recognition of the deficiencies in the current CMME mechanism, the regulatory authorities have been calling for a reform of the mechanism for many years. In 2012, an appeal to establish a special bankruptcy system for financial institutions was made by the regulatory authorities in 'The 12th Five-Year Plan for Development and Reform of the Financial Industry'. Targeted at insurers, it was also recommended in this plan that the 'Rules on Crisis Management of Insurers' should be enacted.[2] Years later, with no substantial progress made in this regard, in 'The Plan to Accelerate the Reform of the Market Exit Mechanism' published in 2019, the regulatory authorities reiterated the necessity of reforming the market exit mechanism for financial institutions.[3] Since it has long been recognised by the authorities that the current CMME mechanism is inadequate, it is necessary that a proper reform should be carried out as soon as possible.

Generally speaking, there is a lack of literature on relevant issues relating to the CMME mechanism. In the existing literature, although all works recognise the need of reforming the CMME mechanism, most of them just point out major problems in the

[2] The People's Bank of China and others, 'The 12th Five-Year Plan for Development and Reform of the Financial Industry [金融业发展和改革"十二五"规划]' (September 2012) <www.gov.cn/gzdt/2012-09/17/content_2226795.htm> accessed 2 November 2020.

[3] The National Development and Reform Commission and others, 'The Plan to Accelerate the Reform of the Market Exit Mechanism [加快完善市场主体退出制度改革方案]' (July 2019) <www.gov.cn/xinwen/2019-07/16/content_5410058.htm> accessed 2 November 2020.

current mechanism but fail to provide advice on how it should be reformed. In light of the fact that research in this area is basically nascent, there is still a need to consider what the framework of the CMME mechanism should be like. As an effort to contribute to a better framework of CMME mechanism, this paper focuses on the relationship between the CMME mechanism and the general bankruptcy system, aiming to find out whether it is desirable for the CMME mechanism to be based on the general bankruptcy system. Since this question concerns the design philosophy underlying the CMME mechanism, the answer to it will indicate the direction for the future reform.

The remainder of this paper proceeds as follows. Section 2 depicts the framework of the current CMME mechanism, which is comprised of the regulatory intervention system and the bankruptcy system for insurers. After that, Section 3 points out some major problems under this framework which are mainly brought about by the incompatible arrangements inherent in the bankruptcy system. Then Section 4 puts forward a better option: to have a CMME mechanism that is independent of the bankruptcy system. This means that a radical overhaul is needed to detach the current CMME mechanism from the bankruptcy system. Based on the discussions in the previous sections, Section 5 draws a conclusion.

2 Framework of the Current CMME mechanism

Despite being the second largest insurance market in the world,[4] generally speaking,

[4] Swiss Re Institute, 'World Insurance: The Great Pivot East Continues' (4 July 2019) 9 <www.swissre.com/dam/jcr:b8010432-3697-4a97-ad8b-6cb6c0aece33/sigma3_2019_en.pdf> accessed 1 July 2021.

the insurance market in China is still at an early stage of development. It can be said that only after the reform and opening-up policy was adopted by the Chinese government in 1978 did the private insurance business begin to develop.[5] Currently, there are merely 177 insurers (including 85 property insurers and 92 life insurers) in the market,[6] and they are supervised by the China Banking and Insurance Regulatory Commission (CBIRC).[7] When an insurer falls below statutory or regulatory requirements, it will be subject to regulatory measures taken by the CBIRC according to the Insurance Act and relevant regulations. If an insurer becomes or is likely to become insolvent, in theory, upon the CBIRC's approval or at the CBIRC's own initiative,[8] the insurer can be brought into a bankruptcy procedure according mainly to the Enterprise Bankruptcy Act. Therefore, the current CMME mechanism is based on the general bankruptcy system, and the regulatory measures and the bankruptcy procedures constitute the measures/procedures that troubled insurers may go through within the mechanism. While the regulatory measures are completely led by

[5] Zhuyong Li and Shi Qiao, 'The Development of Insurance Law in China: Review and Prospect [中国保险法律制度的发展：回顾、反思与展望]' (2019) 100 Financial Law Forum 98, 99.

[6] 'Members of Insurance Association of China' <www.iachina.cn/col/col19/index.html> accessed 20 December 2021.

[7] Before March 2018, insurers were supervised by the commission named the China Insurance Regulatory Commission. After the restructuring of government institutions, the China Insurance Regulatory Commission and the China Banking Regulatory Commission have been merged into the China Banking and Insurance Regulatory Commission (CBIRC). As a consequence, since March 2018, insurers began to be supervised by the commission named the CBIRC. Given the fact that the CBIRC is the successor to the China Insurance Regulatory Commission, which completely substitutes for the China Insurance Regulatory Commission, and the reference to the China Insurance Regulatory Commission in the existing legislation will be automatically regarded as the reference to the CBIRC, no distinctions will be made between these two commissions in this paper. The 'CBIRC' will be used to refer to the commission supervising insurers throughout the paper, even if the discussions are concerned with events taking place before the restructuring of government institutions.

[8] Insurance Act, art 90.

the CBIRC, the bankruptcy procedures are judicial procedures with the court involvement.

In order to present a holistic picture of the CMME mechanism, this section will, in turn, discuss the regulatory intervention system (consisting of the regulatory measures) and the bankruptcy system for insurers (consisting of the bankruptcy procedures).

2.1 Regulatory Intervention System

To ensure that insurers can maintain sound operation, each insurer is required to have at least the minimum solvency capacity which is commensurate with its business scale and risk level.[9] The CBIRC is authorised to establish a solvency regulation system and take relevant regulatory measures towards insurers according to their solvency conditions.[10] Since 2016, a new solvency regulation system has been adopted by the CBIRC; and its revised and updated version came into effect on 1 January 2022. Insurers are now supervised by category in this system.

According to the 'No. 11 Regulatory Rules on Insurers' Solvency: Comprehensive Rating of Risks (Supervising by Category)' (hereinafter, No. 11 Rules), insurers will be rated and classified into 4 categories, from Category A to Category D, with insurers in a latter category being in a more adverse condition.[11] Targeted at insurers in different

[9] Insurance Act, art 101.

[10] Insurance Act, art 137.

[11] As is provided in the No. 11 Rules, Category A indicates an insurer's solvency ratio satisfies the normal requirements and there is a low risk level in the operational risk, the strategic risk, the reputational risk and the liquidity risk; Category B indicates an insurer's solvency ratio satisfies the normal requirements and there is a comparatively low risk level in the operational risk, the strategic risk, the reputational risk and the liquidity risk; Category C indicates an insurer's solvency ratio does not satisfy the normal requirements, or although an insurer's

categories, the CBIRC will adopt different regulatory policies and take different regulatory measures. While no special regulatory measure needs to be taken towards an insurer in Category A, targeted at an insurer in Category B, regulatory measures the CBIRC can take include, but are not limited to: (1) alerting the insurer to crises; (2) holding a regulatory dialogue; (3) requiring the insurer to make corrections within a specified period; (4) initiating an on-site inspection; and (5) requiring the insurer to submit and implement a plan to avoid falling below the solvency requirements or to improve its capacity for crisis management.[12] Targeted at an insurer in Category C, apart from the regulatory measures which can be taken towards an insurer in Category B, regulatory measures the CBIRC can also take include, but are not limited to: (1) restricting the remuneration level of directors, supervisors and senior managers; (2) restricting the payment of dividends to shareholders; (3) requiring the insurer to increase its capital; (4) prohibiting the insurer from accepting new business in part of or the whole of its business scope; (5) requiring the insurer to adjust its business structure, restricting commercial advertisements, etc.; (6) restricting the business scope, ordering the insurer to transfer insurance business, etc.; (7) requiring the insurer to adjust its asset structure, restricting investments, etc.; (8) requiring the insurer to claw back the remuneration of the directors and senior managers who are responsible for the crisis or losses incurred; (9) requiring the insurer to replace certain

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solvency ratio satisfies the normal requirements, there is a comparatively high risk level in the operational risk, the strategic risk, the reputational risk and/or the liquidity risk; Category D indicates an insurer's solvency ratio does not satisfy the normal requirements, or although an insurer's solvency ratio satisfies the normal requirements, there is a high risk level in the operational risk, the strategic risk, the reputational risk and/or the liquidity risk. See No. 11 Rules, r 19.

[12] No. 11 Rules, r 24.

managers.[13] Targeted at an insurer in Category D, apart from the regulatory measures which can be taken towards an insurer in Category C, the CBIRC can also initiate a takeover (接管), or take any other measure the CBIRC thinks fit.[14] In addition, as provided in the Insurance Act, the CBIRC may also initiate a rectification (整顿) towards a troubled insurer if the insurer fails to make corrections following the CBIRC's instructions.[15] While many of these regulatory measures are self-explanatory, 'rectification' and 'takeover', the two regulatory measures with intense effects, need to be clarified.

Rectification is a less severe measure than takeover. Unlike in takeover, where the control of a troubled insurer will be transferred to a takeover group designated by the CBIRC, a troubled insurer in rectification will still be run by its existing management. When the CBIRC decides to put a troubled insurer into a rectification, it will form a rectification group to monitor the insurer's day-to-day operation, and the management of the insurer should perform their duties under the monitoring of the rectification group.[16] The insurer can conduct business as usual within its business scope, unless it is otherwise required by the CBIRC that the insurer should cease some existing business or stop accepting new business.[17] As the purpose of a rectification is to restore the troubled insurer to a condition in line with the regulatory requirements, once the insurer recovers and the need for the rectification is thus removed, the

[13] No. 11 Rules, r 25; Insurers' Solvency Regulation, reg 26.

[14] No. 11 Rules, r 27.

[15] Insurance Act, art 140.

[16] Insurance Act, arts 140 and 141.

[17] Insurance Act, art 142.

rectification group should file an application to the CBIRC to terminate the rectification. When the CBIRC approves such an application, the rectification will come to an end and the insurer will return to normal operation.[18]

When it comes to takeover, it is a very severe regulatory measure that should be used prudently. As the term 'takeover' implies, a troubled insurer will be taken over by a takeover group which is designated by the CBIRC.[19] To date, there have been 6 takeover cases.[20] Generally speaking, the CBIRC has broad discretion in determining relevant issues in takeover, subject to the limit that the duration of a takeover should not exceed 2 years.[21] During the takeover period, a troubled insurer's general meeting of shareholders, the board of directors, the board of supervisors and the management will be suspended, and the takeover group will administer the insurer under the supervision and instructions of the CBIRC.[22] The takeover group can adopt a variety of approaches that are necessary to address the crisis of the insurer, which include, but

[18] Insurance Act, art 143.

[19] From the previous experience, a takeover group is comprised mainly of members of relevant authorities, members of the Insurance Security Fund, members of other insurers, members of agencies (such as law firms and accounting firms), etc. Basically, a takeover group is led by the CBIRC.

[20] These 6 cases are: the takeover of the Yongan Property Insurance Company [永安财产保险股份有限公司], which took place in 1998; the takeover of the Anbang Insurance Group Company (AIGC) [安邦保险集团股份有限公司], which took place in 2018; and the takeover of the Tianan Property Insurance Company [天安财产保险股份有限公司], the Tianan Life Insurance Company [天安人寿保险股份有限公司], the Huaxia Life Insurance Company [华夏人寿保险股份有限公司] and the Yian Property Insurance Company [易安财产保险股份有限公司], which took place in 2020.

[21] Insurance Act, arts 145 and 146.

[22] See CBIRC, 'The CBIRC's Order on the Takeover of AIGC [中国保监会关于对安邦保险集团股份有限公司依法实施接管的公告]' (23 February 2018) <www.cbirc.gov.cn/cn/view/pages/ItemDetail.html?docId=358816&itemId=925&generaltype=0> accessed 20 August 2020.

are not limited to, seeking capital injections, dividing the insurer, merging with other insurers, and transferring the whole or part of the insurer's business, assets or debts to other insurers.[23] However, since takeover may have the actual effect of restructuring a troubled insurer, which is similar to the effect the reorganisation procedure (重整) in the bankruptcy system will have, the line between takeover and reorganisation becomes rather fuzzy. How takeover can be coordinated with reorganisation in dealing with crises of insurers still needs to be clarified.[24] Otherwise, the existence of takeover may eliminate the need to initiate reorganisation towards troubled insurers, rendering the reorganisation procedure useless in practice.

In addition, there is withdrawal liquidation in the regulatory intervention system, which constitutes the most severe regulatory measure an insurer may be subject to. According to Article 149 of the Insurance Act, if the insurance business licence of an insurer is revoked or the solvency condition of an insurer fails to meet regulatory requirements, in order to safeguard the order of the insurance market or to protect the public interest, the CBIRC can withdraw the insurer's authorisation and set up a

[23] See CBIRC, 'The CBIRC's Order on the Takeover of AIGC [中国保监会关于对安邦保险集团股份有限公司依法实施接管的公告]' (23 February 2018) <www.cbirc.gov.cn/cn/view/pages/ItemDetail.html?docId=358816&itemId=925&generaltype=0> accessed 20 August 2020.

[24] See, for example, Yanna Bo, *Research on the Risk Disposal and Market Exit System for Insurance Companies* [保险公司风险处置及市场退出制度研究] (Peking University Press 2013) 31; Xiang Long, 'Reforming the Takeover Measure in the Insurance Act [《保险法》中接管措施的定位与完善]' (2013) 12 China Finance 61, 62; Zheng Sai, 'The Balance Between Adminitrative Powers and Judicial Powers in Reorganisation of Insurers in China [中国保险公司破产重整中行政权与司法权的均衡]' (2016) 37 The Theory and Practice of Finance and Economics 133, 133; Jianming Sheng and Jing Jia, 'A Study on Pre-Bankruptcy Procedures of Insurers in China' [论我国保险公司破产前置程序的实践、困境及解决之道] (2015) 12 Law Journal 52, 55.

liquidation group to liquidate the insurer.[25] Under this circumstance, the liquidation initiated by the CBIRC will normally be termed 'withdrawal liquidation' (撤销清算). Different from 'bankruptcy liquidation' (破产清算) (ie the liquidation procedure provided for in the Enterprise Bankruptcy Act),[26] which is a judicial procedure hosted by a court of competent jurisdiction, withdrawal liquidation is a purely regulatory measure led by the CBIRC. There is a common perception that while bankruptcy liquidation can be applied when an insurer is insolvent, withdrawal liquidation can be applied when an insurer is severely in violation of statutory or regulatory requirements but not yet insolvent according to the insolvency standard provided for in the Enterprise Bankruptcy Act.[27] However, since there are no more statutory provisions concerning withdrawal liquidation, it is unclear how a withdrawal liquidation will be carried out or what effects a withdrawal liquidation may have. Also, since it is still arguable that grounds for initiating a certain procedure in the CMME mechanism should not be limited to 'insolvency',[28] it is questionable whether there need to be both withdrawal liquidation and bankruptcy liquidation in the mechanism dealing with crises of insurers.

What makes the framework of the CMME mechanism more complicated is that

[25] Insurance Act, art 149.

[26] For a more detailed discussion of 'bankruptcy liquidation', see Section 2.2.2 in this paper.

[27] See, for example, Xiang Long, 'The Role of Insurance Regulatory Authorities in the Compulsory Market Exit System for Insurers [保险监管机构在保险公司强制退出市场中的角色]' (2010) 12 Insurance Studies 51, 55; Ting Zhang, 'A Study on China's Risk Disposal and Market Exit System for Troubled Insurance Companies [中国危机保险公司风险化解及市场退出机制研究]' in Jingshan Chen and Ting Zhang (eds), *Legal Comments on Crisis Management System for Financial Institutions in East Asia*, vol 1 (Law Press · China 2015).

[28] For a more detailed discussion, see Section 3.1.1 in this paper.

there is still dissolution liquidation (解散清算) which can be strategically used to liquidate a troubled insurer. As a measure provided for in the Companies Act, dissolution liquidation is normally used by a solvent company to exit the market out of commercial reasons.[29] The main purpose of a dissolution liquidation is to end the company as a legal person, and creditors of the company can usually be fully repaid. Thus, under the current legal framework, unlike withdrawal liquidation which is a regulatory measure and bankruptcy liquidation which is a judicial procedure, dissolution liquidation is basically a 'private matter'. For the purposes of liquidating a company through dissolution liquidation, normally, a liquidation group will be formed by shareholders or directors of the company to carry out the liquidation.[30] Only when the liquidation is unfairly delayed, may there be the court involvement. The shareholders or creditors who are adversely affected by the delay can petition a court of competent jurisdiction for a compulsory dissolution liquidation, which will be hosted by the court.[31] In addition, if a company in dissolution liquidation is eventually found insolvent, the liquidation group should petition the court to convert the dissolution liquidation into a bankruptcy liquidation.[32] Therefore, in cases of insurers, it can be said that while bankruptcy liquidation is targeted at insolvent insurers and withdrawal liquidation is targeted at solvent but troubled insurers which have severely violated statutory or regulatory requirements, dissolution liquidation is basically targeted at comparatively healthy insurers.

[29] See Companies Act, art 180.

[30] Companies Act, art 183.

[31] Companies Act, art 183.

[32] Companies Act, art 187.

However, in the takeover case of the Anbang Insurance Group Company (AIGC),[33] even if the company was insolvent before the CBIRC carried out the takeover, the company was finally brought into a dissolution liquidation after a restructuring during the takeover period. So far, this has been the only case relating to liquidation of an insurer in China. In this case, since AIGC's equity was severely depleted due to its shareholders' cheating during the investment process, the CBIRC expelled these shareholders from the company and cancelled all their shares.[34] Then in order to maintain AIGC's capital at the level in line with its registered capital (61.9 billion RMB), the Insurance Security Fund (ISF)[35] and another two strategic investors were called in by the CBIRC to replenish the company's capital, with the ISF contributing to 98.23% of the company's capital.[36] Later, the Dajia Insurance Group Company, a brand-new insurance group company mainly funded by the ISF, was established, and most of

[33] It should be noted that the Anbang Insurance Group Company (AIGC) is actually not an insurer (ie insurance company) which directly underwrites policies to policyholders, but an insurance holding company with insurers being its subsidiaries. However, the CBIRC just took over AIGC by virtue of Article 144 of the Insurance Act, which only provides for takeover of insurers. This reveals the chaotic situation in the current regulatory practice, where no distinction has been made between takeover of insurers and takeover of insurance holding companies. Therefore, the CBIRC's attitudes towards how to deal with troubled insurers can still be learnt from the case of AIGC.

[34] CBIRC, 'Looking for Strategic Investors to Take Over the Shares of AIGC Held by the ISF [安邦保险集团引入保险保障基金注资并启动战略投资者遴选工作]' <http://bxjg.circ.gov.cn/web/site0/tab7927/info4103853.htm> accessed 17 May 2018.

[35] The Insurance Security Fund (ISF) is a non-profit fund created to protect policyholders and resolve crises in the insurance industry. In order to make use of the ISF, the CBIRC should, in consultation with relevant authorities, propose a crisis management plan to the State Council, and only after the State Council approves the CBIRC's proposal, can the ISF allocate and distribute funds according to the crisis management plan. It is fair to say that the ISF is subordinate to the CBIRC, and will function following the CBIRC's instructions. For more information about the ISF, see Insurance Security Fund Regulations.

[36] CBIRC, 'The CBIRC Approves the Amendment to AIGC's Articles of Association [中国银行保险监督管理委员会关于安邦保险集团股份有限公司修改章程的批复]' (22 June 2018) <http://bxjg.circ.gov.cn/web/site0/tab5168/info4111006.htm> accessed 22 June 2018.

AIGC's and its subsidiaries' business was gradually transferred to the Dajia Insurance Group Company or its subsidiaries through a restructuring process.[37] With regard to the residual AIGC, according to the resolution made by the general meeting of shareholders, which is comprised of the ISF and the two strategic investors, the company will be liquidated through dissolution liquidation.[38] Taken together, to put it simply, when confronted with the crisis of AIGC, the CBIRC chose to bail out most of AIGC's business by making use of the ISF; and after AIGC's business was transferred to a newly-established transferee company, AIGC was put into a dissolution liquidation. In this way, AIGC, a deeply insolvent company, was eventually liquidated through dissolution liquidation, rather than withdrawal liquidation or bankruptcy liquidation. Surely, the dealing with AIGC seems to have a satisfying result, with policyholders being unaffected and financial stability being maintained, but this is based on a bail-out by the ISF which should not be dependent upon blindly.[39]

2.2 Bankruptcy System for Insurers

In the current CMME mechanism, theoretically, crises of insurers may be addressed within the bankruptcy system when the troubled insurers become or are likely to

[37] CBIRC, 'The Establishment of the Dajia Insurance Group Company [大家保险集团有限责任公司成立]' (11 July 2019) <www.cbirc.gov.cn/cn/view/pages/ItemDetail.html?docId=4991&itemId=915&generaltype=0> accessed 11 July 2019.

[38] 'AIGC's Notice of Dissolution Liquidation [安邦保险集团股份有限公司拟解散并清算的公告]' (14 September 2020) <https://baijiahao.baidu.com/s?id=1677819997799204910&wfr=spider&for=pc> accessed 21 May 2021.

[39] The reason is that moral hazard problems will be caused if there will always be bail-outs when insurers are mired in crises. See, for example, OECD, 'Policyholder Protection Schemes: Selected Considerations' (2013) 17 <www.oecd-ilibrary.org/finance-and-investment/policyholder-protection-schemes_5k46l8sz94g0-en> accessed 1 March 2021; IAIS, 'Issues Paper on Policyholder Protection Schemes' (October 2013) 7 <https://iaisweb.org/page/supervisory-material/issues-papers/file/34282/life-insurance-securitisation-october-2003#> accessed 1 March 2021.

become insolvent.[40] Although the Enterprise Bankruptcy Act authorises the State Council[41] to enact administrative regulations on bankruptcy of financial institutions,[42] no administrative regulation on bankruptcy of insurers has ever been made so far. As a consequence, there is a lack of special arrangements for insurers in the bankruptcy system,[43] and the bankruptcy procedures for insurers are almost the same with those for ordinary companies. In practice, there has never been any case involving a bankruptcy procedure of an insurer.

There are three types of bankruptcy procedures: reorganisation (重整), bankruptcy liquidation (破产清算) and composition (和解). With the focus on how troubled insurers may be dealt with in the current bankruptcy system, these bankruptcy procedures will be briefly discussed in turn.

2.2.1 Reorganisation

In line with its nature as a rescue procedure, reorganisation allows a troubled company to remain as a going concern after a restructuring of the company is carried out under the court supervision. In the case of an ordinary company, when the company becomes or is likely to become insolvent, the company or its creditors can file a petition to a court of competent jurisdiction for a reorganisation.[44] Even if a company

[40] For a more detailed discussion of the standard of 'insolvency', see Section 3.1.1 in this paper.

[41] The State Council [国务院] is the central government in China.

[42] Enterprise Bankruptcy Act, art 134.

[43] The modifications to the bankruptcy system made for insurers are mainly shown in the mere 3 articles in the Insurance Act, with Article 90 related to the commencement of a bankruptcy procedure for insurers, Article 91 related to the claims hierarchy in a bankruptcy liquidation and Article 92 related to the transfer of life insurance business in a withdrawal liquidation or bankruptcy liquidation.

[44] Enterprise Bankruptcy Act, arts 2 and 7.

is already in a bankruptcy liquidation which was initiated by its creditors, the company or its shareholders with the equity of no less than one-tenth of the company's registered equity capital may still petition to convert the bankruptcy liquidation to a reorganisation before the company is declared bankrupt.[45] Targeted at insurers, it is especially provided that prior approval from the CBIRC should be obtained before a troubled insurer or its creditors can file a reorganisation petition; otherwise, only the CBIRC itself can file such a petition directly to the court.[46]

When the petition for a reorganisation of a company is accepted by the court, the company enters a reorganisation period, which will last until the reorganisation is terminated.[47] During this period, normally it is a bankruptcy administrator who takes control of the company and carries out the procedure.[48] But upon the sanction of the court, the company's original management may recover the control of the company from the bankruptcy administrator, and operate the business under the supervision of the bankruptcy administrator.[49] No matter whether it is the company's management or the bankruptcy administrator who is in control of the company, a draft reorganisation plan should be submitted to the court within 6 months starting from the date on which the petition for the reorganisation is accepted, with an extension of 3 months upon the leave of the court.[50] The draft reorganisation plan should cover the plan for business operation, the classification of debts, the plan for debt adjustment,

[45] Enterprise Bankruptcy Act, art 70.

[46] Insurance Act, art 90.

[47] Enterprise Bankruptcy Act, art 72.

[48] Enterprise Bankruptcy Act, art 13.

[49] Enterprise Bankruptcy Act, art 73.

[50] Enterprise Bankruptcy Act, art 79.

the plan for debt payment, the implementation period of the reorganisation plan, etc.[51] If the company or the bankruptcy administrator fails to produce such a draft reorganisation plan on time, the court will terminate the reorganisation and declare the company bankrupt.[52]

Whether a draft reorganisation plan will be approved is mainly subject to the decision of the creditors' meeting. After receiving the draft reorganisation plan, the court should convene the creditors' meeting within 30 days.[53] Creditors will be classified into 4 groups for voting purposes, which include the group for secured debts, the group for debts relating to the employees' welfare, the group for unpaid taxes and the group for ordinary debts.[54] Within each group, the draft reorganisation plan will be approved if (1) more than half of creditors participating in the voting process vote in favour of it, and (2) the value of claims of those casting favourable votes is not less than two-thirds of the value of all claims in that group.[55] The draft reorganisation plan will be approved only when all groups show their approval.[56] The approved reorganisation plan will have a binding effect on the company and its creditors if the plan is later sanctioned by the court.[57] Upon the court sanction, the reorganisation will be terminated, and it is the company's management who will be responsible for

[51] Enterprise Bankruptcy Act, art 81.

[52] Enterprise Bankruptcy Act, art 79.

[53] Enterprise Bankruptcy Act, art 84.

[54] Enterprise Bankruptcy Act, art 82.

[55] Enterprise Bankruptcy Act, art 84.

[56] Enterprise Bankruptcy Act, art 86.

[57] Enterprise Bankruptcy Act, art 92.

implementing the reorganisation plan.[58]

Apart from the CBIRC's involvement in the commencement of the procedure, reorganisation for insurers in the current CMME mechanism is completely the same as reorganisation for ordinary companies. Due to the lack of special provisions for insurers in the legislation, it is not known how the reorganisation procedure can be applied to insurers. For example, it is not known how policyholders' voting rights can be calculated for the creditors' meeting, or how a vast number of policyholders, which may be hundreds of thousands or even millions in number, can participate in the creditors' meeting. Given the priority of insurance claims in the claims hierarchy in bankruptcy liquidation,[59] it is also questionable whether policyholders, who constitute the majority of an insurer's creditors, should be classified into the group for ordinary debts for voting purposes in the creditors' meeting.

Reorganisation is appealing to creditors when they would be put in a better position than if the company directly entered a bankruptcy liquidation. Creditors as sensible persons will be in favour of a draft reorganisation plan only if the plan can offer them a better deal. However, in the case of an insurer, since most creditors are policyholders and most policyholders are entitled to be compensated by the ISF if they suffer losses in a liquidation, there is hardly any chance that a draft reorganisation plan could appeal to policyholders. According to the current regulations governing the responsibilities of the ISF, for example, when an individual policyholder suffers a loss[60]

[58] Enterprise Bankruptcy Act, arts 86 and 89.

[59] For more information, see Section 2.2.2 in this paper.

[60] The loss suffered by a policyholder is the difference between the expected benefits under the policy and the

in a bankruptcy liquidation of a property insurer, as to the loss of the first 50,000 RMB, the ISF will compensate the policyholder in full, and as to the rest of the loss (the part which is above 50,000 RMB), if any, the ISF will compensate the policyholder 90% of the loss.[61] As a consequence, there is little room for a troubled insurer to devise a reorganisation plan which would enable the insurer to survive the crisis and, at the same time, would secure the approval from all groups of creditors in the creditors' meeting, especially the group containing a vast number of policyholders. In other words, it is not very likely that reorganisation of insurers in the current mechanism will work out successfully, or at least efficiently.

2.2.2 Bankruptcy Liquidation

When a company becomes insolvent, the company itself or its creditors have the standing to file a petition to the court for a bankruptcy liquidation.[62] In the case of an insurer, prior approval from the CBIRC should be obtained before the troubled insurer or its creditors can file such a petition; otherwise, only the CBIRC can file the petition directly to the court.[63] A bankruptcy liquidation procedure commences when the court accepts such a petition, and a bankruptcy administrator will be appointed to carry out the procedure.[64] But the actual liquidation process will start if the court later declares the company bankrupt.[65]

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dividend the policyholder has been paid in the liquidation. See Insurance Security Fund Regulations, reg 19.

[61] Insurance Security Fund Regulations, reg 19.

[62] Enterprise Bankruptcy Act, art 7.

[63] Insurance Act, art 90.

[64] Enterprise Bankruptcy Act, art 13.

[65] Enterprise Bankruptcy Act, art 107.

After the declaration of bankruptcy of a company is made by the court, the bankruptcy administrator should draft an assets realisation plan as well as an assets distribution plan, which will later be considered by the creditors' meeting.[66] According to the general rule governing the resolution of the creditors' meeting, such a plan will be approved by the creditors' meeting if (1) more than half of creditors participating in the voting process vote in favour of the plan, and (2) the value of claims of those casting favourable votes is not less than half of the value of all unsecured claims.[67] Following the approval of a plan, with the sanction of the court, the bankruptcy administrator should realise or distribute the company's assets according to the plan.[68] A bankruptcy liquidation will be terminated by the court if the assets distribution plan is eventually carried out, or if there is no asset left for further distribution.[69]

In the case of an insurer, in order to protect policyholders in bankruptcy liquidation, preferential treatment has been given to insurance claims during the distribution of the insurer's assets. Generally speaking, the claims hierarchy in bankruptcy liquidation is as follows (in order of priority): (1) bankruptcy expenses, (2) liabilities for common benefits,[70] (3) debts relating to employees' welfare, (4) insurance claims, (5) unpaid taxes, and (6) ordinary debts.[71] Creditors with claims at a lower priority level will be paid only after creditors with claims at a higher priority level have been paid in full.

[66] Enterprise Bankruptcy Act, arts 111 and 115.

[67] Enterprise Bankruptcy Act, art 64.

[68] Enterprise Bankruptcy Act, arts 111 and 116.

[69] Enterprise Bankruptcy Act, art 120.

[70] Liabilities for common benefits are the debts or liabilities arising after a bankruptcy procedure commences, which include, among others, the expenses incurred during the operation of the company's business, and the liabilities to those who are injured by the company's belongings. See Enterprise Bankruptcy Act, art 42.

[71] Insurance Act, art 91.

Thus, compared with creditors with ordinary debts, insurance creditors are provided with a higher priority in distribution.

Given the long-term feature of life insurance policies,[72] it is especially provided that when a life insurer is in a withdrawal liquidation or bankruptcy liquidation, the life insurance policies issued by the troubled insurer should be transferred to other life insurers.[73] If the troubled insurer fails to secure the transfer by contracting with other life insurers, the CBIRC will designate certain life insurers as the transferees.[74] As a consequence, the requirement for the transfer of life insurance policies ensures that life insurance policies will be continued despite the liquidation of a life insurer, which provides a high level of protection to life insurance policyholders. However, in a market economy, there will be doubts about whether the CBIRC should have the power to designate and force certain life insurers to assume policies issued by the troubled insurer after the troubled insurer fails to find appropriate transferees. Nevertheless, at the current stage of China's socialist market economy, since many large insurers are state-owned or state-controlled, normally they will be willing to come to the rescue if the CBIRC instructs them to do so.

[72] Life insurance policies, annuities, etc. tend to cover a very long period and provides policyholders with an appealing way of financial management from a long-run perspective. With the expectation to get insurance benefits when insured events take place many years later, such as premature death or reaching a certain age, policyholders are willing to pay premiums at a level rate on a regular basis. In this case, when an insurer having issued long-term insurance policies fails, in the absence of special protection, not only will policyholders lose the insurance coverage and suffer a huge loss in the premiums they have paid over years, but they are unlikely to procure substitute policies with the policy terms similar to those in the original policies (due to ageing, poorer health conditions, etc.). Thus, to maintain the continuity of long-term insurance policies is necessary for the purposes of policyholder protection.

[73] Insurance Act, art 92.

[74] Insurance Act, art 92.

Since the above-mentioned special arrangements constitute all the modifications made to adapt bankruptcy liquidation for insurers, it is fair to say that the current legislation is far from adequate to guide relevant parties in practice. For example, it remains unknown when property insurance policies will be terminated, as well as how insurance claims will be calculated, after an insurer is placed into a bankruptcy liquidation. Also, just like the situation in reorganisation, due to the fact that the number of creditors (including policyholders) of an insurer is normally vast, it seems impracticable to hold a creditors' meeting for an insolvent insurer and secure the required majority votes for the approval of an assets realisation plan or an assets distribution plan.

2.2.3 Composition

Composition provides a troubled company with an opportunity to achieve a voluntary arrangement with its creditors rather than going through a reorganisation or liquidation. It is a bankruptcy procedure for which only a company as the debtor itself has the standing to petition. When a company becomes or is likely to become insolvent, it can either file a petition to a court of competent jurisdiction for a composition so as to enter the bankruptcy process, or file such a petition before the company is declared bankrupt by the court during an existing bankruptcy procedure.[75] A draft composition proposal provided by the company should be submitted when the petition is filed.[76] If the court accepts the petition, it will appoint a bankruptcy administrator to take over the company and carry out the composition procedure, and

[75] Enterprise Bankruptcy Act, art 95.

[76] Enterprise Bankruptcy Act, art 95.

a creditors' meeting will then be convened to discuss whether to approve the draft composition proposal.[77]

A composition proposal will be approved by the creditors' meeting if (1) more than half of creditors participating in the voting process vote in favour of it, and (2) the value of claims of those casting favourable votes is not less than two-thirds of the value of all unsecured claims.[78] Upon the approval for the composition proposal being given by the creditors' meeting, the court will decide whether to sanction the proposal. If such sanction is made, the composition proposal will have a binding effect on the company and its unsecured creditors who have filed their claims, and the composition procedure will be terminated.[79] The bankruptcy administrator will then return the control of the company to its original management, and it is the company itself that will implement the composition proposal.[80] However, in cases where the creditors' meeting decides not to approve the composition proposal or the court decides not to sanction the approved proposal, the composition procedure will also be terminated and the court will declare the company bankrupt and liquidate the company through bankruptcy liquidation.[81]

The purpose of a company's petition for a composition is to seek compromises from all unsecured creditors regarding reduction of debts or deferral of debt payment. However, in the case of insurers, similar to the little likelihood of securing approval for

[77] Enterprise Bankruptcy Act, arts 13 and 96.

[78] Enterprise Bankruptcy Act, art 97.

[79] Enterprise Bankruptcy Act, arts 98 and 100.

[80] Enterprise Bankruptcy Act, art 98.

[81] Enterprise Bankruptcy Act, art 99.

a reorganisation plan from the creditors' meeting of an insurer in reorganisation, it is also unlikely that a composition proposal will be approved by the required majority of creditors (including policyholders) in the creditors' meeting of an insurer in composition. Considering the fact that composition as a company voluntary action inevitably involves seeking approval from the creditors' meeting, it is doubtful whether it is practicable to apply composition to insurers. As a corollary, it is reasonable to question whether it is still necessary to maintain composition in the CMME mechanism.

3 Major Problems under the Current Framework

Situated in the insurance market with a short history, China's CMME mechanism is underdeveloped. Since the current mechanism is based on the general bankruptcy system and there is a lack of modifications or complements to adapt the mechanism to accommodate the special features of insurers, it would be unfeasible or inefficient to apply many of the arrangements therein to insurers. This section will point out some major problems which are caused by the arrangements that are inherent in the general bankruptcy system but are arguably not suitable for insurers. Due to the fact that there have been no cases involving bankruptcy procedures of insurers, these problems just exist in the form of doubt, uncertainty or ambiguity.

3.1 Commencement of Bankruptcy Procedures

The commencement of bankruptcy procedures mainly concerns two aspects: one is the triggers, which relate to the circumstances where a bankruptcy procedure may be initiated; and the other is the initiative, which relates to the parties who will have the standing to petition the court for a bankruptcy procedure.

3.1.1 Triggers

Currently, the triggers for bankruptcy procedures for insurers are completely the same with those for ordinary companies. A bankruptcy procedure may be initiated when a company (including insurer) is insolvent or is likely to become insolvent.[82] According to Article 2 of the Enterprise Bankruptcy Act, a company will be regarded as insolvent if (1) the company is unable to pay its debts as they fall due (ie cash-flow insolvent), and (2) the company's assets are not sufficient to pay all of its debts or the company is apparently unable to pay all the debts (ie balance-sheet insolvent).[83] Taken together, the current triggers for bankruptcy procedures for insurers are focused merely on 'insolvency', and the standard of insolvency is a combination of cash-flow insolvency and balance-sheet insolvency.

However, due to the uniqueness of the insurance business, it is rare that insurers will become insolvent according to this insolvency standard. In the traditional insurance business, since insurers normally collect premiums from a vast number of policyholders and only make insurance payments to some of them when insured events take place, insurers will always be able to pay debts falling due even if they are in a poor financial condition.[84] So it is not very likely that insurers will become cash-flow insolvent if they are not deeply involved in complicated financial transactions that

[82] Enterprise Bankruptcy Act, arts 2 and 7.

[83] Enterprise Bankruptcy Act, art 2.

[84] David A. Skeel, 'The Law and Finance of Bank and Insurance Insolvency Regulation' (1998) 76(4) Taxas Law Review 723, 765. See also Guillaume Plantin and Jean-Charles Rochet, *When Insurers Go Bust: An Economic Analysis of the Role and Design of Prudential Regulation* (Princeton University Press 2007) 44.

may lead to immediate large liquidity needs, such as securities lending or derivatives.[85] In addition, since insurance claims are contingent, which crystallise after insured events occur, it will never be an easy task to tell whether an insurer becomes or is likely to become balance-sheet insolvent.[86] As a consequence, with the grounds for commencing bankruptcy procedures of insurers focused merely on 'insolvency', the chance of utilising bankruptcy procedures to deal with troubled insurers will be largely reduced.

According to the prevailing view, the earlier the relevant measures/procedures in the CMME mechanism are initiated against troubled insurers, the better the outcomes that could be achieved and the smaller the losses that could be incurred.[87] Taken together with the fact that insurers are subject to a series of statutory and regulatory requirements during their operation, this paper argues that the triggers for a certain procedure in the current bankruptcy system should accordingly be set to reflect these requirements, not just limited to 'insolvency'. Only in this way can relevant procedures

[85] IAIS, 'Holistic Framework for Systemic Risk in the Insurance Sector' (November 2019) 10 <www.iaisweb.org/page/supervisory-material/financial-stability> accessed 15 November 2019.

[86] Al Slavin, 'Reflecting on the Past' (Best's Review, August 2011) <http://news.ambest.com/articlecontent.aspx?pc=1009&AltSrc=108&refnum=189989> accessed 10 August 2020.

[87] See, for example, Martin F. Grace, Robert W. Klein and Richard D. Phillips, 'Insurance Company Failures: Why Do They Cost so Much?' (Georgia State University Center for Risk Management and Insurance Research Working Paper No. 03-1, 20 November 2003) 33 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=463103> accessed 10 August 2020; Martin Čihák and Erlend Nier, 'The Need for Special Resolution Regimes for Financial Institutions – The Case of the European Union' (IMF Working Paper, September 2009) 13 <www.imf.org/external/pubs/ft/wp/2009/wp09200.pdf> accessed 25 April 2020; EIOPA, 'Opinion to Institutions of the European Union on the Harmonisation of Recovery and Resolution Frameworks for (Re)insurers Across the Member States' (July 2017) para 89 <https://register.eiopa.europa.eu/Publications/Opinions/EIOPA-BoS-17-148_Opinion_on_recovery_and_resolution_for_(re)insurers.pdf> accessed 10 April 2021.

(ie the modified reorganisation and liquidation, as proposed in this paper)[88] be utilised timely and fully so as to prevent crises of insurers running wild. Otherwise, it may be too late for these procedures to serve to turn things around or minimise losses when insurers eventually become insolvent. For example, as a judicial procedure, reorganisation can have some special effects such as moratorium[89] and restructuring of debt, which regulatory measures (eg rectification and takeover) normally do not have. To diversify the triggers for reorganisation of insurers will allow timely utilisation of reorganisation during crises of insurers. Then there will be more feasible approaches to restoring a troubled insurer to normal conditions in line with the statutory and regulatory requirements before the insurer actually becomes insolvent.

3.1.2 Initiative

In the case of an ordinary company, the company as the debtor itself has the standing to petition the court for a composition, reorganisation or bankruptcy liquidation, and creditors of the company have the standing to petition for a reorganisation or bankruptcy liquidation.[90] Targeted at insurers, it is specifically provided in the Insurance Act that an insurer or its creditors should obtain prior approval from the CBIRC before filing a petition for a composition, reorganisation or bankruptcy liquidation.[91] Otherwise, only the CBIRC can petition the court for a reorganisation or

[88] For a brief description of the modified reorganisation and liquidation proposed in this paper, see Section 4.

[89] See Enterprise Bankruptcy Act, arts 16, 19 and 20.

[90] Enterprise Bankruptcy Act, art 7.

[91] Insurance Act, art 90.

bankruptcy liquidation of the insurer.[92]

As indicated in the current statutory provisions, without the CBIRC's prior approval or own initiative, no bankruptcy procedure of an insurer will commence. As a consequence, an insurer's or its creditors' legal standing to file a bankruptcy petition becomes rather nominal, the existence of which only makes the arrangements burdensome and complicated, but being of little or no practical use. This can be briefly illustrated from two perspectives:

Firstly, it is reasonable to assume that few creditors (including policyholders) of a troubled insurer will bother to petition for a reorganisation or liquidation of a troubled insurer. This is because it will always be beyond most creditors' capacity to prove that an insurer runs into trouble, and further convince the court to commence a reorganisation or liquidation. Also, since most unsecured creditors other than policyholders have claims inferior to insurance claims in the claims hierarchy which should be respected in bankruptcy procedures, the incentives for these creditors to initiate the procedures are further reduced.

Secondly, it is not very likely that the CBIRC will show its approval if a bankruptcy petition filed by a troubled insurer or its creditors is not in line with the CBIRC's own plan to address the crisis. Since the CBIRC is responsible for supervising insurers, normally it will have in place a plan which contains an escalation ladder of intervention (theoretically, including filing a bankruptcy petition) when confronted with a troubled insurer. In this circumstance, the CBIRC's plan may be disrupted when there is an

[92] Insurance Act, art 90.

unexpected bankruptcy petition filed by other parties. It is assumed that where the petition or the timing of the petition would lead to an outcome that may deviate from the desirable result the CBIRC plans to achieve, the CBIRC will not be willing to approve this petition. As a consequence, more likely than not, the efforts made to prepare for the petition will just turn out in vain. On the other hand, even if the petition filed is surprisingly in line with the CBIRC's plan and thus be approved, the petitioning party will still find its efforts not worth much, since the petition contemplated in the CBIRC's step-by-step plan will otherwise be filed by the CBIRC anyway.

Based on the above discussion, it seems that the arrangements will be more streamlined if no legal standing to file a bankruptcy petition is vested in an insurer or its creditors, while the CBIRC has the exclusive standing to file such petitions to the court. Relevant parties, if they are the first one to identify a certain crisis faced by an insurer, only need to report the crisis to the CBIRC.

3.2 Bankruptcy Administrators

Upon the commence of an ordinary bankruptcy procedure, a bankruptcy administrator will be appointed by the court to carry out the procedure.[93] Normally, the bankruptcy administrator will be chosen from the 'administrator pool' set up by the court, where law firms, accounting firms, liquidation firms, etc., are pool members.[94] Generally speaking, bankruptcy administrators' main consideration is to protect creditors of insolvent companies, so they can fulfil the responsibilities even if they are not familiar

[93] Enterprise Bankruptcy Act, art 13.

[94] Enterprise Bankruptcy Act, art 24.

with the business in which the insolvent companies engage.

However, there remains doubt about the competence of ordinary bankruptcy administrators when it comes to dealing with troubled insurers. Given the role insurers play in society, the objectives of addressing crises of insurers are more complex, which mainly include protecting policyholders and maintaining financial stability.[95] Since ordinary bankruptcy administrators are business entities from the private sector, although they may still function well in protecting policyholders, it is unrealistic to expect that they are able to address concerns about financial stability when troubled insurers pose a systemic risk.[96] Without doubt, to achieve the objective of maintaining financial stability is far beyond ordinary bankruptcy administrators' capacity as well as responsibilities. In addition, due to the fact that insurers in China tend to be large in size, with just 177 insurers[97] operating in the world's second-largest insurance market,[98] crises of insurers will normally have a great impact on the society, at least at a regional level. How crises of insurers are addressed will always be relevant to the

[95] See, for example, FSB, 'Key Attributes of Effective Resolution Regimes for Financial Institutions' (October 2014) <www.fsb.org/wp-content/uploads/r_141015.pdf> accessed 15 July 2021; FSB, 'Developing Effective Resolution Strategies and Plans for Systemically Important Insurers' (June 2016) <www.fsb.org/wp-content/uploads/Final-guidance-on-insurance-resolution-strategies.pdf> accessed 15 July 2021; IAIS, 'Holistic Framework for Systemic Risk in the Insurance Sector – Public Consultation Document' (November 2018) <www.iaisweb.org/page/consultations/closed-consultations/2019/holistic-framework-for-systemic-risk-in-the-insurance-sector> accessed 15 November 2018.

[96] See, for example, Martin Čihák and Erlend Nier, 'The Need for Special Resolution Regimes for Financial Institutions – The Case of the European Union' (IMF Working Paper, September 2009) 6 <www.imf.org/external/pubs/ft/wp/2009/wp09200.pdf> accessed 25 April 2020.

[97] 'Members of Insurance Association of China' <www.iachina.cn/col/col19/index.html> accessed 20 December 2021.

[98] Swiss Re Institute, 'World Insurance: The Great Pivot East Continues' (4 July 2019) 9 <www.swissre.com/dam/jcr:b8010432-3697-4a97-ad8b-6cb6c0aece33/sigma3_2019_en.pdf> accessed 1 July 2021.

maintenance of social stability, which is enshrined, explicitly or implicitly, as an ultimate policy goal by the Chinese government. It is also beyond ordinary bankruptcy administrators' capacity as well as responsibilities to take into account social stability in their work. Therefore, it could be argued that ordinary bankruptcy administrators are not the appropriate bodies to take a lead in carrying out relevant procedures such as reorganisation or liquidation when confronted with crises of insurers.

Since the CBIRC, as the regulatory authority in the insurance business, is responsible for achieving the objective of protecting policyholders and the objective of maintaining financial stability, it will be desirable if it is the CBIRC who will carry out reorganisation or liquidation when dealing with crises of insurers. Also, given the fact that the incidence of reorganisation or liquidation of insurers is low,[99] the design that the CBIRC has the exclusive standing to carry out these procedures can make sure the cases will not fall into an inexperienced hand. And the CBIRC will gradually gain ample experience as the cases it is involved in accumulate. In addition, the CBIRC's exclusive standing can to a large extent ensure that consistent strategies will be applied in different cases, with similar situations always being treated in a similar way, so that fairness can be promoted between cases.

In fact, in order to allow the regulatory authorities to continue carrying out their plans about how to address crises of financial institutions (including commercial banks, securities companies and insurers) when the regulatory intervention process is converted into the bankruptcy process, it is especially provided by the Supreme

[99] Just to emphasise again: to date, no reorganisation or bankruptcy liquidation of insurers has ever occurred in China.

People's Court that the relevant regulatory authorities involved in the regulatory intervention of a financial institution can be designated by the court as the bankruptcy administrator to carry out a bankruptcy procedure.[100] In practice, in most cases involving bankruptcy procedures of financial institutions,[101] it is the regulatory authorities who carried out, or at least took a lead in carrying out, bankruptcy procedures. In other words, actually, the regulatory authorities have already had extensive powers in bankruptcy procedures of financial institutions. Therefore, the idea of vesting the CBIRC with the exclusive standing to carry out reorganisation or liquidation in the CMME mechanism will face no operational difficulty, but make the arrangements more clear and desirable.

3.3 Creditors' Meeting

'Creditors' meeting' is a key element in the bankruptcy system, which provides a forum for creditors to decide relevant issues in a bankruptcy procedure. Upon entry into a bankruptcy procedure, creditors of the insolvent company should file claims within a certain period of time so as to become members of the creditors' meeting.[102] As members of the creditors' meeting, creditors are normally entitled to vote in the

[100] See Provisions of the Supreme People's Court on the Designation of Bankruptcy Administrators in Enterprise Bankruptcy Cases, arts 18, 19 and 22.

[101] Just to name a few: the bankruptcy liquidation of the Guangdong International Trust Investment Company [广东国际信托投资公司] taking place in 1999; the bankruptcy liquidation of the China Eagle Securities Limited Company [大鹏证券有限责任公司] taking place in 2006; the bankruptcy liquidation of the Minfa Securities Limited Company [闽发证券有限责任公司] taking place in 2008; the bankruptcy liquidation of the Huaxia Securities Limited Company [华夏证券股份有限公司] taking place in 2008; and the bankruptcy liquidation of the Baoshang Bank Limited Company [包商银行股份有限公司] taking place in 2020.

[102] Enterprise Bankruptcy Act, art 45.

creditors' meeting.[103] However, as to a creditor whose claim is uncertain, unless the court temporarily attributes an estimated value to the claim for voting purposes, the creditor will have no voting right.[104]

The creditors' meeting is entitled to perform various functions, which include reviewing filed claims, monitoring the bankruptcy administrator, deciding whether or not to cease the operation of the insolvent company's business, approving a composition proposal, approving a reorganisation plan, approving a distribution plan in liquidation, etc.[105] Unless otherwise provided, a resolution of the creditors' meeting will be passed if (1) more than half of creditors participating in the voting process vote in favour of it, and (2) the value of claims of those casting favourable votes is not less than half of the value of all unsecured claims.[106] Once a decision is made by the creditors' meeting, unless it is otherwise overturned by the court, the decision will have a binding effect on all creditors of the insolvent company.[107]

However, it is doubtful whether holding a creditors' meeting is feasible or desirable in the case of an insurer. Due to the nature of insurance business, before insured events take place, all policyholders can be regarded as potential insurance creditors of an insurer. Under the current bankruptcy system, it seems that only policyholders who have got crystallised insurance claims against the insurer by the date on which the court accepts the petition for the bankruptcy procedure are entitled to vote in the

[103] Enterprise Bankruptcy Act, art 59.

[104] Enterprise Bankruptcy Act, art 59.

[105] Enterprise Bankruptcy Act, art 61.

[106] Enterprise Bankruptcy Act, art 64.

[107] Enterprise Bankruptcy Act, art 64.

creditors' meeting.[108] It remains unanswered as to how to treat policyholders without crystallised claims or how to treat insurance creditors whose claims arise after the court accepts the petition but before the creditors' meeting is held. On the one hand, it is unreasonable for policyholders to be bound by decisions of the creditors' meeting in which they have no voting right. On the other hand, it is also unreasonable for insurance creditors with insurance claims arising before the date when the court accepts the petition to be subject to a set of arrangements which are different from those for other policyholders. As a consequence, a dilemma has been created by the design of 'creditors' meeting'. In addition, since there are normally a vast number of creditors (including policyholders) in an insurer, perhaps with hundreds of thousands of or even millions of policyholders,[109] it seems unrealistic to expect that favourable votes from the required majority of creditors can be secured in the creditors' meeting so as to pass a resolution. But what we can know for sure is that to hold such a creditors' meeting, no matter physically or virtually, will definitely be at a huge cost.

As shown in the existing cases, under the current CMME mechanism, the CBIRC tends to address a severe crisis of an insurer by virtue of the takeover measure but avoids bringing the insurer to a bankruptcy procedure, even if the insurer is insolvent. Since takeover is a regulatory measure, the CBIRC has great discretion in making relevant decisions, without resorting to creditors' decisions. For example, in the takeover case of AIGC, the majority of insurance policies in the Anbang Property

[108] Enterprise Bankruptcy Act, art 44.

[109] For example, when AIGC was taken over by the CBIRC, there were more than 35 million customers (including policyholders) in its whole insurance group. See 'The First Year of Dajia Insurance [大家保险成立一周年]' (29 June 2020) <www.djbx.com/art/2020/6/29/art_146_4404.html> accessed 28 August 2021.

Insurance Company[110] were transferred to the Dajia Property Insurance Company by the takeover group,[111] without seeking policyholders' approval.[112] As a consequence, no arrangement of creditors' meeting has ever been involved in dealing with crises of insurers in the past.

4 A Better Option

The current CMME mechanism in China is based on the general bankruptcy system. However, due to the lack of consideration of the special features of insurers, it would be unfeasible or inefficient to apply many of the arrangements therein when crises of insurers occur. Based on the discussions in the previous sections, it is not difficult to find that many of the problems identified derive from the general bankruptcy system itself. To put it another way, many arrangements which are key elements inherent in the bankruptcy system are arguably incompatible with the special features of insurers. Therefore, an overhaul of the CMME mechanism is needed, and to detach the CMME mechanism from the general bankruptcy system deserves consideration.

In fact, to have a CMME mechanism which is independent of the bankruptcy system

[110] The Anbang Property Insurance Company is a subsidiary of AIGC.

[111] See, CBIRC, 'The Establishment of the Dajia Insurance Group Company [大家保险集团有限责任公司成立]' (11 July 2019) <www.cbirc.gov.cn/cn/view/pages/ItemDetail.html?docId=4991&itemId=915&generaltype=0> accessed 11 July 2019; CBIRC, 'The CBIRC's Notice of the Ending of the Takeover of AIGC [中国银行保险监督管理委员会依法结束对安邦集团的接管]' (22 February 2020) <www.cbirc.gov.cn/cn/view/pages/ItemDetail.html?docId=891332&itemId=925&generaltype=0> accessed 22 February 2020.

[112] It is worth noting that in this case all property insurance policies transferred remained intact, so policyholders would not be adversely affected because of the transfer. But still, strictly speaking, the transfer of this kind lacks legal basis in the current legislation, since there is no statutory provision providing the CBIRC (or the takeover group) with such authority.

is not out of reach. For example, the US mechanism represents a successful model in this regard. Basically, insurers are excluded from the scope of the US Bankruptcy Code,[113] and the US CMME mechanism is centred on the insurer receivership system in each state. Since each state's insurer receivership system is largely based on the model proposed by the National Association of Insurance Commissioners (NAIC), to look into the NAIC's model can reveal how the CMME mechanism in the US works.[114] Generally speaking, the state insurance commissioner (ie the chief insurance regulator in a state) takes a leading role in dealing with troubled insurers, and there are pre-receivership tools (including administrative supervision and seizure) and receivership procedures (including conservation, rehabilitation or liquidation) available for the state commissioner to make use of.[115] There is not a procedure analogous to the composition procedure in China, and an insurer's attempt to systemically compromise with creditors will suffice to trigger a receivership procedure.[116] Grounds for commencing a receivership procedure are diverse, covering various aspects of insurers' operation, such as financial conditions, management, and compliance with laws.[117] Upon a finding of one or more of these grounds, the state insurance commissioner has the exclusive standing to petition a court of competent jurisdiction to put a troubled

[113] 11 U.S.C. § 109.

[114] In the US, insurers are regulated at the state level and subject to state laws. In order to coordinate insurance regulation in different states, there exists the NAIC functioning as the US standard-setting and regulatory support organisation, and a variety of model acts have been enacted by the NAIC to guide the state legislation. This paper will just refer to the relevant model acts when describing the state receivership system in the US.

[115] See Administrative Supervision Model Act and Insurer Receivership Model Act.

[116] Insurer Receivership Model Act § 207R.

[117] Insurer Receivership Model Act § 207.

insurer into a receivership procedure.[118] Following the court receivership order, the state insurance commissioner will be appointed as receiver and will carry out the receivership under the supervision of the court.[119] The receiver has broad discretion during the process and can decide all relevant issues without seeking creditors' decisions, but subject to the court approval or review.[120] By virtue of this mechanism, the US has rich experience in addressing crises of insurers, and no other country is comparable with the US in this respect.[121]

From the US experience, it is reasonable to expect that a CMME mechanism which is independent of the bankruptcy system may work properly if it is well structured and designed. Due to the fact that many tricky problems in China's current CMME mechanism are caused by the incompatible arrangements inherent in the bankruptcy system, to get rid of the bankruptcy system and make the whole CMME mechanism specific to insurers is believed to be a better option. In a carefully overhauled CMME mechanism that is independent of the bankruptcy system, all arrangements can be designed in a way which is compatible with the special features of insurers, without containing any elements in the bankruptcy system which may not work effectively or efficiently when applied to insurers. Under such a framework, it will be much easier to address the problems pointed out in the previous sections. For example, there is no need to keep composition in the CMME mechanism; grounds for commencing reorganisation or liquidation of an insurer can be set to reflect the statutory or

[118] Insurer Receivership Model Act § 208.

[119] See Insurer Receivership Model Act §§ 301A, 401A and 501A.

[120] See Insurer Receivership Model Act §§ 302, 402 and 504.

[121] 'A Look Abroad (Interview)' (2019) 26(1) The Insurance Receiver 4, 5.

regulatory requirements insurers should comply with, not limited only to 'insolvency',[122] and thus it is not necessary to have both withdrawal liquidation and bankruptcy liquidation, but one liquidation as a judicial procedure; the CBIRC can have the exclusive standing to petition the court for a reorganisation or liquidation, and then carry out the procedure under the court supervision; and the CBIRC can have great discretion in addressing crises of insurers, subject to the court's approval or review where necessary, but without the need to seek decisions from the creditors' meeting.[123]

5 Conclusion

Based on the general bankruptcy system, the current CMME mechanism in China is comprised of a series of regulatory measures (including takeover, withdrawal liquidation, etc.) as well as bankruptcy procedures (including composition, reorganisation and bankruptcy liquidation). Mainly due to the lack of consideration of the special features of insurers, the current mechanism is far from satisfactory in terms

[122] This is in line with the ICP 12 established by the International Association of Insurance Supervisors (IAIS). See IAIS, 'Insurance Core Principles (ICPs) and Common Framework for the Supervision of Internationally Active Insurance Groups' (November 2019) ICP 12.6 <www.iaisweb.org/page/news/press-releases-prior-to-2014/file/87170/iais-icps-and-comframe> accessed 14 August 2021.

[123] This is in line with the IAIS's ICP 12. See IAIS, 'Insurance Core Principles and Common Framework for the Supervision of Internationally Active Insurance Groups' (November 2019) ICP 12.7.10 and 12.11.3. It should be noted that the removal of 'creditors' meeting' from the CMME mechanism does not mean that the level of protection of creditors' interests will be downgraded, since there will be other arrangements in place to safeguard creditors' interests. For example, in the US, all interested parties are allowed to file objections with the court if they object to any actions proposed by the receiver. (See Insurer Receivership Model Act § 107B.) In addition, according to the commonly accepted principle of 'no creditor worse off than in liquidation', creditors should never be put into a worse situation than they would have been if the troubled insurer had been liquidated. (See, for example, IAIS, 'Insurance Core Principles and Common Framework for the Supervision of Internationally Active Insurance Groups' (November 2019) ICP 12.11.2.)

of both its structure and details. There exists a lot of doubt, uncertainty or ambiguity with regard to the mechanism. Notably, it is arguable that many basic arrangements inherent in the bankruptcy system are not fit for insurers. For example, there is barely any room for the composition procedure to function in dealing with troubled insurers; the grounds for commencing reorganisation or liquidation of insurers should be diverse, not limited only to 'insolvency'; nobody other than the CBIRC should have the standing to petition for reorganisation or liquidation of insurers; ordinary bankruptcy administrators from the private sector are arguably not competent enough to take a lead in addressing crises of insurers; and it would be impracticable to hold a creditors' meeting for a troubled insurer so as to get creditors' decision. In addition, the relationship between relevant regulatory measures and bankruptcy procedures under the current framework still needs to be adjusted or clarified. For example, it is not clear what the line is between takeover and reorganisation, or how to coordinate dissolution liquidation, withdrawal liquidation and bankruptcy liquidation.

Because of the deficiencies in the current CMME mechanism, it would be unfeasible or inefficient to apply many of the arrangements therein when confronted with crises of insurers. This can partially explain why there has never been any bankruptcy procedures of insurers.[124] Therefore, in order to change the situation, a radical overhaul of the CMME mechanism is needed. Considering that many incompatible arrangements are inherent in the general bankruptcy system, to detach the CMME

[124] Admittedly, due to the fact that an insurer usually has great importance in society, at least at a regional level, in order to achieve the government's policy goal of maintaining social stability, the CBIRC tends to bail out a troubled insurer or its business when it is mired in a serious crisis. This constitutes a major reason why there has been no bankruptcy procedures of insurers.

mechanism from the general bankruptcy system is argued to be a better option. In this way, the whole CMME mechanism can be specifically designed to accommodate the special features of insurers, without containing any elements in the bankruptcy system which are arguably not fit for insurers. From the US experience, it is reasonable to expect that a well-designed CMME mechanism which is independent of the bankruptcy system can work effectively and efficiently in addressing crises of insurers.

At a stage where the Enterprise Bankruptcy Act is in the revision process, this paper recommends that the revised act should exclude insurers from its scope, and at the same time, a new act targeted at the CMME mechanism should be enacted. Basically, as this paper proposes, in the overhauled CMME mechanism, there will be regulatory measures (including takeover), reorganisation and liquidation, but no composition; grounds for commencing reorganisation or liquidation of an insurer will reflect the statutory or regulatory requirements insurers should comply with, not limited only to 'insolvency'; the CBIRC will have the exclusive standing to petition the court for a reorganisation or liquidation, and will have great discretion in carrying out a reorganisation or liquidation under the court supervision, without the need to seek decisions from the creditors' meeting during the process. Since such a proposal is a bit bold and radical, the legislature will probably not be well prepared to carry it out during this revision period. Nevertheless, this paper believes that the proposal constitutes a desirable choice which can contribute to a better CMME mechanism in the long run.