

# Legislative developments in personal insolvency in China's mainland: A comparative analysis of regional practices in China's mainland, Hong Kong, and Taiwan Region

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## Abstract

With the ongoing implementation of personal insolvency practices in China's mainland, the realization of a nationwide personal insolvency system in China's mainland no longer appears distant. In the design of specific personal insolvency schemes, key elements to consider are establishing entry criteria, assessing the integrity of debtors, determining the duration of the discharge examination period, setting the length of the blocking period for subsequent insolvencies. Additionally, the availability of a simplified procedure for personal insolvency should also be considered. By analysing 12 official documents from regional practices in China's mainland and comparing them with corresponding regulations in Taiwan Region ("Taiwan") and Hong Kong, we can draw valuable experiences and identify shortcomings. This effort aims to lay the foundation for a unified personal insolvency system in the future of China's mainland.

## 1 | INTRODUCTION

Since the issuance of the "Notice by the National Development and Reform Commission, the Supreme People's Court, the Ministry of Industry and Information Technology and Other

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Departments of Issuing the Reform Plan for Accelerating Improvement of the Exit System for Market Participants” (“Reform Plan”)<sup>1</sup> in 2019, the personal insolvency system in China’s mainland has been actively explored for nearly 4 years, primarily at the regional judicial levels and above, and is now taking shape.

Considering China’s historical legislative approach of starting with local pilot programs before nationwide implementation, it is foreseeable that the introduction of a personal insolvency system in China’s insolvency law system is inevitable in the near future. Based on the analysis of the 12 regional normative documents and corresponding provisions in Hong Kong and Taiwan, the paper will focus on the underground structure of nationwide personal insolvency legislation in China’s mainland. This discussion will centre around issues such as the eligibility criteria for personal insolvency, the establishment of debtor integrity assessment regulations, the duration of exemption and blocking periods, and the design of simplified procedures.

## 2 | NORMATIVE REGULATIONS IN CHINA’S MAINLAND, HONG KONG, AND TAIWAN

### 2.1 | Regional practice in China’s mainland

In practices across China’s mainland, the “Regulations of Shenzhen Special Economic Zone on Personal Insolvency” (“Shenzhen Regulations”)<sup>2</sup> has gained prominence as the first legislative regulation at the legislative level in China’s mainland since the proposal to establish a personal insolvency system. Its comprehensive construction of the personal insolvency procedure has positioned it as a blueprint for China’s future personal insolvency system.

In addition, according to incomplete statistics by the author, a total of seven provincial-level regions in China’s mainland, including Jiangsu, Zhejiang, Jiangxi, Shandong, Guangdong, Sichuan, and Gansu, have attempted to carry out “debt relief for natural persons in debt”, accounting for approximately 22.58% of the number of provincial-level districts in China’s mainland and 43% of the total GDP of China’s mainland.<sup>3</sup> This involves 15 cities and 12 normative documents. Except for the “Shenzhen Regulations,” all others are operational guidelines or implementation opinions at the judicial practice level.

Among them, Jiangsu was carried out on a pilot basis, with a total of nine pilots, including two levels of courts in three cities: Nanjing, Suzhou, and Xuzhou, as well as district courts in Wuxi (Xishan), Zhenjiang (Jingkou), Nantong (Haimen), Taizhou (Medical High-Tech Industrial Development Zone), Yancheng (Economic and Technological Development Zone), and Lianyungang (Haizhou).<sup>4</sup> The normative documents in Jiangsu include the informal document “Jiangsu High People’s Court’s Answers to Some Questions Regarding the Pilot Work of ‘Func-

<sup>1</sup>No. 1104 [2019] of the National Development and Reform Commission.

<sup>2</sup>No. 208 of the Announcement of the Standing Committee of the Sixth People’s Congress of Shenzhen Municipality (issued on 31 August 2020).

<sup>3</sup>China National Bureau of Statistics, available at: <<https://data.stats.gov.cn/search.htm>>.

<sup>4</sup>Jiangsu Court Website, “The Higher People’s Court of Jiangsu Province has issued an ‘Answers’ document on 28 key issues, advancing the pilot work on ‘Functional Equivalence to the Personal Insolvency System’,” available at <<http://www.jsfy.gov.cn/article/33386.html>>.

tions Equivalent to the Personal Insolvency System” (“Jiangsu Answers”),<sup>5</sup> as well as the formal documents “Wuxi Intermediate People’s Court’s “Guidelines for Pilot Work on “Functional Equivalence to the Personal Insolvency System” (Trial)” (“Wuxi Guidelines”),<sup>6</sup> and “Nanjing Intermediate People’s Court’s Implementing Opinions on the Pilot Work on the Economic Rebirth of Honest Executed Persons (Natural Persons) (Trial)” (“Nanjing Opinions”).<sup>7</sup>

In Zhejiang, there is the “Guidelines for the Centralized Clearing of Individual Debts (Similar to Personal Insolvency) by Zhejiang Courts (Trial)” (“Zhejiang Guidelines”),<sup>8</sup> issued by the Zhejiang High People’s Court, the “Implementation Opinions of Wenzhou Intermediate People’s Court on the Centralized Clearing of Personal Debts (I) and (II)” (“Wenzhou Opinions”),<sup>9</sup> and the “Procedures for the Transfer of Execution Procedures to the Procedures for Clearance of Personal Debt of the Taizhou Intermediate People’s Court (Trial)” (“Taizhou Procedures”).<sup>10</sup>

In Shandong, there is the “Implementation Opinions on the Clearing of Personal Debts” (“Dongying Opinions”),<sup>11</sup> issued by the Dongying Intermediate People’s Court. In Sichuan, Chengdu has the “Chengdu Intermediate People’s Court’s Operational Guidelines on Centralized Clearance of Personal Debts (Trial)” (“Chengdu Guidelines”) and Luzhou has the “Implementation Measures of Personal Insolvency and Reconciliation of Longmatan District People’s Court of Luzhou City (Trial)” (“Luzhou Measures”).<sup>13</sup> In Gansu, Yinchuan has the “Yinchuan Intermediate People’s Court on the Implementation Opinions of the Centralized Clearing of Personal Debt (Trial)” (“Yinchuan Opinions”).<sup>14</sup> Although Jiangxi Province lacks normative regulations, there is a case of a personal insolvency order, namely, the Civil Order (2022) Gan 0681 Shen Po 1, issued by Guixi City.<sup>15</sup>

<sup>5</sup>Jiangsu High People’s Court’s Answers to Some Questions Regarding the Pilot Work of “Functions Equivalent to the Personal Insolvency System” (江苏省高级人民法院《关于开展“与个人破产制度功能相当试点”工作中若干问题解答》) (issued on 07 December 2021), available at <<http://jsfy.gov.cn/article/60436.html>>.

<sup>6</sup>Wuxi Intermediate People’s Court’s “Guidelines for Pilot Work on “Functional Equivalence to the Personal Insolvency System (Trial)” (无锡市中级人民法院“与个人破产制度功能相当”试点工作指引(试行)) (issued on 22 March 2022).

<sup>7</sup>Nanjing Intermediate People’s Court’s Implementing Opinions on the Pilot Work on the Economic Rebirth of Honest Executed Persons (Natural Persons) (Trial) (南京关于开展诚信被执行人(自然人)经济重生试点工作的实施意见(试行)) (issued on 18 November 2021).

<sup>8</sup>Guidelines for the Centralized Clearing of Individual Debts (Similar to Personal Insolvency) by Zhejiang Courts (Trial) (《浙江法院个人债务集中清理(类个人破产)工作指引(试行)》) (issued on 02 December 2020).

<sup>9</sup>Implementation Opinions of Wenzhou Intermediate People’s Court on the Centralized Clearing of Personal Debts (I) and (II) (温州市中级人民法院关于个人债务集中清理的实施意见(一)和(二)) (issued on 13 August 2019 and 20 October 2020).

<sup>10</sup>Procedures for the Transfer of Execution Proceedings to the Procedures for Clearance of Personal Debt of the Taizhou Intermediate People’s Court (Trial) (《台州市中级人民法院执行程序转个人债务清理程序审理规程(暂行)》) (issued on 26 September 2019).

<sup>11</sup>Implementation Opinions on the Clearing of Personal Debts (东营中院《关于个人债务清理的实施意见》) (issued on 1 December 2020).

<sup>12</sup>Chengdu Intermediate People’s Court’s Operational Guidelines on Centralized Clearance of Personal Debts (Trial) (成都市中级人民法院关于个人债务集中清理的操作指引(试行)) (issued on 29 June 2022).

<sup>13</sup>Luzhou Longmatan District People’s Court’s Implementation Measures for Personal Insolvency Settlement (for Trial Implementation) (《州市龙马潭区人民法院(个人破产和解实施办法(试行))》) (issued on 29 May 2020).

<sup>14</sup>Yinchuan Intermediate People’s Court on the implementation Opinions of the centralized clearing of personal debt (Trial) (《银川市中级人民法院关于个人债务集中清理的实施意见(试行)》) (issued on 21 April 2023).

<sup>15</sup>Civil Order (2022) Gan 0681 Shen Po 1, issued by Guixi City (issued on 5 January 2022).

## 2.2 | Personal insolvency laws in Hong Kong and Taiwan

Personal insolvency in Taiwan is provided for separately in the “Bankruptcy Law” (“Taiwan Bankruptcy Law”)<sup>16</sup> and the “Consumer Debt Clearance Statute” (“Taiwan Clearance Statute”).<sup>17</sup>

In Taiwan’s insolvency law system, there is a differentiated approach in the design of bankruptcy procedures for natural persons based on their involvement in business activities. For those engaged in business activities, such as shareholders, directors, or legal representatives involved in operations, the general bankruptcy procedures under the Taiwan Bankruptcy Law (originally intended for enterprises) are applied.<sup>18</sup> Alternatively, natural persons who are not engaged in business activities or are involved in small-scale business operations fall under the consumer debt clearance procedures outlined in the Taiwan Clearance Statute, which includes three methods: reorganization, composition, and liquidation.<sup>19</sup>

In Hong Kong, there is no differentiation in the identity of the debtor, and the Bankruptcy Ordinance (Cap. 6) (“Hong Kong Bankruptcy Ordinance”)<sup>20</sup> is uniformly applied to both corporate and personal debtors, and there are no special procedures for personal debtors who are not engaged in business activities or who are engaged in small-scale business activities. The special feature of Hong Kong is that both creditor and debtor can apply for the commencement of personal bankruptcy proceedings.

The influence of the legal practices of Taiwan and Hong Kong on the design of the mainland’s personal insolvency system can be seen in the normative documents of various regions in China’s mainland.

## 3 | APPLICATION REQUIREMENTS

### 3.1 | “Obvious lack of solvency” as a ground for insolvency?

In the above-mentioned practices in China’s mainland regarding the construction of the personal insolvency system, “lack of solvency” is recognized as a ground for the application of personal insolvency. However, there are slight differences in whether “obvious lack of solvency” can also be a ground for personal insolvency application. In the above-mentioned 11 judicial documents, “obvious lack of solvency” is explicitly mentioned as an applicable case. However, in the Shenzhen Regulations, this case is not considered as a ground for application. Only “incapacity for solvency” and “insufficient property to cover all debts” are taken into account.<sup>21</sup>

Looking at the experience of Hong Kong and Taiwan, the Hong Kong Bankruptcy Ordinance’s grounds of application distinguish between creditor and debtor applications, and in the case of a debtor’s own application requires that:

<sup>16</sup>Taiwan Bankruptcy Law (amended as at 13 June 2018), available at:

<<https://law.moj.gov.tw/LawClass/LawAll.aspx?pcode=B0010006>>.

<sup>17</sup>Taiwan Consumer Debt Clearance Statute (amended as at 26 December 2018), available at:

<<https://law.moj.gov.tw/ENG/lawclass/lawall.aspx?Pcode=B0010042>>.

<sup>18</sup>Article 3, Taiwan Bankruptcy Law.

<sup>19</sup>Article 2, Taiwan Clearance Statute.

<sup>20</sup>Hong Kong Bankruptcy Ordinance (Cap. 6) (version dated 17 June 2022), available at:

<<https://www.elegislation.gov.hk/hk/cap6>>.

<sup>21</sup>Article 2, Shenzhen Regulations.

the debtor's petition may only be made to the court on the ground of the debtor's inability to pay his/her debts.<sup>22</sup>

In the case of a creditor petition for the insolvency of the debtor, it is provided that:

the debtor appears either to be unable to pay or to have no reasonable prospect of being able to pay.<sup>23</sup>

The Taiwan Clearance Statute provides that:

if the debtor is unable to pay his/her debts or is in danger of being unable to pay, he/she may liquidate his/her debts in accordance with the rehabilitation or liquidation procedures provided for in these regulations.<sup>24</sup>

In the author's opinion, in the future unified legislation of China's mainland, obvious lack of solvency should be also regarded as one of the grounds for applying for personal insolvency, for the reason that, on the one hand, in the existing insolvency law in China's mainland, namely, the "Enterprise Bankruptcy Law of the People's Republic of China" ("CNEBL"), the grounds for enterprise insolvency are:

inability to settle debts as they fall due, and the assets are insufficient to settle all the debts or there is a clear lack of solvency.<sup>25</sup>

For the consideration of uniform legislation and systematic interpretation, the grounds for personal insolvency should be incorporated. Furthermore, this approach has already been used in many of the practices mentioned above, which will facilitate their future application.

On the other hand, the determination of the grounds for insolvency application involves the determination of the starting point for the debtor's relief. Considering that the purpose of any personal insolvency law is to help individuals facing serious debt difficulties to recover their economic situation, identifying the risk of insolvency as early as possible and prompting the debtor to commence insolvency in a timely manner is not only a means of protecting the interests of creditors but also a means of ensuring that the debtor is able to obtain a reasonable reorganization of the debt or a relief from the relief measures. Therefore, the inclusion of "obvious lack of solvency" as a condition for the application of a insolvency petition is in line with the conceptual requirements of the future insolvency law, which at present favours the early commencement of relief for the debtor.<sup>26</sup> This would ensure that the personal insolvency law would be more comprehensive and flexible in responding to the needs of debtors in different circumstances and would provide the necessary relief for individuals who are genuinely unable to pay their debts.

<sup>22</sup>Ibid., section 6(2)(a).

<sup>23</sup>Ibid., section 10(1).

<sup>24</sup>Article 3, Taiwan Clearance Statute.

<sup>25</sup>Article 2, paragraph 1, CNEBL.

<sup>26</sup>See Shuguang Li, 'The Multi-dimensional Deconstruction of China's Insolvency Reorganisation System and its Improvement' (《我国破产重整制度的多维解构及其改进》)(2022) 3 *Law Review* (《法学评论》) 99–113, 105.

## 3.2 | Identity requirements

### 3.2.1 | “General insolvency doctrine” or “merchant insolvency doctrine”?

The debate on the identity conditions for personal insolvency focuses on three issues, one of which is whether to apply the “general insolvency doctrine” or the “merchant insolvency doctrine”.<sup>27</sup> The answer to this question has become more and more obvious with the pan-subjectification of economic activities; that is, the barriers between “businessmen” and “private persons” have been gradually broken down. Especially in the booming development of the Internet economy nowadays, the threshold for engaging in independent economic activities has been lowered to an unprecedented level. Micro-businesses, podcasts, and other professions are used as main or side businesses. The threshold for engaging in independent economic activities has been lowered to an unprecedented extent, with micro-businesses, anchors, and other similar self-employment being commonplace as main or side businesses, and individuals as purely private individuals rarely exist. It is difficult to distinguish between a businessman and a private person from a practical point of view in the current Chinese economic life.<sup>28</sup>

Therefore, it is now generally believed that the future personal insolvency legislation in China’s mainland should adopt the general insolvency doctrine rather than the merchant insolvency doctrine. Furthermore, the general insolvency doctrine has been adopted uniformly in the practice of various localities. Although the main target is debtors whose debts are in crisis “due to production and business activities,” there are also provisions that “natural persons who are unable to repay their debts due to difficulties in their livelihood” can also be applied.<sup>29</sup>

Moreover, whether from the perspective of Hong Kong or Taiwan or even the laws of other countries and regions with advanced personal insolvency legislation, general insolvency doctrine has become the mainstream legislative trend.<sup>30</sup> Still, it is worthwhile to learn from the differentiated application of personal insolvency procedures in Taiwan between natural persons involved in business activities and those not involved in business activities. Considering that the essence of personal insolvency is a centralized liquidation of personal debts, and that the scale of debts of natural persons who are uninvolved in business activities is relatively small compared with those who are involved in business activities, a separate “simplified procedure” can be considered to enhance judicial efficiency and save judicial costs. This practice has also been adopted by the Shenzhen Regulations.<sup>31</sup> The Wuxi Guidelines also contain a similar statement, which provides that when applying the centralized liquidation of personal debts, the personal executors applying the procedure are mainly engaged in commercial activities, and other qualified personal executors may refer to the application of the procedure.<sup>32</sup> Clearly, space has

<sup>27</sup>See Shanbin Zhang and Ning Qian, “Cold thinking on the hotspot of personal insolvency—centred on the consideration of the legislative conditions” (《个人破产热点的冷思考——以立法条件的考量为中心》)(2021) 6 *The Jurist* (《法学家》) 135–148 and 195, 135.

<sup>28</sup>See Yang Zhang, “How is personal insolvency possible: traceability, evidence and outlook” (《个人破产何以可能:溯源、证立与展望》)(2019) 4 *Taxation and Economy* (《税务与经济》) 1–10, 1.

<sup>29</sup>Article 3, paragraph 1, subparagraph 4, Chengdu Guidelines; Article 4, paragraph 1, subparagraph 4, Yinchuan Opinions; Article 6, paragraph 1, subparagraph 4, Wenzhou Opinions; Article 2, Shenzhen Regulations.

<sup>30</sup>Chapter 10, Shenzhen Regulations.

<sup>31</sup>Article 2, Wuxi Guidelines.

<sup>32</sup>See Zhang and Qian (above note 25), 142; Zhang (above note 26), 7; Bing Liu, “The Construction of China’s Personal Insolvency System” (《论我国个人破产制度的构建》)(2019) 4 *China Legal Science* (《中国法学》) 223–243, 239.



been reserved for the following simplified procedures to be set up for debtors who are less involved in market economy activities.

### 3.2.2 | Farmers as subjects of insolvency?

Another discussion on the application of personal insolvency is whether farmers can be subject to personal insolvency. The opposing view is that under the China's mainland special rural economic form and property ownership system, it is difficult to define the income and property of rural residents, which will make it difficult to define the personal insolvency of rural residents in practice, and it should not be considered as part of the scope of personal insolvency for the time being.<sup>33</sup> On the contrary, proponents of this viewpoint argue that in the legislation relating to rural land, such as "the Civil Code of the People's Republic of China" ("CNCC") and the "Law of the People's Republic of China on the Contracting of Rural Land," there are clear provisions on the relevant property rights enjoyed by rural residents and their transfers.<sup>34</sup> Therefore, in contemporary China's mainland, defining the property of farmers is no longer considered a challenging issue.<sup>35</sup>

Moreover, since the 18th National Congress of the Communist Party of China (CPC), with the ongoing efforts to deepen rural economic system reforms, there has been a continuous increase in the marketization of rural land operating rights and other agricultural property rights. The economic structure in rural China is transitioning from the small-scale "household responsibility system" to a larger-scale and modernized agricultural system. In China's 14th Five-Year Plan, there is a specific emphasis on the goals of agricultural modernization and rural modernization.<sup>36</sup> Therefore, the income structure of future rural residents will no longer be solely dependent on agricultural output but will become more industrialized and diversified.

In addition, the internet economy is quite prevalent in the current rural areas, with many rural residents engaging in supplementary businesses such as express delivery services and operating points for online businesses. On the other hand, a significant number of residents with rural household registration are migrating to large cities for employment. The issue of rural migrant workers is no longer a new topic, and the income of residents with this type of rural household registration is, in fact, comparable to the income structure of urban populations. Furthermore, the Reform Plan outlined the overall goal of constructing an efficient, convenient, and orderly market exit mechanism for various market entities, including "farmers' professional cooperatives."<sup>37</sup>

As China is a populous country with a significant rural population, excluding the majority of the rural population from the development of the rule of law would raise questions about the universality and significance of legislative reforms. Therefore, the author believes that from both a practical and legal policy perspective, rural residents should not be excluded from the personal insolvency system.

<sup>33</sup>Articles 9 and 10, Law of the People's Republic of China on the Contracting of Rural Land (《农村土地承包法》) (issued on 29 December 2018).

<sup>34</sup>See Yin Zhao, "The Chinese path of personal insolvency access regulation" (《个人破产准入规制的中国路径》) (2020) 6 *Politics and Law* (《政治与法律》) (122–134, 126); Zhang (above note 26), 7.

<sup>35</sup>Outline of the 14th Five-Year Plan (2021–2025) for National Economic and Social Development and Vision 2035 of the People's Republic of China (issued on 3 November 2021).

<sup>36</sup>Above note 1.

<sup>37</sup>See Zhao (above note 32), 128.

### 3.2.3 | Territorial jurisdiction

There has also been considerable discussion as to whether there should be a limitation on the nationality or territoriality for personal insolvency and that discussion related primarily to the determination of jurisdiction.<sup>38</sup> In the current regional practice in China's mainland, there is some limitation on the geographical scope of debtors to whom personal insolvency applies. Specifically, the following indicators are the main defining conditions: "three years of social insurance contributions," "place of domicile," "place of residence," "place of main property." The local provisions are either a combination or an intersection of these indicators.

Hong Kong emphasizes the personal connection of the debtor. In Hong Kong, the debtor must be domiciled in Hong Kong at the time of filing the bankruptcy petition and either be personally present in Hong Kong on the date of the petition or has been ordinarily resident or has had a place of residence or carried on business in Hong Kong at any time in the period of 3 years ending with that day.<sup>39</sup> While Taiwan prioritizes the property connection of the debtor. In Taiwan, even for debtors without a residence or main place of business in Taiwan, jurisdiction can be assigned to the court in the area where the debtor's primary assets are located.<sup>40</sup>

The personal insolvency procedure is mainly a procedure related to property. Therefore, the author proposes that the future nationwide legislation may build upon the property connection approaches. It is also in line with the general jurisdictional principle of Civil Procedure Law of the People's Republic of China ("CNCPL"). According to the jurisdictional rules of CNCPL, for litigation related to property, besides the general jurisdiction of the defendant's domicile or habitual residence, the court where the property in dispute is located also has jurisdiction.<sup>41</sup> It could be further specified that the courts with jurisdiction are those in the area of the debtor's domicile or habitual residence, or where the insolvency property is located. Moreover, it may further stipulate that the court in which the case is first filed shall have exclusive jurisdiction. A debtor's eligibility for application should not depend on their nationality, nor should it be based on whether they have paid local social insurance or the duration of such payments. Foreigners with a domicile in China's mainland should also be allowed to apply for personal insolvency. Debtors like students or others who have not paid social insurance for some reason should not be restricted from using the personal insolvency process to achieve economic rebirth.

### 3.2.4 | Ethical requirements

It has long been the default premise of "personal insolvency" that only "honest" debtors are allowed to go insolvency procedure. The aim is to prevent abuse of the personal insolvency system for evading debts. Such misuse constitutes a grave breach of the contract spirit in civil activities, disrupting the foundation of trust in civil transactions, and is detrimental to the development of trade behaviour. However, there is disagreement in practice of China's mainland as to whether the examination of "honest" debtors should take place between the commencement of insolvency procedures or after they have entered insolvency procedures.

<sup>38</sup>Section 4(1), Hong Kong Bankruptcy Ordinance.

<sup>39</sup>Article 5, paragraph 1, Taiwan Clearance Statute.

<sup>40</sup>Article 21–35, CNCPL.

<sup>41</sup>Article 6, Wuxi Guidelines.



In the above mentioned regional normative documents issued in China's mainland, a part of the regional practice takes it as an access requirement; that is, the debtor applying for insolvency is required to be a "good" debtor, and the cause of insolvency should be "good"; that is, it should not be caused by gambling, illegal or criminal offense, squandering, etc.; otherwise, it will not be admitted. Such practices are adopted in the Wuxi Guidelines,<sup>42</sup> the Dongying Opinions<sup>43</sup> the Shenzhen Regulations,<sup>44</sup> and the Chengdu Guidelines;<sup>45</sup> some other practices take the moral threshold as a success requirement for the discharge of debts; that is, they do not look into the reasons behind the insolvency application, but rather focus on the performance of the debtor after the insolvency application, so that only debtors who have faithfully provided the required documents and honestly cooperated with the various supervisory requirements and has no other bad behaviours (e.g., gambling, crime, high spending) in the personal insolvency procedures can finally obtain the permission for the discharge of the remaining debts. One such practice is the Yinchuan Opinion.<sup>46</sup>

In terms of the institutional design of this ethical requirement, Taiwan<sup>47</sup> and Hong Kong<sup>48</sup> have adopted the design of the success requirement; that is, the insolvency application is examined in form only, without substantive examination. The documents provided by the debtor and the debtor's performance during the application for insolvency are examined after entry into insolvency procedures and in conjunction with the "discharge examination period" procedure.

The advantage of being an access requirement is the ability to identify at an early-stage situations where debt discharge is not possible, reducing the investment of judicial resources at a later stage. However, it will increase the workload at an early stage, and it is a great challenge for the chief judge to identify the correctness and completeness of the materials submitted by the debtor within a short period of acceptance (generally 30 days). And there will also be requirements for the completeness of the debtor's one-time submission, which will make it more difficult for the debtor to enter into insolvency procedures, or else it will give rise to a large number of duplicate applications due to the completion of materials. While as a success requirement, it can provide the court with a longer discernment period, from the ruling of acceptance to the ruling of exemption, and then to the discharge examination period. This not only allows for a more comprehensive judgment of the debtor's "character" from the text but also from the debtor's actions. It also reduces the difficulty for debtors to enter the insolvency process.

In fact, being a success requirement is a current trend in personal insolvency legislation. Modern insolvency concepts suggest that insolvency law should serve multiple functions. In addition to ensuring that creditors' claims are reasonably satisfied in situations where assets fall short, the sustainability of businesses and the assistance of debtors are also considerations that insolvency law should address.<sup>49</sup>

<sup>42</sup>Article 10, Dongying Opinions.

<sup>43</sup>Article 14, Shenzhen Regulations.

<sup>44</sup>Article 6, Chengdu Guidelines.

<sup>45</sup>Article 11, Yinchuan Opinion.

<sup>46</sup>Article 134, Taiwan Clearance Statute.

<sup>47</sup>Section 6D, Hong Kong Bankruptcy Ordinance.

<sup>48</sup>KOM (2014) 1500 endg; KOM (2016) 723 endg; RL 2019/1023/EU, 54.

<sup>49</sup>Albert Yu-Wei Cheng, "Nondischargeable Debts: Observations and Suggestions for Taiwan's 2016 Draft of Debts Clearance Act from the View of Super Discharge" (2019) 45(6) *Cheng Kung Law Review* (《中原財經法學》) 69–113, 73; Ulrich Keller, *Insolvenzrecht* (4. Teil: Die besonderen Verfahrensarten) (second edn) (Beck, 2020), Rn. 1919.

When it comes to rescuing debtors, there should not be an indiscriminate blame on the debtor. The requirement for personal insolvency to be “honest but unfortunate” should mean that the debtor honestly reports their true financial situation when filing for insolvency and faithfully fulfils their cooperation obligations. It should not demand that the debtor is in a state of insolvency due to living a “virtuous and honest” life unexpectedly. Otherwise, a paradox arises because individuals who lead a well-behaved life, have risk awareness, and make prudent investments are unlikely to easily face insolvency. On the contrary, individuals who lack financial planning, have no concept of risk, or enjoy taking risks are more prone to falling into a state of insolvency.

This point is further supported when examining the emergence of modern personal insolvency systems for private person. Whether in the United States, Taiwan, or Germany, the introduction of personal insolvency systems for private person is rooted in the phenomenon of excessive personal credit burdens leading to widespread societal insolvency.<sup>50</sup> This is particularly prevalent among the younger generation aged between their twenties and thirties, where the overconsumption resulting from reliance on credit products has led to a serious situation of actual insolvency. The increasing pressure on the younger generation has also contributed to a highly stifled and unstable societal development. Personal insolvency is a solution proposed by nations to alleviate this societal dilemma.

Clearly, if “virtuous insolvency grounds” were to be considered as admission criteria for personal insolvency, the majority of individuals actually facing insolvency would likely be unable to meet this condition. Personal insolvency would then become an awkward situation, limited to a minority of cases, contradicting the former intent behind establishing the personal insolvency procedure.

In conclusion, the requirement of good faith insolvency should be treated as a success requirement for insolvency rather than an access requirement for insolvency. It should focus more on the completeness and correctness of the materials submitted during the application for insolvency and during the insolvency procedure, as well as on the performance of the debtor's conduct after the debtor has entered into the insolvency procedure, and should look to the future to judge whether there is a necessary to give the debtor an opportunity of economic rebirth, instead of retrospectively criticizing the inappropriateness of the debtor's conduct. The law should be the ground floor of morality rather than the high point of morality.

#### 4 | EXAMINATION OF THE DEBTOR'S INTEGRITY

How to examine the debtor's “integrity” in the design of the practical mechanism is the core issue to be considered in the construction of the personal insolvency system. The current approaches in China's mainland to examine the debtor's obligation of integrity are similar, mainly involving three phases and aspects: the obligation to disclose property when applying for insolvency, including the submission of a property register, a claims register, and the signing of a good faith undertaking; the obligation to cooperate in the insolvency investigation, including the good faith and full cooperation in the investigation conducted by the insolvency trustee and active notification of property changes, etc., and obligations of good behaviour during the insolvency procedures and the investigation period, including refraining from high consumption or gambling, active declaration of property changes, and refraining from unauthorized departure from the place of residence. These provisions are largely similar to the personal insolvency laws in Hong Kong and Taiwan.

<sup>50</sup>Q&A 2, Jiangsu Answers; Article 6, Wuxi Guidelines.

## 4.1 | Impact of the property situation of related persons

### 4.1.1 | Practices in China's mainland

However, there are two points that are worthy of further attention, one of which is the declaration of the property of the related person and the obligation of the related person to cooperate in the investigation of the property, for which the provisions covering the related person vary from place to place. In Jiangsu Province, it is stipulated in both the Jiangsu Answers and the Wuxi Guidelines that the property and income status of the debtor, his/her spouse, and minor children should be submitted when applying for personal insolvency procedures.<sup>51</sup> In Dongying, it is stipulated that the debtor must make a declaration of himself/herself and his/her spouse's property when applying for insolvency and that the debtor's grown-up lineal relatives or other family members have an obligation to cooperate in the investigation.<sup>52</sup>

The Chengdu Guidelines provide that the debtor must state at the time of insolvency application the situation of himself/herself, his/her spouse, children, and other close relatives living together, as well as other persons dependent on the debtor, as well as a property report and a notice of change of property.<sup>53</sup> The Yinchuan Opinion stipulates the obligation of the debtor and his/her spouse to declare property and cooperate in the investigation, as well as the obligation of other grown-up lineal relatives or other family members to cooperate in the investigation, if necessary.<sup>54</sup> The Wenzhou Opinion requires only a property report from the debtor and his/her spouse.<sup>55</sup> The Shenzhen regulations provide for the obligation of the debtor's spouse, children, close relatives living together, property trustees, and other interested persons to cooperate with the investigation, as well as the obligation of the debtor to declare the property in the name of the debtor's spouse, minor children, and other close relatives living together.<sup>56</sup>

### 4.1.2 | Situation in Taiwan and Hong Kong

Observing the experience of Taiwan and Hong Kong, provisions have been made in the following three aspects in dealing with the issue of the debtor's related person, namely, the scope of the related person, the division of the debtor's own insolvency property, and the revocation of the act which disposes of the debtor's property to the related person.

In Taiwan, it is stipulated that compensated acts established between spouses, lineal relatives, or cohabiting relatives or family members, and acts in which the debtor disposes of his/her property at less than half of the market price are considered as non-compensated acts.<sup>57</sup> A non-compensable act is an act that the trustee can revoke.<sup>58</sup>

In Hong Kong, there is a duty on spouses to cooperate with the court's inquiry,<sup>59</sup> and the trustee has the right to revoke a debtor's wrongful disposition of property to an associate within

<sup>51</sup>Article 5, Nos. 1–2, Article 6, No. 6, Dongying Opinions.

<sup>52</sup>Article 5, No. 2, Article 7, Chengdu Guidelines.

<sup>53</sup>Article 5, Nos. 2–3, Yinchuan Opinions.

<sup>54</sup>Article 7, Nos. 2–3, Article 10, Wenzhou Opinions.

<sup>55</sup>Article 22, Shenzhen Regulations.

<sup>56</sup>Article 20, paragraph 2, Taiwan Clearance Statute; Article 15, Taiwan Bankruptcy Law.

<sup>57</sup>Article 20, paragraph 1, Taiwan Clearance Statute; Article 78, Taiwan Bankruptcy Law.

<sup>58</sup>Section 29, Hong Kong Bankruptcy Ordinance.

<sup>59</sup>*Ibid.*, sections 48–51A.

2 years.<sup>60</sup> An associate is defined as a spouse, relative, spouse of a relative, relative of a spouse, person in a business partnership, person in an employment relationship, beneficiary of a fiduciary relationship or other relationship, and a company of the debtor or other associate could also be an associate. Relatives include siblings, uncles and aunts, nieces and nephews, and direct ancestors or descendants. Half-blood relatives are considered full-blood relatives, and stepchildren or adopted children are considered as his/her own children. Children born out of wedlock are considered legitimate children of their mother and their alleged father. References to spouses include former spouses.<sup>61</sup> In addition, Hong Kong invalidates the transfer of existing or future book debts by a debtor engaged in business.

#### 4.1.3 | Interim summary

It is reasonable to assume that the regional practice in China's mainland regarding the property declaration and the obligation to cooperate with investigations by spouses or children or other relatives is based on the consideration of avoiding the transfer of property from the debtor to the related person in order to evade the debt. However, it is obvious that the scope of the related persons is not well defined in those approaches. There is also no specific provision for the transfer of property to related persons can be revoked but only based on the general provisions of the revocation of the trustee's right to recover the property.

On the other hand, the provisions on the property declaration requirements for spouses or children also have the suspicion that the declaration obligation is overly expanded. Although spouses or children have a closer connection with the debtor in terms of property relationship, but it is still the debtor's insolvency rather than the insolvency of the whole family, and the requirement of declaration of the property of the whole family violates the basic principle of the self-responsibility of the civil law. In addition, the obligation of the spouse or children and any other related persons to cooperate in the investigation is also a due sense of the trustee's exercise of authority, and the provision of this is not indispensable. From this we can see that it is necessary to provide for the disposal of property by the debtor to related persons, but it is neither necessary nor complete to separately require that the property of the debtor's spouse and children be declared in personal insolvency.

In the future legislation of China's mainland, more attention should be paid to the determination of related persons and the revocation of related behaviours. In fact, CNCC and the Code of Civil Procedure contain similar references to the importance of "interested persons" in matters such as preservation, enforcement, and the opening of special procedures.<sup>63</sup> However, there is no specific definition of "interested person" in the law, which has given rise to a lot of discussion and has not yet made any conclusion.<sup>63</sup>

For insolvency procedure concretely, combining the relevant expressions of CNCC and CNCPL and referring to the experience of Taiwan and Hong Kong, the related persons should be defined into two categories, one is the persons with kinship relationship, including spouses,

<sup>60</sup>Ibid., section 51B.

<sup>61</sup>Article 84, paragraph 2, Article 104, Article 186, Article 190, paragraph 1, Article 191, paragraph 1, Article 193, Article 194, paragraph 1, Article 226, Article 228 and Article 230, CNCPL; Article 24, Article 40, Article 44, Article 45, Article 50, Article 53, Article 70, paragraph 3, Article 94, paragraph 2, Articles 218–220, Article 234 and Article 1,146, CNCC.

<sup>63</sup>See Xi lian Li, "The Definition of 'Interested Parties' in CNCPL" (《民事诉讼法上的“利害关系人”之界定》) (2012) 1 *Legal Science (Northwest University of Political Science and Law Journal)* (《法律科学(西北政法大学学报)》) 139–147, 139.

<sup>63</sup>Article 1045, CNCC.

blood relatives, and relatives by marriage.<sup>64</sup> Secondly, persons with interests, specifically including members living together besides family members, persons with partnership, employment, fiduciary relationship, or beneficiaries of other relationships. In addition, any person who has the above relationships within 1 year before the filing of the insolvency application should be included as a related person in terms of time.<sup>65</sup> And related persons should also possibly include legal persons or other entities. The exercise of the right of avoidance and the validity of the act of transfer of property can be referred to CNEBL.<sup>66</sup>

## 4.2 | Punitive liability for breach of the duty of integrity

The other point for concern is that the punitive consequences for the debtor's breach of the duty of integrity, that is, a fine or detention. The Jiangsu Answers and the Shenzhen Regulations even provide that close relatives or interested persons of the debtor who violate the duty of integrity may also be fined or detained.<sup>67</sup> In addition the Shenzhen Regulations further provide for penalties for the abuse of personal insolvency by creditors and interested persons.<sup>68</sup> The Taiwan Clearance Statute also combine the consequences of breaching the relevant obligations in personal insolvency with criminal penalties.<sup>69</sup> Hong Kong has also made specific provisions on criminal penalties in the event of a debtor's breach of the duty of integrity, where it is considered an offence to commit fraudulent acts in the declaration of property and during the discharge examination period, or to obtain credit during the discharge examination period, to engage in gambling, to fail to keep appropriate books of account, or to abscond with the money or hide it in order to avoid being served.<sup>70</sup>

In CNCPL, there are provisions on fines or detention for participants in litigation or executed persons who falsify or destroy evidence, falsely report property, or transfer property in violation of the law.<sup>71</sup> It can be seen that the civil judicial process for violations of administrative penalties in order to protect the judicial authority, is a traditional practice in China's mainland. As to the question of whether the penalty should be imposed only on the debtor or on all participants in the procedures, in the opinion of the author, it should be equally applicable to all participants in the procedures. On the one hand, where the purpose of the penalty is to preserve judicial authority, any contempt or offense against judicial authority, whether by a creditor or a debtor or other related person, should be subject to the penalty. On the other hand, both debtors and creditors are at risk of abusing personal insolvency. In addition, if the penalty is imposed only on the debtor, there is a risk of discrimination in insolvency. Personal insolvency is a rescue procedure for the economic rehabilitation of natural person debtors and is one of the tools of a modernized insolvency system, so that there can be no "presumption of guilt" of the debtor, and penalties cannot be set on the basis of the assumption in advance that the debtor has the purpose of evading the debt and that the creditor is completely innocent. Both

<sup>64</sup>Consider that the restriction period for revocable acts in the existing CNEBL is also 1 year: Article 31, CNCPL.

<sup>65</sup>Articles 31–33, CNEBL.

<sup>66</sup>Q&A 2, Jiangsu Answers; Article 27, Wuxi Guidelines; Article 41, paragraph 3, Wenzhou Opinions; Articles 68–71, Taizhou Procedures; Article 59, Zhejiang Guidelines; Article 54, Yinchuan Opinions; Article 167, Shenzhen Regulations; Article 39, Chengdu Guidelines.

<sup>67</sup>Article 169, Shenzhen Regulations.

<sup>68</sup>Articles 146–147, Taiwan Clearance Statute.

<sup>69</sup>Sections 129 and 131–135, Hong Kong Bankruptcy Ordinance.

<sup>70</sup>Article 111, CNCPL.

<sup>71</sup>See Liu (above note 30), 88.

debtors and creditors, as well as other participants in the litigation, should bear adverse consequences for their breach of the obligation to participate in individual insolvency procedures, and the consequences should correspond to the obligations set. In that regard, the Shenzhen regulations could serve as a blueprint.

### 4.3 | Discharge examination period

The discharge examination period is the period of time after a debtor has been declared eligible for personal insolvency, during which the debtor demonstrates by his/her integrity and diligence that he/she is serious about restarting his/her life, and then the court can decide, depending on his/her behaviour, whether or not he/she should be declared successful in personal insolvency and have his/her residual debts discharged. There are restrictions on the debtor's substantially all property and certain personal rights during the discharge examination period, and the restrictions are lifted at the end of the examination period, which is also referred to as loss of rights and restoration of rights in Taiwan. The discharge examination period is a comprehensive period, in which debt discharge is its core and focus.<sup>72</sup>

#### 4.3.1 | Situation in China's mainland

At present, the regional practice in China's mainland for the provisions of the discharge examination period are mainly three types. The first type is to set up the statutory discharge examination period with additional punitive extension clauses. In the Dongying Opinions is so arranged. That is, set up 3 years discharge examination period, due if the debtor is found to have violated the obligation situation can be extended for 2 years as the case may be.<sup>73</sup> The second is to set up a separate early termination clause in addition to the general statutory discharge examination period; Shenzhen and Wuxi are so arranged.<sup>74</sup> That is, the debtor in the stipulated period of time in advance of the repayment to a certain proportion can be regarded as the discharge examination period ended early. The third is to set the statutory discharge examination period at the same time also encourages the creditor and debtor's independent negotiation; Zhejiang and Yinchuan are so arranged.<sup>75</sup> That is, if the creditor agreed, there could also be no examination period. The length of the discharge examination period varies from place to place, with Jiangsu, Zhejiang, and Yinchuan setting the discharge examination period at 5 years or more. The discharge examination period in Shenzhen and Dongying is set at 3 years.

#### 4.3.2 | Situation in Taiwan and Hong Kong

The discharge examination period in the Hong Kong also has a punitive design<sup>76</sup> that is, if there is a violation during the examination period, the calculation of the examination period will be

<sup>72</sup>Article 55, paragraph 2, Dongying Opinions.

<sup>73</sup>Article 57, paragraph 1, Wuxi Guidelines; Article 100, paragraph 2, Shenzhen Regulations.

<sup>74</sup>Article 57, Zhejiang Guidelines; Article 52, Yinchuan Opinions.

<sup>75</sup>Section 30A, Hong Kong Bankruptcy Ordinance.

<sup>76</sup>Article 75, Taiwan Clearance Statute.



suspended, and the suspension period can may extend for up to 4 years. If the debtor fails to comply with the obligations of the examination period, the debtor may face up to a maximum of 7 years of the examination period, and for the re-insolvent person may be 8 years.

The discharge examination in the Taiwan is distinguished by the loss of right and the restoration of right, and the period of discharge examination is the period of loss of right. The period of loss of right is determined by the reorganisation agreement, but there are also exceptions by the early reinstatement; that is, in the case where the debtor continues to perform for a justifiable reason that is not attributable to its own side and there are also difficulties in extending the period and at the same time the debtor has paid more than two-thirds of all debts and the total amount of unsecured and non-priority claims paid exceeds the total amount paid under the liquidation procedures, the debtor may apply to the court for a waiver of liability and for restoration of rights.<sup>77</sup> In liquidation procedures, the general discharge examination period is set at 5 years, or 3 years if there has been no misconduct to the detriment of the claim within 3 years after the liquidation procedures have been concluded.<sup>78</sup>

### 4.3.3 | Interim summary

The purpose of the discharge examination period is, on the one hand, to give applicants for personal insolvency a serious warning of the consequences, so as to prompt the debtor to open personal insolvency procedures prudently, thereby effectively avoid abuse of the insolvency application. Once the debtor considers applying for personal insolvency, he/she must be prepared to have his/her behaviour and rights restricted during the discharge examination period and transfer all his/her property except for the necessities of life to the trustee. On the other hand, in order to make an effective clarification of the debtor's property, during the discharge examination period, both the court and the trustee should conduct an inventory of the debtor's property ex officio, for example, to recover any improper transfer of property within a certain period of time prior to the insolvency application, and to track down the debtor's hidden property, and creditors can also report to the court or the trustee if they find any hidden or transferred debtor's property. The examination period is also a testament to the sincerity of the debtor in restarting his/her or her life, and only if he/she passes the test of the examination period and fulfils his/her obligations honestly and diligently during the period of examination can he/she or she be judged to have the necessity to be granted insolvency.

Therefore, for the first kind of punitive design, the author believes that it is unnecessary. The discharge examination period itself is already a period of investigation that must be endured to limit the debtor's rights and interests and at the same time impose more prudent and diligent obligations on the debtor because the debtor wants to obtain relief; it is the price that the debtor has to pay in order to realize the debt discharge; that is, it is also a screening of whether the debtor is worthy of being allowed to be discharged or not.<sup>79</sup>

If the debtor fails to conscientiously fulfil the relevant obligations during the examination period, the debtor already has a very high moral risk of insolvency, and it can be assumed that the debtor has the intention of evading its debts by means of insolvency, then it does not have

<sup>77</sup>Ibid., Article 144.

<sup>78</sup>See Shanbin Zhang and Jiangbo Yu, "Construction of the Exemption Examination Period System for Personal Bankruptcy" (《个人破产免责考察期制度的构建》) (2022) 4 *Hubei Social Science* (《湖北社会科学》) 131–138, 134.

<sup>79</sup>See Liu (above note 30), 90.

the characteristics of an “honest but unfortunate” debtor worthy of being permitted to enter into a successful insolvency, and further punitive extensions are therefore no longer necessary, and it should be declared to have been refused personal insolvency.

The second and third institutional designs each have their own advantages and are not contradictory to each other and can be utilized in combination. In the second design, allowing the debtor to discharge debts in advance under certain circumstances is conducive to creating an incentive for the debtor to repay as much as possible as soon as possible, which is also conducive to the realization of the creditor's debts, and is a win-win situation for both parties. Can also be regarded as a reward for honest and diligent debtors. The third design is more open and tolerant on the basis of the second one, and also fits the fundamental concept of civil law's autonomy. Particularly for non-private debtors, this provision allowing for a self-negotiated waiver of the inspection period makes for a more efficient exit from the market.

The author is of the view that the time limit for the discharge examination period should not be too long. On the one hand, in the light of extra-territorial experience, there is a tendency to shorten the current discharge examination period because, with the accelerated pace of the contemporary economy, an excessively long discharge examination period will increase the cost of the debtor's exit from the market, and will not be more beneficial to the creditors themselves.

It is better to strictly control the conditions of debtor's insolvency than to increase the punishment to the debtor, so that the insolvency procedure can be utilized in a more qualified manner, preventing the bad debtor from using the insolvency procedure to evade debts and avoiding the abuse of the insolvency procedure. On the other hand, an excessively long exemption examination period will also face many difficulties at the practical operation level, increase judicial costs, and be unfavourable to the improvement of judicial efficiency. If the court or insolvency administration wants to continuously supervise the debtor for several years, it is difficult to ensure the continuity of the procedure if there is a change in the competent personnel or if the data filing is not comprehensive, and it is easy to manage the discharge examination period of several years in a chaotic manner or superficially.<sup>80</sup>

#### 4.4 | Blocking period

In order to prevent the procedure from being abused, a blocking period is used to be set for a further application for insolvency, so that no further application for insolvency can be made within a certain period of time after the initial application.

This institutional design is not currently found in any document other than the Shenzhen Regulations in China's mainland, where the blocking period is set at 8 years after the last successful insolvency.<sup>81</sup> The blocking period is 7 years in Taiwan.<sup>82</sup> While Hong Kong has not specifically set up a blocking period, it has differentiated whether it is a repeat insolvency or not by making a distinction in the discharge examination period. The examination period for a debtor in a repeat insolvency and the punitive stay in the event of dishonest conduct will be longer.<sup>83</sup>

The establishment of a blocking period also complements the grounds for dismissal of applications for insolvency and residual debt discharge, and together they build a wall of protection

<sup>80</sup> Article 14, paragraph 1, subparagraph 4, Shenzhen Regulations.

<sup>81</sup> Article 134, Taiwan Clearance Statute.

<sup>82</sup> Section 30A(2)–(3), Hong Kong Bankruptcy Ordinance.

<sup>83</sup> Taiwan Clearance Statute (*passim*).

against the abuse of personal insolvency. In conjunction with the previous discussion on whether a moral threshold should be set for the acceptance of personal insolvency, the blocking period provides a favourable argument for not having to set a moral threshold in advance.

As China has not had personal insolvency system before, for the debtors who have been plunged into the quagmire of over-indebtedness, there will not be any psychological presuppositions and substantive preparations for becoming a good debtor before, but they are precisely the groups who need to realize self-salvation through the insolvency system the most. Therefore, it is more appropriate to set more lenient entry conditions for first-time debtors applying for personal insolvency and debt discharge, and to be lenient but strict, so as to limit the conditions for success in insolvency, and the blocking period can also wake up the debtors to cherish the opportunity, and they will not be given the chance to start over easily if they put themselves into substantive insolvency again.

All things considered, it can be argued that the setting of a blocking period is necessary, as the law can only provide limited relief and not unlimited underwriting. For personal debtors, the effective economic productivity of their lifetime is limited, and the lessons learnt from a single insolvency are painful. If debtors are allowed to file for insolvency repeatedly within a short period of time, it will not be conducive to the clarification of their property relations, whether they are entrepreneurs or consumers with only personal consumption, whose property relations need time to settle down. Repeated bankruptcies in a short period of time do not make sense. It tends to give debtors a reverse incentive to take advantage of legal loopholes and repeatedly evade their debts. Setting a certain blocking period is also a way to give debtors more responsibility for their own lives while they venture out into the world.

#### 4.5 | A simplified procedure

A simplified procedure is procedure for non-operator individuals with simple property relationships. This is the case in the Taiwan Clearance Statute<sup>84</sup> and is also designed in the Shenzhen Regulations.<sup>85</sup> Usually, the judgement of whether a simplified procedure can be applied has a great deal to do with whether the debtor's property relationship is clear and unambiguous. The purpose of the design of the simplified procedure is also to expand the application of personal insolvency and improve the efficiency of the procedure, usually the simplified procedure will be shorter than the ordinary procedure, and the process will be simplified, for example, allowing written hearings, etc., but there will be no simplification of the review matters, so it is the judge who determines whether to apply for the simplified procedure, not the debtor who applies for the simplified procedure. The Shenzhen Regulations provides that if it is found in the course of the hearing that simplified procedure is not applicable, they may be converted to ordinary procedures, and what has already been examined will not be affected.<sup>86</sup>

In terms of the conditions for the application of simplified procedures, the Shenzhen Regulations provides that simplified procedures may be applied if the debtor's property status is clear and the facts of the case are simple, and further provides that if the debtor's debt does not exceed RMB 200,000, judges may sit alone.<sup>87</sup> There is no further provision on the specific rules

<sup>84</sup>Chapter X—Simplified Procedure (Article 148 *et seq.*), Shenzhen Regulations.

<sup>85</sup>*Ibid.*, Article 154.

<sup>86</sup>*Ibid.*, Article 148.

<sup>87</sup>Article 2, Taiwan Clearance Statute.

for determining whether the property status is clear and the facts of the case are simple. However, it can be seen that the size of the debt can be used as a reference standard, but whether the standard is reasonable is subject to further debate.

Does the small size of a debt necessarily mean that “the property situation is clear and the case is simple”? For the application of simplified procedures, Taiwan has also stipulated that those who have been engaged in business activities or small-scale business activities within 5 years, with an average monthly turnover of less than NTS 200,000, may be subject to consumer debt settlement procedures. It can be seen that Taiwan will also include the size of the property into the consideration of the prerequisites for the application of simplified procedures.

The size of the property as the judgement standard is mostly from the judicial cost considerations. In personal insolvency procedure, the size of the debtor's estate is essentially the subject matter of the case. The application of simplified procedure for cases with a small amount of subject matter is similarly applied in ordinary civil procedures and is also in line with the choice of judicial efficiency. However, the “small size of the property” does not logically prove that the “property relationship is clear,” and there may be cases where the property is small, but the debt relationship is large. The underlying logic of “clear property relations” is that debt relations are clear. From this perspective, the indicator of the number of creditors could also be considered as a criterion. A smaller number of creditors means fewer debt relationships to deal with, easier agreement on the distribution of the debtor's property, quicker convening of the creditor's process, etc. Therefore, the number of creditors and the size of the claim can be combined as a basis for the application of a simplified procedure. For example, stipulating that simplified procedures can be applied if the number of creditors is less than 20 and the size of the claim is less than RMB 200,000.

## 5 | SUMMARY AND OUTLOOK

The judicial practice of personal insolvency has not only appeared in the economically developed regions in the east and south of China but has also been actively tried out in the northwest, southwest, and north of China, which are not known for their active economic activities. In particular, the Yinchuan Opinion, which draws on mature and advanced legislative experience in terms of the requirement of good behaviour as a success element for insolvency as well as the provision that consensual discharges can be made without an examination period, is extremely eye-catching in terms of judicial practice on personal insolvency system in China's mainland. Meanwhile, as the only legislative practice, the Shenzhen Regulations provide a reference for the future legislation of personal insolvency system in terms of style and structure. However, the grounds for insolvency, the moral gateway, and the specific provisions for related persons are still subject to further discussion and clarification.

For a nationwide implementation of the personal insolvency system in China's mainland, a more comprehensive and nuanced rule design is essential. The regional practices within China's mainland offer invaluable insights into local adaptation, while Taiwan and Hong Kong provide models of mature institutional frameworks. The amalgamation of these two types of experiences will greatly enrich the future development of China's mainland personal insolvency system.

Looking ahead, a significant consideration for the evolution of China's mainland personal insolvency system is the potential development of a unified insolvency code, as opposed to maintaining separate legislation for personal insolvency. This is because there are no significant

differences in the reasons and procedures between personal and corporate insolvency. A unified application of insolvency reasons for both individuals and corporations can be adopted, specifically considering “inability to settle debts as they fall due, and the assets are insufficient to settle all the debts or there is a clear lack of solvency” as grounds for insolvency applications for both. Adopting a unified legislative approach can reduce redundant expressions, seek common ground while respecting differences, and save on future judicial interpretation efforts. Separate chapters may be established in the insolvency code for personal insolvency, such as a “debt discharge chapter” and a “simplified procedure chapter,” to define the unique aspects of personal insolvency, while the rest of the general insolvency procedure provisions can be directly applied where not specifically mentioned. This approach will be beneficial in linking personal insolvency with other insolvency procedures, maintaining consistency in the insolvency system.

Furthermore, farmers and foreigners with property relations in China’s mainland should be allowed to apply for personal insolvency. The criterion for insolvency eligibility should be based on having property relations in China’s mainland, rather than on nationality or occupation. Under certain conditions, all natural persons with property relations in China’s mainland should have equal rights to apply for personal insolvency.

It is also important that in order to prevent abuse of personal insolvency procedure, the obligation to declare the debtor’s property and changes therein at the time of filing for insolvency and during the discharge examination period should be strictly reviewed. The transfer of property prior to the debtor’s filing for insolvency and during the discharge examination period should also be strictly limited, especially to related persons. In this regard, the scope of related persons must be further clarified. The scope of related persons should not be limited to relatives, but should also take into account persons with interests. While the reporting obligation should extend only to the debtor, the obligation to cooperate with the investigation should extend to all related persons. If there was any subjective and intentional breach of the obligation, both the debtor and the related persons should bear the corresponding negative consequences.

Additionally, regarding the setting of the discharge examination period and the re-insolvency blocking period, a combination of shortening the examination period but extending the blocking period can be considered, drawing from international experiences. A 3-year discharge inspection period and an 8- to 10-year blocking period are suggested. The combined application of these periods can ensure the seriousness and credibility of the personal insolvency system while giving debtors a chance for a fresh start.

In terms of procedure, a simplified process can be established. For debtors with clear property relations, the court can decide to apply a simplified procedure to expedite the insolvency process, improve the efficiency of judicial handling of insolvency, and expand the applicability of personal insolvency, making it a more universal system conducive to economic vitality in the modern socialist market economy of China’s mainland.

Based on the limitation of space, this paper cannot possibly analyse all the regional practice in China and the concrete cases of Taiwan and Hong Kong, and it is believed that the specific cases can provide further practical experience. In addition to the specific design of the above five factors discussed in this paper, the selection and appointment of the trustees, the transfer of property, the debtor’s pre-petition behaviour of the revocation, and debt settlement counselling before the insolvency procedure have not been discussed, which is also important for the guarantee of effective implementation of personal insolvency system. Only by being thorough and meticulous in system design, the personal insolvency system can really play its due role, so that natural persons can get reasonable help and protection in economic difficulties, and at the same

time safeguard the lawful rights and interests of creditors, and maintain the stability and fairness of the market.

### ACKNOWLEDGMENT

The author would like to thank her doctoral supervisor, Prof. Dr. Stephan Madaus, for his invaluable guidance and support throughout this research. The author is also sincerely grateful to the anonymous reviewers for their insightful comments and suggestions for improvement. Special thanks go to the Editor-in-Chief of *International Insolvency Review*, Prof. Dr. P. J. Omar, and the Wiley editorial team for their continuous and comprehensive support in the editing and publication of this article. The author further appreciates the China Scholarship Council (CSC, Grant No. 202308080018) for its long-term financial support during the author's Ph.D. studies and extends special acknowledgment to ULB Sachsen-Anhalt and the DEAL project for their financial support in making this publication open access. Open Access funding enabled and organized by Projekt DEAL.

**How to cite this article:** Liu, P. (2024). Legislative developments in personal insolvency in China's mainland: A comparative analysis of regional practices in China's mainland, Hong Kong, and Taiwan Region. *International Insolvency Review*, 33(3), 473–492. <https://doi.org/10.1002/iir.1553>