Msr Mingming Ma*
Profesor dr Qingwu Li**

Istraživanje standarda nesolventnosti društava za osiguranje iz uporedne perspektive

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Apstrakt

Za društva za osiguranje u Kini uspostavljen je višeslojni okvir za upravljanje rizicima, uključujući tržišne, administrativne i sudske aspekte. Međutim, nedostatak praktičnosti zakonodavnog okvira najvišeg nivoa i koncentracija regulatorne moći ometali su praktičnu primenu mehanizma za izlazak sa tržišta kroz stečajne postupke. U poređenju sa Sjedinjenim Američkim Državama, Japanom i Velikom Britanijom, postoje značajne razlike u izboru zakonodavnog modela o stečaju društava za osiguranje, standardu za pokretanje stečajnog postupka osiguravajućih društava i granice između administrativnih mera za upravljanje rizicima i sudskih postupaka. Stoga je svrha ovog rada da ukaže na nedostatke kineskog zakonodavstva o uzrocima stečaja osiguravajućih društava, pojašnjenju standarda nesolventnosti osiguravajućih društava i nesmetanoj primeni procedura za stečaj društava za osiguranje.

Ključne reči: stečaj društva za osiguranje, standard nesolventnosti, regulatorni standard, mere za upravljanje rizicima

1. UVOD

Produbljivanjem tržišno orijentisane reforme privrednog i finansijskog sistema, Kina je napravila značajne pomake u izgradnji svog tržišta osiguranja, koje je preteklo Japan i postalo drugo najveće svetsko tržište osiguranja u 2017. godini. Međutim, razvoj prosperiteta neizbežno prati akumulacija rizika, a dok industrija osiguranja postiže skokoviti razvoj interne akumulacije rizika nastavljaju da rastu, prevare u osiguranju, nepravilnosti u primeni fondova osiguranja na rešavanje problema su beskrajne, usluge osiguranja kao specijalizovana delatnost za upravljanje rizikom izgleda postati „tvorac rizika" (Sun, 2019, 115). U stvari, od primene „C-ROSS-a"[1] 2016. godine, jedan broj osiguravajućih društava je bio podvrgnut različitim nivoima regulatornih mera zbog nedovoljne solventnosti. Štaviše, u julu 2022. godine, Finansijski sud u Pekingu je odobrio zahtev za sanaciju nesolventnosti koji je podnela Kineska komisija za nadzor bankarstva i osiguranje (u daljem tekstu: KKNBO)[2] protiv „Jian" društva za osiguranje imovine i nezgode, razbijajući anomaliju da nijedno društvo za osiguranje nije otišlo u stečaj u Kini od obnove delatnosti osiguranja.

Međutim, u poređenju sa SAD, Japanom, Velikom Britanijom i drugim razvijenim tržištima osiguranja, postojeće kinesko zakonodavstvo o stečaju osiguravajućih društava ima mnogo neadekvatnosti, a nedovoljna razrađenost ponuda zakonskih pravila stvoriće prepreke za upravljanje problematičnim rizicima osiguravajućih društava u praksi, kao što su: (1) nehijerarhijska priroda regulatornih mera regulatora, za koju se sumnja da je „paternalistička"; i (2) pitanje administrativnog zadiranja u sudsku vlast. Stoga je svrha ovog rada da ukaže na nedostatke kineskog zakonodavstva o uzrocima stečaja osiguravajućih društava,

* Doktorand Univerziteta međunarodnog biznisa i ekonomije, Pravni fakultet, Peking, Kina. Imejl: m13298139650@163.com

** Univerzitet međunarodnog biznisa i ekonomije, Pravni fakultet, Peking, Kina. Imejl: 01929@uibe.edu.cn

[1] "C-ROSS" (China Risk-Oriented Solvency System), skraćenica za kinesku drugu generaciju regulatornog sistema solventnosti predstavlja riziku-orjentisan regulatorni okvir koji je formulisala Kineska komisija za nadzor osiguranja (hereinafter referred to as "CIRC") radi jačanja i unapređenja nadzora solventnosti društava za osiguranje.

[2] Kineska administrativno-regulatorna komisija za nadzor osiguranja osnovana je 18. novembra 1998. godine i zamenjena je Kineskom komisijom za nadzor bankarstva i osiguranja 2018. godine, a ona je zamenjena Kineskom agencijom za nadzor finansijskih institucija osnovanoj 2023. godine.

pojašnjenju standarda nesolventnosti osiguravajućih društava i nesmetanoj primeni procedura za stečaj društava za osiguranje.

2. AKTUELNO ZAKONODAVSTVO O STANDARDU NESOLVENTNOSTI ZA DRUŠTVA ZA OSIGURANJE U KINI

2.1. Postojeći pravni okvir za upravljanje rizicima u kineskoj delatnosti osiguranja

Trenutno, Kina nije donela poseban zakon o stečaju društava za osiguranje, ali je usvojila „monistički model zakonodavstva", primenjujući Zakon o stečaju privrednih društava Narodne Republike Kine („Zakon o stečaju", 2006), dopunjen nizom propisa kao što su Zakon o osiguranju Narodne Republike Kine („Zakon o osiguranju" 2015), Mere za upravljanje garantnom rezervom osiguranja (2022) i Pravila o upravljanju solventnošću društava za osiguranje (2021). Prvo, da bi se obezbedilo da regulatorni organi mogu odmah da pokrenu mere za upravljanje rizicima, Zakon o osiguranju (Zakon o osiguranju, 2015, čl. 137) uspostavlja regulatorni sistem usmeren na solventnost. Drugo, u zavisnosti od ozbiljnosti nedostatka u solventnosti društva za osiguranje, Zakon o osiguranju (Zakon o osiguranju, 2015, čl. 138-149) predviđa mere za rešavanje rizika različite težine, od visokog do niskog, odnosno „administrativnim ograničenjima", „reorganizacijom", „prinudnom upravom", „stečajem", „otkazivanjem" i njihovim odgovarajućim mehanizmima primene. Treće, propisi kao što su Pravila o upravljanju solventnošću društava za osiguranje (2021), Mere za upravljanje korišćenjem fondova osiguranja (2018), Mere za upravljanje kapitalom društava za osiguranje (2018), a usvojene su i Mere za regulatorne rejtinge društava za osiguranje lica (2024), koje imaju za cilj da precizno identifikuju rizik solventnosti, rizik ponašanja na tržištu i rizik korporativnog upravljanja društavima za osiguranje. Konkretno, osiguravajuća društva moraju ispuniti minimalni osnovni koeficijent adekvatnosti solventnosti od najmanje 50%, kombinovani koeficijent adekvatnosti solventnosti ne manji od 100% i rejting kapitala zasnovan na riziku od najmanje B kako bi se smatralo da ima adekvatnu solventnost.

Možemo da zaključimo da progresivne mere za upravljanje rizicima daju regulatornim vlastima višestruke izbore prilikom sprovođenja različitih regulatornih politika. Međutim, postojeća regulatorna praksa je pokazala da je problem nedovoljnog pravnog okvira i dalje ozbiljan. Opšte ili ovlašćujuće odredbe koje postoje u zakonodavnom okviru najvišeg nivoa slabe određenost normativnih ciljeva zakonskih odredbi, što dovodi do kritike prekomerne diskrecione moći regulatornih organa i nepostojanja efektivnog nadzora.

2.2. Problemi u postojećem stečajnom zakonodavstvu kineskih društava za osiguranje

2.2.1. Primena standarda nesolventnosti opštih privrednih društava može odložiti spasavanje društava za osiguranje

Uzrok nesolventnosti je pravna činjenica kojom se utvrđuje nesposobnost dužnika da izmiri svoja dugovanja, što omogućava strankama da podnesu zahtev za stečaj i na osnovu koje sud pokreće stečajni postupak i proglašava dužnika nesolventnim (Li, 2011, 29). Trenutno, Kina nema posebne odredbe o uzrocima nesolventnosti društava za osiguranje, ali primenjuje pravila koja važe za privredna društva, koristeći imovinsko stanje društva za osiguranje kao jedini pokazatelj da li treba pokrenuti stečajni postupak. Konkretno, Zakon o stečaju (Zakon o stečaju, 2006, čl. 2) predviđa opšte uzroke nelikvidnosti i posebne uzroke sanacije za osiguravajuća društva, odnosno „Kada privredno pravno lice ne izmiri svoj dug u roku i ako njegova imovina nisu dovoljni da izmiri sva dugovanja ili ako je očigledno nesposobno da isplati svoje dugove, njegove obaveze će se likvidirati u skladu sa odredbama ovog zakona. Kada se privredno pravno lice nalazi u navedenim okolnostima ili je očigledno da nije u mogućnosti da izmiri svoje dugove, ono može biti predmet oživljavanja u skladu sa odredbama ovog zakona." Istovremeno, Zakon o stečaju (Zakon o stečaju, 2006, čl. 134)[3] dozvoljava finansijskim institucijama, uključujući osiguravajuća društva, da postanu nesolventne, a regulator može podneti sudu zahtev za stečaj pod okolnostima navedenim u članu 2 tog zakona. Pored toga, Zakon o osiguranju (Zakon o osiguranju, 2015, čl. 90 i 148) ponavlja odredbe Zakona o stečaju i uzrocima nesolventnosti finansijskih institucija, odnosno da li se zahtev za stečaj podno-

[3] „Kada se finansijske institucije kao što su poslovna banka, kompanija za hartije od vrednosti ili osiguravajuće društvo nalaze u bilo kojoj od sledećih okolnosti kako je propisano čl. 2 ovog zakona, organ za finansijski nadzor pri Državnom savetu podnosi zahtev narodnom sudu za reorganizacijom ili stečajem finansijske institucije. Kada organ finansijskog nadzora pri Državnom savetu donese, u skladu sa zakonom, mere kao što su uvođenje prinudne uprave i čuvanje finansijskih institucija koje nose velike poslovne rizike, može podneti zahtev narodnom sudu za obustavu parničnog ili izvršnog postupka, pri čemu navedena finansijska institucija je tuženi ili stranka protiv koje se donosi presuda ili rešenje. Kada je finansijska institucija u stečaju, Državni savet može, u skladu sa ovim zakonom i drugim relevantnim zakonima, da formuliše odgovarajuće mere za sprovođenje."

si neposredno sudu u skladu sa čl. 90[4] ili se u postupku reorganizacije i prinudne uprave društva za osiguranje on pretvara u stečajni postupak u skladu sa čl. 148[5], pri čemu se primenjuju odredbe o standardu za stečaj iz čl. 2 Zakona o stečaju. Međutim, prosuđivanje o tome da li je finansijska institucija nesolventna prema standardu nesolventnosti opšteg stečajnog prava ne ukazuje vrednosnu orijentaciju nesolventnosti finansijske institucije u korist opstanka društva za osiguranje radi finansijske sigurnosti, jer nesolventnost finansijskih institucija ima posebne karakteristike koje se razlikuju od nelikvidnosti drugih privrednih društava (Zhu, Jiang, 2009, 209-220).

2.2.2. Dileme u vezi sa procedurom likvidacije društava za osiguranje kojima je oduzeta dozvola za rad po Zakonu o osiguranju

Pored dva načina dobrovoljne i prinudne likvidacije u cilju stvarnog izlaska sa tržišta osiguranja, Zakon o osiguranju (Zakon o osiguranju, 2015, čl. 149)[6] predviđa mogućnost poništenja likvidacije. Iako se pomenutim članom zakona izričito preciziraju okolnosti u kojima se dozvola osiguravajućih društava može oduzeti i organ nadležan za oduzimanje dozvole, on se ne bavi pitanjima kao što su priroda otkazivanja, obim nezakonite radnje zbog nejasnoće zakonodavstva, a neki naučnici smatraju da likvidacija oduzimanjem dozvole za rad zbog „nezakonitog poslovanja" kako je navedeno u tom članu zapravo stečaj zbog nesolventnosti, i na taj način zaključuju da nesolventnost kineskih društava za osiguranje usvaja standard dvostruke nesolventnosti „standarda za imovinu privrednog društva" i „standard nezakonitog poslovanja", u meri da solventnost pada ispod regulatornih zahteva i da li se likvidacija sprovodi u skladu sa zakonom o stečaju ili zakonom o privrednim društvima (Lei, Sun, 2014, 14).

2.2.3. Pravo društava za osiguranje da pokrenu stečaj nije ekskluzivno pravo regulatora

Članovi 90 i 148 Zakona o osiguranju određuju lica koja imaju pravo da pokrenu stečaj. Što se tiče predmeta predlog za pokretanje stečaja, pored ponavljanja čl. 134 Zakona o stečaju, koji predviđa da regulator može pokrenuti stečaj nad finansijskim institucijama, članom 90 takođe je predviđeno da i društvo za osiguranje i njegovi poverioci mogu podneti zahtev za stečaj nad društvom za osiguranje ako postoji zakonski osnov za stečaj. Pored toga, u cilju održavanja sigurnosti i stabilnosti finansijskog tržišta i sprečavanja poremećaja i zloupotreba tržišta osiguranja prouzrokovanih pokretanjem stečajnog postupka u praksi, Zakon o osiguranju daje pravo regulatornom organu osiguranja da daje saglasnost i odobrova predloge za pokretanje stečajnog postupka nad navedenim subjekatima. Međutim, posledica takvog zakonskog rešenja su novi problemi u vezi sa tumačenjem, odnosno da li je pravo na pokretanje stečaja osiguravajućeg društva suštinski monopolizovano u korist regulatora osiguranja, a moć drugih subjekata da pokrenu stečaj društva za osiguranje suštinski prikriveno negiran u slučaju pasivnosti regulatora osiguranja.

3. PITANJA U PRAKSI UPRAVLJANJA RIZICIMA DRUŠTVA ZA OSIGURANJE

U praksi, Kina je u više navrata usvajala različite mere za upravljanje rizicima kako bi odgovorila na rizike koje predstavljaju osiguravači sa nedovoljnom solventnošću. Međutim, neadekvatni resursi će dovesti do regulatornih praznina, a postojeće zakonodavstvo otežava obezbeđivanje savršenog pravnog izlaza za kineske osiguravače. Tipični problemi su nedostatak hijerarhijskog pristupa upravljanju rizicima zbog prekomerne regulacije nakon što su rizici nastali, kao i zadiranje izvršne vlasti u pravosuđe.

3.1. Mere za upravljanje rizicima nisu hijerarhijske

U praksi, prekomerna regulacija se odnosi na činjenicu da nakon izloženosti osiguravajućih društava riziku, regulator ne preduzima progresivne regulatorne mere od niskog do visokog stepena ozbiljnosti, već

[4] „Kada društvo za osiguranje potpadne pod bilo koju od okolnosti propisanih čl. 2 Zakona o stečaju privrednih društava Narodne Republike Kine, po odobrenju organa za nadzor osiguranja pri Državnom savetu, društvo za osiguranje ili bilo koji njen poverilac može da se obrati narodnom sudu za reorganizaciju, mirenje ili stečajnu likvidaciju firme; organ za nadzor osiguranja pri Državnom savetu može se obratiti i narodnom sudu za reorganizaciju ili stečajnu likvidaciju preduzeća."

[5] „Kada društvo za osiguranje koje je reorganizovano ili pod prinudnom upravom potpadne pod okolnosti propisane čl. 2Zakona o stečaju privrednih društava Narodne Republike Kine, organ za nadzor osiguranja u okviru Državnog saveta može podneti zahtev narodnom sudu za reorganizaciju ili stečajnu likvidaciju privrednog društva."

[6] „Kada se društvu za osiguranje oduzme dozvola za rad osiguranja zbog nezakonitog poslovanja ili je solventnost društva niža od standarda koji propisuje organ za nadzor osiguranja pri Državnom savetu, a može doći do ugrožavanja reda na tržištu osiguranja ili ozbiljnog narušavanja javnog interesa ako se društvo ne ugasi, organ za nadzor osiguranja pri Državnom savetu će ga ugasiti, oglasiti se i pravno formirati likvidacionu grupu za blagovremeno sprovođenje likvidacije."

direktno koristi prinudne mere u zamenu za veću slobodu delovanja, što dovodi do sumnje u „paternalistički" sistem nadzora. Kao što je gore pomenuto, Kina je uspostavila regulatorni sistem koji se kreće od niskog nivoa regulacije do visokog nivo regulacije, slično kao u SAD, Japanu i UK (Xiong, 2011, 167). Međutim, posmatranje prakse upravljanja rizicima u kineskim osiguravajućim društvima pokazuje da kada se društva suočavaju sa krizom nedovoljne solventnosti, regulatori stalno i direktno usvajaju jednu regulatornu meru snažnog upravnog prinudnog nadzora. Kao primer za ovu tvrdnju navodi se prinudni postupak nad četiri društva za osiguranje od strane KKNBO-e 2020. godine. KKNBO-e je 17. jula 2020. uvela jednogodišnju prinudnu upravu nad četiri društva za osiguranje, uključujući *Tian'an Property and Casualty Insurance Company Limited*, *Huaxia Life Insurance Company Limited*, *Tian'an Life Insurance Company Limited* i *Yi'an Property and Casualty Insurance Company Limited*, na osnovu čl. 144 Zakona o osiguranju. Danom uvođenja prinudne uprave skupština akcionara, upravni odbor i nadzorni odbor društva za osiguranje prestaju da obavljaju svoje dužnosti i sve relevantne funkcije preuzima tim prinudne uprave. Prinudna uprava koju imenuje KKNBO-e vrši upravljačka prava nad institucijom pod prinudnom upravom, a šef prinudne uprave obavlja dužnosti zakonskog zastupnika institucije.[7] Iako su sva četiri osiguravajuća društva poslovala sa gubitkom u vreme uvođenja prinudne uprave, postojao je legitiman osnov da regulator preduzme mere prinudne uprave protiv osiguravača. Međutim, pre nego što je objavljeno uvođenje prinudne uprave, prema informacijama o obelodanjivanju solventnosti u prvom kvartalu 2020. godine, osnovna ocena adekvatnosti solventnosti četiri osiguravajuća društva bila je preko 50%, a kombinovana ocena adekvatnosti solventnosti bila je preko 100%, pa čak i kombinovana ocena rizika *Tian'an Life and Ii'an Property & Casualty Insurance* su oba bila u kategoriji „B", a radilo se o društvu koje je bilo u skladu sa standardima o solventnosti.[8] Dakle, izricanje mere prinudne uprave bez objavljivanja kombinovanog rejtinga solventnosti i rizika za drugi kvartal jasno je bilo u suprotnosti sa prvobitnom namerom zakonodavca i nije odražavalo proces postepenog povećanja intenziteta nadzora. Osim toga, KKNBO-e je opravdao uvođenje prinudne uprave u četiri osiguravajuća društva time što su „uslovi za prinudnu upravu u skladu sa čl. 144 Zakona o osiguranju Narodne Republike Kine", bez daljeg objašnjenja o tome kako su ovi uslovi nastali.

3.2. Pitanje zadiranja administrativne u pravosudnu vlast

Pravo osiguravajućeg društva da pokrene stečajni postupak u suštini isključivo ima regulator, što postavlja pitanja o eroziji sudske vlasti ekskluzivitetom ovlašćenja administrativnog organa. Kao što je gore pomenuto, prema čl. 90 Zakona o osiguranju potrebna je saglasnost regulatora pre nego što društvo za osiguranje ili njeni poverioci, osim regulatora, mogu da podnesu sudu predlog za pokretanje stečaja nad društvom za osiguranje. Pored toga, prema čl. 148 Zakona o osiguranju, ako u društvu pod prinudnom upravom ili reorganizovanom društvu za osiguranje postoje okolnosti predviđene čl. 2 Zakona o stečaju, organ nadzora može, u skladu sa zakonom, podneti zahtev sudu za oživljavanjem ili stečajem društva za osiguranje. Bukvalno značenje izraza proizilazi iz činjenice da kada kod osiguravajućeg društva koje se reorganizuje ili stavlja pod prinudnu upravu postoje razlozi za nesolventnost, regulator može nastaviti da sprovodi njegovu reorganizaciju ili ga zadržati pod prinudnom upravom umesto da pokrene stečajni postupak pred sudom (Gao, Lei, 2023, 44). Posledica toga je da pravo na otvaranje stečaja u stvari ima isključivo regulator, što pogoršava negativne efekte „paternalističke" regulative. Na primer, u slučaju *Tian'an Property and Casualty Insurance Company*, koje je preuzeo KKNBO-e, to društvo za osiguranje je već bilo u stanju ozbiljne nesolventnosti na kraju perioda prinudne uprave, sa imovinom od 14,401 milijardi juana i obavezama od 15,255 milijardi juana, koje su ispunjavale tehničke uslove za proglašenje nesolventnosti. Umesto toga, regulator je pokušao da reši rizik putem prenosa portfelja osiguranja. Pored toga, dovedena je u pitanje prikladnost vršenja regulatorne moći pošto prenos portfelja nije prošao glatko, zbog čega rešavanje rizika *Tian'an P&C* još nije završeno.

[7] Announcement of the China Banking and Insurance Regulatory Commission on the Implementation of receivership of Tian'an Property and Casualty Insurance Company Limited and Six Other Institutions in accordance with Law, dostupno na: http://www.cbirc.gov.cn/cn/view/pages/ItemDetail.html?docId=917190&itemId=925&generaltype=0,Oct,22,2023.

[8] Prema informacijama koje su obelodanjene, u prvom kvartalu 2020. godine, osnovni koeficijent adekvatnosti solventnosti društva *Huakia Life* bio je 113,83%, a kombinovani pokazatelji adekvatnosti solventnosti 130,26%; osnovni koeficijent adekvatnosti solventnosti *Tian'an Property & Casualty Insurance* bio je 191,74%, a kombinovani pokazatelj adekvatnosti solventnosti bio je 237,24%; osnovna ocena adekvatnosti solventnosti kompanije *Tian'an Life* bila je 112,01%, a kombinovani koeficijent adekvatnosti solventnosti je bio 128,27%, sa kompozitnom ocenom rizika B. Kombinovani koeficijent adekvatnosti solventnosti i osnovni koeficijent adekvatnosti solventnosti *Ii'an Property Insurance & Casualty Insurance* su bili oba 175,19%, sa kompozitnim koeficijentom rizika B.

4. ANALIZA RAZLIKA STANDARDA NESOLVENTOSTI OSIGURANJA SA MEĐUNARODNIM STANDARDIMA

Zakon o osiguranju i Zakon o stečaju su dva osnovna zakona kojih se treba pridržavati u rešavanju pitanja nesolventnosti osiguravajućih društava, ali kao zakoni višeg reda oni mogu samo svoje odredbe da pružaju pravila o opštim stvarima, zbog čega je teško očekivati da se njima obezbede detaljna rešenja za konkretna pitanja u vezi sa nesolventnošću osiguravajućih društava. Nepostojanje zakona o stečaju društava za osiguranje i nedostatak praktičnog iskustva biće prepreka za vođenje stečajnih postupaka u praksi. Zbog posebnih karakteristika društava za osiguranje, pitanje da li ona treba da imaju iste granice nesolventnosti kao i opšta privredna društva je najosnovnije i najvrednije jedne teorijske studije.

4.1. Analiza tipova standarda nesolventnosti društava za osiguranje i njihova perspektiva

Pregled uzroka nesolventnosti privrednih društava u međunarodnoj areni pokazuje da postoje tri glavne vrste pravnog normiranja, a to su: generalizacija, nabrajanje i statutarni regulatorni standardi, takođe poznati kao „nesolventnost zahtevanog kapitala" ili „nesolventnost regulatornih zahteva" (Wang, 2009, A13). Kina je usvojila opšti zakonodavni pristup, sa „nesposobnošću plaćanja dospelih dugova" kao važnom komponentom i ključnim elementom uzroka nesolventnosti u svom zakonu o stečaju (Zou, Zhou, 2013, 61). U praksi, sudovi uglavnom usvajaju standard imovine-obaveza i standard novčanih tokova kao kriterijume za procenu nesolventnosti privrednog društva, ali se nesolventnost finansijskih institucija više fokusira na održavanje finansijske sigurnosti, nego na nesolventnost opštih privrednih društava, pa je teško da opšti uzroci nesolventnosti da ostvare gore navedene vrednosne ciljeve. Stoga je akademska zajednica usmerila pažnju na pitanje da li treba uvesti regulatorne standarde za razmatranje uzroka nesolventnosti finansijskih institucija, posebno društava za osiguranje. U narednim izlaganjima ćemo posebno razmotriti dva postojeća standarda i uporediti njihove karakteristike i nedostatke u oceni da li postoji potreba za uvođenjem regulatornih standarda u Kini.

(1) *Standard protoka gotovine.* Naglasak je na to da li se odnos poverilac-dužnik može održati ili ne, što može pokazati solventnost dužnika na intuitivniji način, tako da je uobičajena praksa u zemljama širom sveta da se to uzme kao uzrok nesolventnosti dužnika. Međutim, standard novčanih tokova ima vremensko zaostajanje u odnosu na početak nesolventnosti, jer je do tada već ukazano da dužnik nije u mogućnosti da otplati dospeli dug, koji je već u kontinuiranom stanju, nije privremeno nesposoban za plaćanje ili da odbija plaćanje (Wang, 2010, 16-27) i njegovo korišćenje kao razlog za nesolventnost osiguravajućeg društva ima mnogo nedostataka. Prvo, mehanizam stečaja ne mora nužno da reši probleme tokova gotovine osiguravajućih društava. Da li je dužnik nesolventan ne može se proceniti samo na osnovu iznosa imovine koju poseduje, već bi trebalo da se utvrdi kombinacijom različitih raspoloživih sredstava za ocenu solventnosit. Uopšteno govoreći, solventnost je kombinacija dužnikove imovine, obaveza, rada i drugih faktora, pa čak i ako se privredno društvo muči sa plaćanjem, može se osloniti na svoju dobru kreditnu sposobnost da preuzme novi dug kako bi otplatila stari dug, bez proglašenja nesolventnim. Drugo, to bi povećalo izloženost riziku, pa čak i gubitku odlaganjem vremena za spasavanje osiguravača procenjujući njihovo zdravlje na osnovu toga. Zbog toga, standard protoka gotovine nije pogodan za poboljšanje stope izlečenja poslovnih problema zbog „zaostajanja vremena ocene" i nemogućnosti da se obezbedi rana pomoć osiguravačima u nevolji.

(2) *Standard imovine i obaveza*. Ovaj standard se obično zasniva na bilansu stanja privrednog društva kao preliminarnoj proceni da je društvo u situaciji u kojoj zbir njegovih obaveza premašuje njegovu ukupnu imovinu i postoji verovatnoća da neće u stanju da izmiruje svoje obaveze. Takođe će sprečiti privredno društvo da nastavi da se zadužuje u lošoj nameri kako bi izbeglo potencijalno ili postojeće stanje nesolventnosti. Međutim, upotreba standarda imovine i obaveza kao standarda nesolventnosti za osiguravače je takođe manjkava jer su osiguravači finansijske institucije koje pružaju zaštitu od rizika u vidu polise osiguranja, pri čemu su rizici oni koji mogu nastati u budućnosti. Na osnovu neizvesnosti nastanka rizika, primećuje se da je sastav duga osiguravajućih društava sačinjen od velikog udela potencijalnih obaveza, a dužnička poluga je prilično visoka, što u velikoj meri utiče na tačnost bilansa stanja i tačnog odražavanja finansijskog položaja osiguravajućih društava. Pored toga, imovina se procenjuje na statičkoj osnovi i kada se stavlja na prodaju u stvarnom procesu nadmetanja, računovodstveni kriterijumi nisu precizni i može postojati veliki jaz između knjigovodstvene vrednosti imovine i stvarne tržišne vrednosti, u zavisnosti od faktora ponude kupca i načina na koji se imovina prodaje. Dakle, jednostavnoj upotrebi standarda imovine i obaveza kao kriterijuma za procenu nesolventnosti osiguravajućih društava takođe nedostaje određeni stepen racionalnosti. Takođe je teško unapred identifikovati skrivene opasnosti od nesolventnosti društava za osiguranje.

S obzirom na nedostatke standarda protoka gotovine i standarda imovine i obaveza u određivanju da li je osiguravajuće društvo u stanju nesolventnosti, kineski naučnici su fokusirali svoja istraživanja na to da li treba uvesti regulatorne standarde kako bi se razmotrio uzrok nesolventnosti društava za osiguranje (Zou, Zhou, 2013, 297). Regulatorni standardi su skup pokazatelja koje određuju finansijski regulatori za upravljanje bezbednošću i procenom rizika finansijskih institucija. Tvrdilo se da je regulatorni standard za osiguravajuća društva fokusiran na solventnost osiguravajućeg društva, pa čak i ako imovina i obaveze osiguravajućeg društva pokažu da je njegov kapital pozitivan, regulator osiguranja može da utvrdi da je društvo za osiguranje nesolventno po tom osnovu, pod uslovom da regulator osiguranja smatra da društvo za osiguranje ne ispunjava regulatorne zahteve i da njegov finansijski položaj više nije siguran i zdrav (Sai, 2020, 67). Solventnost je, s druge strane, važan regulatorni pokazatelj adekvatnosti kapitala osiguravača u datom trenutku i sposobnosti osiguravajućeg društva da ispuni svoje obaveze po štetama osiguranika. Održavanje adekvatne solventnosti je ključno za dobro poslovanje osiguravajućih društava i zaštitu potrošača osiguranja.

4.2. Analiza legitimnosti regulatornog standarda kao standarda za stečaj društva za osiguranje

Istraživanje regulatornih standarda širom sveta počelo je 70-ih godina 20. veka, kada je delatnost osiguranja u razvijenim zemljama brzo rasla, a sve veći unutrašnji i eksterni rizici doveli do visoke učestalosti nesolventnosti osiguravača. Na primer, u periodu 1970. – 1986. delatnost životnog osiguranja u SAD pretrpela je veliku krizu pod dvostrukim uticajem reforme marketizacije kamatnih stopa u delatnosti osiguranja i neuspeha investicija društava za životno osiguranje, što je izazvalo talas stečaja društava za osiguranje, sa skoro 300 društava koja su proglasila nesolventnost jer nisu bile u stanju da reše svoje dugove. Na osnovu toga, istraživači osiguranja širom sveta počeli su da preusmeravaju svoju pažnju na proučavanje regulatornih standarda usredsređenih na solventnost društava za osiguranje. Dobri primeri su SAD, Japan i Velika Britanija.

Sjedinjene Američke Države su tipično visoko uređena zemlja, sa modernim regulatornim okvirom osiguranja koji poreklo vuče još iz 19. veka, kada je država Nju Hempšir 1851. imenovala prvog komesara za osiguranje u istoriji SAD. Državni komesari za osiguranje su u SAD formirali Nacionalnu komisiju za osiguranje (*National Insurance Commission*) 1871. godine, da regulišu delatnost osiguranja kroz uspostavljanje jedinstvenog sistema finansijskog izveštavanja, sistema revizije i razvoja finansijskih standarda. Pod vođstvom Nacionalne komisije za osiguranje državni komesari za osiguranje koriste različite alate za procenu finansijskog stanja osiguravajućih društava kako bi sprečili pojavu nedostataka solventnosti. Ti alati obuhvataju Regulatorni informacioni sistem osiguranja (*Insurance Regulatory Information System*), Sistem za finansijsku analizu i praćenje solventnosti (*Financial Analysis and Solvency Tracking System*), Minimalni kapitalni zahtevi zasnovani na riziku (*Minimum Risk-Based Capital Requirements*), Kapitalni zahtevi zasnovani na riziku (*Risk-Based Capital Requirements*, dalje u tekstu: KZZR) za osiguravače imovine i nezgode, Dinamička finansijska analiza industrije osiguranja (*Dynamic Financial Analysis of the Insurance Industry*) i niz rutinskih i nerutinskih provera na licu mesta. U metrici procene solventnosti za delatnost osiguranja u SAD, regulatorne intervencije koje preduzimaju komesari za osiguranje se procenjuju prvenstveno na osnovu regulatornih standarda kapitalnih zahteva zasnovanih na riziku. Osnovni sadržaj regulatornog standarda kapitalnih zahteva zasnovanih na riziku je da društvo za osiguranje prilikom obavljanja poslova osiguranja treba da ima minimalni kapital srazmeran obimu poslovanja i stepenu rizika, a njegova imovina ne sme biti manja od vrednosti obračunate metodom koji propisuju kapitalni zahtevi zasnovani na riziku, kako bi se obezbedila dovoljna solventnost. Kapitalni zahtevi zasnovani na riziku klasifikuju rizik osiguravača u pet nivoa kapitala zasnovanog na riziku tako što izračunava osiguravačeve koeficijente kapitala zasnovanog na riziku, odnosno: (1) nivo bez preduzimanja aktivnosti, (2) nivo regulatorne akcije, (3) nivo ovlašćene kontrole i (4) nivo obavezne kontrole. Po pravilu, komesar je ovlašćen da preduzme radnje za rehabilitaciju ili likvidaciju osiguravača ako je kapitalni zahtev zasnovan na riziku za solventnost između 70% i 100%, a dužan je da rehabilituje ili likvidira osiguravača ako je indeks rizika ispod 70%. Tabela, br. 1 prikazuje standard za rešavanje solventnosti prema regulatornom režimu američkih kapitalnih zahteva zasnovanih na riziku:

Od 70-ih godina 20. veka, japanska delatnost osiguranja je skokovit rasla, postajući drugo najveće svetsko tržište osiguranja posle SAD 1980-ih i 1990-ih. Međutim, pucanje japanskog ekonomskog balona 1990. godine izazvalo je tešku ekonomsku krizu, gurnuvši Japan u najdužu posleratnu recesiju. U okolnostima strmoglavog pada cena akcija i imovine, knjigovodstveni gubici postali su glavna prepreka razvoju osiguravajućih organizacija, ukupna imovina osiguravajućih društava naglo se smanjila, novi prihodi od premija su brzo opali i mnogi osiguravači su imali finansijske probleme. U tom kontekstu, Japan je počeo da menja Zakon o osiguranju,

Tabela, br. 1: Nivoi kapitalnih zahteva zasnovanih na riziku (KZZR).

KZZR Racio	KZZR Nivo	Regulatorna mera
≥200%	NE	NE
150%-200%	Društvo – Mera	Osiguravači su dužni da komesaru pošalju plan KZZR u roku od 45 dana, sa objašnjenjem, korektivnim merama (na primer, povećanje kapitala ili smanjenje rizika), finansijske projekcije, itd.
100%-150%	Regulatorna mera	Komesar je ovlašćen da zahteva od osiguravača da pošalje ili izmeni plan KZZR i može sprovesti finansijsku proveru imovine osiguravača, obaveza, poslovanja, itd.
70%-100%	Fakultativna kontrola	Komesar može pokrenuti postupke reorganizacije or likvidacije radi pojačanja nadzora nad osiguravačeim. Osiguravač ima pravo na zaštitu u sudskom postupku i pravo da odlučuje o razvoju svog poslovanja.
≤70%	Obavezna kontrola	Ako je potrebno, komesar može staviti društvo za osiguranje pod obavezan nadzor u skladu sa zakonom savezne države o reorganizaciji i stečaju društava za osiguranje.

smanjujući ograničenja za ulazak na tržište osiguranja i uspostavljajući regulatorni model zasnovan na solventnosti po američkom standardu KZZR, omogućavajući tržištu osiguranja da izađe iz nesolventnosti. Tokom perioda 1997. – 2001, ukupno sedam društava za životno osiguranje i dva za osiguranje imovine i nezgode u Japanu proglasile su bankrot i podvrgnute su rehabilitaciji (Sun, Fei, 2017, 83-87). Istovremeno, u cilju jačanja regulacije finansijskog sektora, u junu 1998. godine u Japanu je osnovana Agencija za finansijski nadzor koja je od Ministarstva finansija preuzela nadzor nad bankarskom industrijom, industrijom hartija od vrednosti i osiguranja. U julu 2000. godine, Agencija za finansijski nadzor je postala Agencija za nadzor finansijskih usluga, razdvajajući programe finansijskog upravljanja i zakonodavna ovlašćenja koja su ranije imala Ministarstvo finansija, i obezbeđenjem nezavisnosti direktora finansija kroz njegovo direktno imenovanje od strane premijera.[9] U Sveobuhvatnim smernicama za nadzor društava za osiguranje koje je formulisala Agencija za nadzor finansijskih usluga, nadzorni organ klasifikuje radnje nadzora za društva za osiguranje u četiri nivoa na osnovu koeficijenta solventnosti sa odgovarajućim korektivnim i regulatornim merama, koje su prikazane u sledećoj tabeli:

Finansijski sektor u Velikoj Britaniji, uključujući društva za osiguranje, firme za hartije od vrednosti, itd. reguliše Agencija za finansijske usluge prema Zakonu o finansijskim uslugama i tržištima.[10] U martu 2016. godine, Agencija za prudencijalni nadzor je donela Pristup nadzoru osiguranja i ažurirala u julu 2023. čiji odeljak 210 detaljno opisuje kako će se baviti problematičnim rizicima osiguranja. Za potrebe analize nivoa solventnosti osiguravajućih društava, regulator usvaja i hijerarhijski regulatorni model, propisuje odgovarajuće mere upravljanja rizikom, a društva za osiguranje klasifikuju prema prethodno urađenoj proceni rizika, pri čemu se nivo rizika klasifikuje u pet nivoa održivosti društva u opadajućem redosledu: društvo u rešavanju ili dobrovoljno likvidirana, prinudno likvidirana i za stečaj, neposredan rizik, rizik bez akcije firme, umereni rizik i nizak rizik.[11] Dok je Agencija za prudencijalni nadzor, od svog početka, uglavnom usvojila manje obavezne mere upravljanja rizicima, kao što su naredbe o prijavljivanju i podnošenju planova, Pristup nadzoru osiguranja izričito predviđa pristup „bez nesolventnosti", pri čemu će ta Agencija pokrenuti odgovarajući stečajni postupak kako bi pravilno regulisala izlazak osiguravača sa tržišta, ako je to potrebno.

[9] Ministarstvo finansija Japana je centralni vladin finansijski organ koji je postojao do 2000. godine i bio je zadužen za japanski trezor, finansije i poreze. Dana 6. januara 2001. godine, centralna ministarstva i kancelarije su reorganizovani u Ministarstvo finansija i Agenciju za nadzor finansijskih usluga.

[10] Agencija za nadzor finansijskih usluga je 2012. godine podeljena na Agenciju za finansijsko ponašanje i Agenciju za prudencijalni nadzor. Prva je nadležna za regulisanje poslovanja svih vrsta finansijskih institucija, dok je druga nadležna za prudencijalno regulisanje svih vrsta finansijskih institucija, uključujući banke, građevinska društva, kreditne unije i osiguravajuća društva. Vidi Agenciju za finansijsko ponašanje na: https://vvv.fca.org.uk/, 11. 10. 2023.

[11] The Prudential Regulation Authority's approach to banking supervision, Box 5: Stages in the Proactive Intervention Framework.

Tabela, br. 2: Nadzorno-regulatorni standardi u vezi solventnosti.

Racio solventnosti	Regulatorni nivo	Regulatorna mera
≥200%	1	NE
100%-200%	2	Zahtev da osiguravači pošalju realna unapređenja poslovnih planova
0%-100%	3	Predlaže realne planoce za povećanje solventnost osiguravača; zabranjuje ili ograničava isplatu dividendi osiguravačima ili ugovaračima; menja unapred utvrđene kamatne stope za nove ugovore o osiguranju; ograničava upotrebu fondova; ograničava vrste osiguranja; i menja procenat dozvoljenog vlasništva u zavisnim društvima itd.
≤0%	4	Naređuje da cela ili deo društva prestane sa prodajom polisa osiguranja i podnosi predlog za otvaranje stečaja.

5. ZAKONSKI PREDLOZI ZA UNAPREĐENJE STANDARDA NESOLVENTNOSTI ZA KINESKA DRUŠTVA ZA OSIGURANJE

Međunarodno iskustvo pokazuje da je uspostavljanje specijalnih zakona o stečaju postepeno postalo moderan trend u razvoju modela stečajnog zakonodavstva za osiguravajuća društva širom sveta. Stečajno zakonodavstvo za kineska društva za osiguranje trebalo bi da se zasniva na postojećoj strukturi Zakona o stečaju, a Državni savet bi trebalo da formuliše posebne propise o stečaju osiguravajućih društava u skladu sa principom „podela poslova, podela upravljanja, podela nesolventnosti", insistirajući na tome da se stečaj osiguravajućeg društva razlikuje od stečaja opštih privrednih društava.

5.1. Utvrđivanje regulatornih standarda kao važan faktor za nesolventnost društava za osiguranje

Kao što je već pomenuto, postojeći standardi za utvrđivanje uzroka nesolventnosti društva ne odražavaju koncept da se pravni okvir nesolventnosti društava za osiguranje fokusira na prevenciju i spasavanje. Stoga postoji hitna potreba za uvođenjem regulatornih kriterijuma u kineskom zakonodavstvu u odnosu na strane propise. Međutim, kada se uvede, trebalo bi da se zasniva i na kineskoj pravnoj realnosti. Pitanje je da li je moguće direktno preuzeti propise razvijenih zapadnih zemalja i direktno utvrditi regulatorni standard kao uzrok nesolventnosti društava, a konačno utvrđivanje uzroka nesolventnosti prepustiti nadzornom organu društva za osiguranje. Prvo, korišćenje regulatornih standarda u suštini stavlja utvrđivanje uzroka nesolventnosti osiguravača u ruke regulatora, a ne sudova. Sledstveno tome, postoji nekoliko zemalja u kojima su regulatorni standardi direktno navedeni kao uzrok nesolventnosti osiguravača i to u većini zemalja sa zakonodavstvom koje usvaja model „sudske nesolventnosti" za društva za osiguranje. Neki naučnici tvrde da moć regulatora da odobri predloge za pokretanje stečaja već odražava kompromis sudske moći nad administrativnom. Proces administrativne dispozicije odražava poseban regulatorni alat za regulatore finansijskih institucija sa visokim poslovnim rizicima, a pravosuđe u ovoj fazi može biti samo pasivno uključeno u postupke sudske revizije (Huang, 2009, 867-884). Dakle, sa stanovišta održavanja autoriteta i jedinstva vladavine prava, uzroci nesolventnosti društava za osiguranje ne bi trebalo da imaju vanpravnu nadležnost nad uzrocima nesolventnosti drugih privrednih društava (Lei, Sun, 2014, 14). Drugo, korišćenje koeficijenta solventnosti društva za osiguranje kao kriterijuma za pokretanje stečajnog postupka je u određenoj meri razumno, ali kriterijum je kontinuirani proces promene koji takođe postavlja veće zahteve za kapacitete i rad regulatora i koji je teško primenjiv u praksi. Konačno, trenutni kineski propisi o solventnosti ne odražavaju potpunu i tačnu poziciju imovine društva za osiguranje. U „Kvartalnoj rang listi solventnosti životnog osiguranja za 2022." koju je objavio KKNBO-e, društvo za osiguranje pod nazivom *Huahui Life* ima veoma visok konsolidovani koeficijent solventnosti od 2.270 procenata, što je posledica činjenice da je kompanija tek osnovana i još uvek nije imala priliku da u potpunosti iskoristi svoj prihod od premije. U ovom trenutku, što je veći koeficijent solventnosti društva za osiguranje, to je veći prihod od premije ono zadržalo, a previsok koeficijent solventnosti može ukazivati na to da kompanija ima probleme kao što su spor razvoj i neiskorišćeni kapital koji se ne može razumno iskoristiti i ne odražavaju u potpunosti stvarnu solventnost društva. Dakle, kršenje regulatornih standarda ne znači istovremeno i nesolventnost društva za osiguranje, a uzrok nesolventnosti ipak treba da se zasniva na solventnosti dužnika u smislu propisa, bez svih razlika u zavisnosti od vrste poslovanja, ali samo načini utvrđivanja uzroka nesolventnosti mogu biti različiti. Kada društvo za osiguranje ne ispuni određene regulatorne standarde, to se može iskoristiti kao poseban osnov za

rehabilitaciju i sud može smatrati da postoji „jasan rizik od nesolventnosti" i na zahtev podnosioca pokrenuti postupak rehabilitacije zbog nesolventnosti.

5 2. Pojašnjenje postupka likvidacije društva za osiguranje kojem je oduzeta dozvola za rad

Poništenje likvidacije je upravni akt za koji je Državni savet ovlastio organ za nadzor osiguranja, a kako čl. 149 Zakona o osiguranju nije predviđen način poništenja likvidacije, nejasno je da li se Zakon o privrednim društvima ili Zakon o stečaju primenjuje na likvidaciju. Kao što se vidi iz čl. 148, koji predviđa da reorganizovano ili društvo za osiguranje pod prinudnom upravom može biti predmet stečajnog postupka na zahtev regulatora samo ako postoje okolnosti navedene u čl. 2 Zakona o stečaju, društvo kojem je oduzeta dozvola za rad ne može *ipso facto* u stečajni postupak, već samo ako postoje okolnosti navedene u čl. 2 Zakona o stečaju. Što se tiče pravne primene poništenja likvidacije, autori smatraju da je na osnovu karakteristika društava za osiguranje kao kvazi-javnih društava, u cilju zaštite društvenih javnih interesa i održavanja poretka na tržištu osiguranja, prikladnije primeniti ideju o administrativnoj likvidaciji u Uredbi o upravljanju rizicima društava za hartije od vrednosti (Uredba o upravljanju rizicima društava za hartije od vrednosti, 2023, čl. 21)[12], društvima za hartije od vrednosti kojima je oduzeta dozvola za rad i da se sprovedu postupci administrativne likvidacije koju je pokrenuo regulator. Dalje, da bi se obezbedila efektivnost i nezavisnost poništenja likvidacije, akcionari društva za osiguranje mogu biti isključeni iz delokruga likvidacione grupe, oslanjajući se na iskustvo upravljanja rizicima društava za hartije od vrednosti.

5.3. Redefinisanje prava na pokretanje stečaja

S obzirom na nepotpuno stečajno zakonodavstvo i nedostatak praktičnog iskustva u Kini, razumno je i opravdano da se regulatoru da ovlašćenje da se složi i odobri predloge o pokretanju stečaja koje podnose društva za osiguranje ili dužnici. Prvo, to je specifična primena teorije finansijske regulative na oblast regulacije osiguranja. Drugo, time se može postići cilj regulatora da održi stabilnost i uravnotežuje interese svih strana u društvu za osiguranje. Konačno, regulator ima jače profesionalne veštine i rasuđivanje od drugih subjekata i sud se neće protiviti da se regulatoru daju određena ovlašćenja za odobravanje u postupku stečaja. Međutim, kako bi se otklonila prekomerna diskreciona ovlašćenja regulatora i obezbedilo pravo drugih subjekata da podnesu predlog za stečaj društava za osiguranje, autori smatraju da se o situaciji podnošenja predloga za stečaj od strane društva za osiguranje ili poverioca može diskutovati u drugačijem kontekstu. U slučaju reorganizacije društva za osiguranje, društvo za osiguranje ili poverioci mogu direktno da podnesu predlog sudu za otvaranje postupka reorganizacije u slučaju stečaja društva za osiguranje, bez saglasnosti i odobrenja nadzornog organa. U slučaju stečaja društva za osiguranje, društvo za osiguranje ili poverioci mogu podneti predlog sudu za pokretanje postupka stečaja u samo uz saglasnost nadzornog organa. Nadalje, kako bi se dodatno ograničilo zadiranje administrativne vlasti u sudsku vlast, čl. 148 Zakona o osiguranju trebalo bi izmeniti tako da se propiše da ako reorganizovano ili društvo za osiguranje pod prinudnom upravom ima osnov za nesolventnost, regulator će se obratiti sudu za reorganizacija ili stečaj društva za osiguranje.

5.4. Uspostavljanje robusnog mehanizma za kontrolu agencije

Trenutno zakon ima izuzetno ograničene odredbe o nadzornim ovlašćenjima regulatora osiguranja, a praksa „jake administracije i slabe pravde" u delatnosti osiguranja dovešće do zloupotrebe administrativnih ovlašćenja, lišavanja poverilaca prava na parnicu i negovanje moralne korupcije. „Dobar zakon je preduslov za dobro upravljanje", stoga je neophodno usvojiti zakone koji će usmeravati i regulisati pravo na nadzor osiguravajućih društava u oblastima upravljanja rizicima i izlaska sa tržišta, kao i usmeravanje osiguravajućih društava u krizama solventnosti da unaprede svoje poslovanje putem konsolidacije i stečaja po Zakonu o osiguranju ili da izađu sa tržišta kroz postupke reorganizacije, konsolidacije i stečaja po Zakonu o stečaju, kako bi izašli iz svog stanja. Oslanjajući se na teoriju ekonomskog prava, u zaštiti javnih interesa društva i legitimnih prava i interesa učesnika na tržištu, zakonodavstvo mora poveriti ovlašćenja regulatornim organima. Ali, kako je rekao Monteskje, „svi oni koji imaju moć skloni su da je zloupotrebe", te da bi se sprečila zloupotreba regulatornih ovlašćenja i pasivnost regulatora, ponovo je neophodno vršiti nadzor nad regulatornim ovlašćenjima koja su data regulatornim organima. Kinesko zakonodavstvo bi takođe trebalo da sledi ovu zakonodavnu logiku i uspostavi regulatorni sistem osiguranja koji integriše funkcije ovlašćenja i nadzora,

[12] „Za ukidanje društva za hartije od vrednosti, regulatorna Agencija za hartije od vrednosti pri Državnom savetu donosi odluku o oduzimanju dozvole za rad, izabrati profesionalne agencije, uključujući advokatsku kancelariju i računovodstvenu firmu da formiraju administrativnu likvidacionu grupu u skladu sa propisanom procedurom i podvrgava kompaniju administrativnoj likvidaciji."

reguliše ponašanje regulatora i promoviše efikasno i efektivno vršenje njegove nadzorne moći nad delatnošću osiguranja.

6. ZAKLJUČAK

Ako postoji „sloboda" ali nema „reda", tržište će biti „živo" ali „haotično." Ako postoji „red", ali nema „slobode", tržište neće biti „živo", iako neće biti „haotično" (Jiang, 2010, 5). Da bi se postigla „održivost" tržišta osiguranja, a da ono ostane „nezatrpano", zakonodavci treba da se pozabave pitanjima koja se odnose na standarde nesolventnosti za društva za osiguranje. Prvo, u vezi sa utvrđivanjem uzroka nesolventnosti, potvrđuje legitimnost i razumnost regulatornog standarda usredsređenog na nesolventnost osiguravajućih društava, ali se protivi direktnom utvrđivanju regulatornog standarda kao uzroka nesolventnosti pod režimom „sudske nesolventnosti" koje se primenjuje u Kini. Nadležni subjekt može podneti predlog za pokretanje postupka reorganizacije zbog nedovoljne solventnosti. Drugo, što se tiče izbora postupka likvidacije za društvo za osiguranje kojem je oduzeta dozvola za rad, sprovešće se proces administrativne likvidacije koji vodi regulator. Treće, o okolnostima u kojima osiguravajuće društvo ili poverilac može podneti predlog za stečaj treba posebno razgovarati. Konačno, trebalo bi da postoji regulatorni sistem, sa kombinacijom ovlašćenja i kontrolnih funkcija, koji bi regulisao ponašanje regulatora.

Preveo sa engleskog jezika:
prof. dr Slobodan Jovanović

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Mingming Ma, PhD candidate.*
Professor Qingwu Li, PhD.**

Research on Insurance Company Insolvency Standard from A Comparative Perspective

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Abstract

A multi-level risk disposal framework, including market, administrative and judicial aspects, has been established for insurance companies in China. However, the lack of practicality of the top-level legislative design and the concentration of regulatory power have hindered the practical application of the market exit mechanism through insolvency proceedings. Compared with the United States, Japan and the UK, there are significant differences in the choice of insurance company insolvency legislative model, the standard for initiating insurance company insolvency procedures, and the interface between administrative risk disposal measures and judicial proceedings. Therefore, the purpose of this paper is to address the shortcomings of Chinese legislation on insurance company insolvency causes, the clarification of insurance company insolvency standard and the smooth implementation of insurance company insolvency procedures.

Key words: Insurance Company Insolvency; Insolvency Standard; Regulatory Standard; Risk Disposal Measures

1. INTRODUCTION

With the deepening of market-oriented reform of economic and financial systems, China has made significant breakthroughs in the construction of its insurance market, which has surpassed Japan to become the world's second largest insurance market in 2017. However, the development of prosperity is inevitably accompanied by the accumulation of risk, the insurance industry to achieve leapfrog development of the internal accumulation of risk continues to increase, insurance fraud, insurance capital irregularities in the application of the problems are endless, the insurance industry as a specialized industry to manage risk seems to have become a "risk maker" (Sun, 2019, 115). In fact, since the implementation of "C-ROSS" [1]in 2016, a number of insurance companies have been subject to varying degrees of regulatory measures for insufficient solvency. Moreover, in July 2022, the Beijing Financial Court approved the application for insolvency rehabilitation filed by the China Banking and Insurance Regulatory Commission (hereinafter referred to as "CBIRC")[2] against Yi'an Property and Casualty Insurance Company, breaking the anomaly that no insurance company has gone into insolvency in China since the restoration of the insurance industry.

However, compared with the United States, Japan, the UK and other developed countries in the insurance market, China's existing legislation on insurance company insolvency has many inadequacies, and the insufficient supply of legislative resources will create obstacles to the disposal of problematic insurance company risks in practice, such as (1) the

* University of International Business and Economics, School of Law, Beijing, China, email: m13298139650@163.com

** University of International Business and Economics, School of Law, Beijing, China, email: 01929@uibe.edu.cn

[1] "C-ROSS"(China Risk-Oriented Solvency System), shortened for China's second-generation solvency regulatory system, is a risk-oriented regulatory framework formulated by the China Insurance Regulatory Commission (hereinafter referred to as "CIRC") to strengthen and improve the supervision of insurance companies' solvency capabilities.

[2] The China Insurance Regulatory and Administrative Commission (CIRC) was established on 18 November 1998 and was replaced by the China Banking and Insurance Regulatory Commission (CBIRC) in 2018, and the China Financial Regulatory Authority (CFRA) was established in 2023 to replace the responsibilities of the CBIRC.

non-hierarchical nature of regulatory action by the regulator, which is suspected of being "paternalistic"; (2) the issue of administrative encroachment on judicial power. Thus, the purpose of this paper is to correct the deficiencies of Chinese legislation on the causes of insurance company insolvency, clarify the standard for insurance company insolvency and ensure the smooth implementation of insurance company insolvency procedures.

2. CURRENT LEGISLATION ON INSOLVENCY STANDARD FOR INSURANCE COMPANIES IN CHINA

2.1. Current Legal Framework for Risk Disposal in China's Insurance Industry

Currently, China has not enacted specific legislation on insurance company insolvency, but has adopted a "monistic legislative model", applying the Enterprise Bankruptcy Law of the People's Republic of China ("Bankruptcy Law", 2006), supplemented by a number of normative legal documents such as the Insurance Law of the People's Republic of China ("Insurance Law", 2015), the Measures for the Administration of the Insurance Security Fund (2022) and the Provisions on the Administration of the Solvency of Insurance Companies (2021). First, to ensure that regulatory authorities can promptly initiate risk disposal measures, the Insurance Law (Insurance Law, 2015, art. 137) establishes a solvency-centred regulatory system. Second, depending on the severity of the insurance company's solvency deficiency, the Insurance Law (Insurance Law, 2015, art. 138-149) provides for measures to deal with risks of varying severity, from high to low, namely "administrative restrictions", "reorganization", "receivership", "insolvency", "cancellation" and their respective application scenarios. Third, legal documents such as the Provisions on the Administration of the Solvency of Insurance Companies (2021), the Measures for the Administration of the Utilization of Insurance Funds (2018), the Measures for the Administration of Equities of Insurance Companies (2018), and the Measures for the Regulatory Ratings of Personal Insurance Companies have been promulgated (2024), which aim to accurately identify the solvency risk, market conduct risk and corporate governance risk of insurance companies. Specifically, insurance companies must meet a minimum core solvency adequacy ratio of not less than 50%, a comprehensive solvency adequacy ratio of not less than 100%, and a risk-based capital rating of at least B in order to be considered as having adequate solvency.

In conclusion, the progressive risk disposal measures provide regulatory authorities with multiple choices when implementing differentiated regulatory policies. However, existing regulatory practices have shown that the problem of insufficient legislative resource supply remains severe. The general or authorizing provisions that exist in the top-level legislative design weaken the determinacy of the normative goals of the legal provisions, leading to criticism of excessive discretionary power of regulatory authorities and lack of effective supervision.

2.2. Problems in the Current Insolvency Legislation of Chinese Insurance Companies

2.2.1. Applying the Same Insolvency Standards as Ordinary Businesses May Delay the Rescue of Insurance Companies

The cause of insolvency is the legal fact that establishes the inability of the debtor to pay its debts, which enables the parties to file an application for insolvency and on the basis of which the court initiates insolvency proceedings and declares the debtor insolvent (Li, 2011, 29). At present, China has no special provisions on the causes of insolvency of insurance companies, but applies the same as ordinary businesses, using the property status of the company as the only indicator for whether to initiate insolvency proceedings. Specifically, the Bankruptcy Law (Bankruptcy Law, 2006, art. 2) provides for general causes of insolvency and special causes of rehabilitation for insurance companies, namely "Where an enterprise legal person fails to clear off its debt as due, and if its assets are not enough to pay off all the debts or if it is obviously incapable of clearing off its debts, its liabilities shall be liquidated according to the provisions of the present Law. Where an enterprise legal person is under the aforesaid circumstance or if it is obviously likely that it is unable to pay off its debts, it may be subject to revival according to the provisions of the present Law". At the same time, the Bankruptcy Law (Bankruptcy Law, 2006, art. 134) [3]allows financial institutions,

[3] "Where such financial institutions as a commercial bank, securities company or insurance company is under any of the following circumstances as prescribed in Article 2 of the present Law, the financial supervision organ under the State Council shall file an application with the people's court for revival or bankruptcy liquidation of the financial institution. Where the financial supervision organ under the State Council adopts, according to law, such measures as take-over and custody to a financial institutions carrying major business risks, it may apply with the people's court for suspending the procedures for civil action or execution, wherein the said financial institution is the defendant or party against whom a judgment or order is

including insurance companies, to become insolvent and the regulator may file an insolvency petition with the court under the circumstances specified in Article 2. In addition, the Insurance Law (Insurance Law, 2015, art. 90, art. 148) continue the provisions of the Insolvency Law on the causes of insolvency of financial institutions, i.e., whether an application for insolvency is filed directly with the court pursuant to Article 90 [4]or is converted into an insolvency proceeding in the process of reorganization and receivership of the insufficient solvency insurance company pursuant to Article 148,[5] the provisions on the standard for insolvency set forth in Article 2 of the Insolvency Law are followed. However, judging whether a financial institution is insolvent according to the insolvency standard of general insolvency law does not achieve the value orientation of financial institution insolvency in favor of social orientation, such as financial security, because the insolvency of financial institutions has special characteristics that differ from the insolvency of other commercial enterprises (Zhu, Jiang, 2009, 209-220).

2.2.2. Controversy over Liquidation Path for Cancelled Insurers under Insurance Law

In addition to the two paths of dissolution and insolvency liquidation, in order to realistically exit the insurance market, the Insurance Law (Insurance Law, 2015, art. 149)[6] provides for the cancelled of liquidation. Although the article expressly specifies the circumstances in which the liquidation of insurance undertakings may be reversed and the authority responsible for canceling the liquidation, it does not address issues such as the nature of the cancellation, the scope of the illegal activity due to the ambiguity of the legislation, some scholars believe that the liquidation cancelled due to "illegal operation" as stipulated in this article is actually a liquidation of insolvency, and thus conclude that the insolvency of Chinese insurance companies adopts the dual insolvency standard of "enterprise property standard" and "illegal operation standard", the extent to which solvency falls below the regulatory requirements, and whether the liquidation is carried out in accordance with insolvency law or company law (Lei, Sun, 2014, 14).

2.2.3. Insurance Companies' Right to File for Insolvency Essentially Exclusive to Regulator

Articles 90 and 148 of the Insurance Law specify the entities entitled to file for insolvency. Regarding the subject of filing, in addition to the continuation of Article 134 of the Bankruptcy Law, which provides that the regulator may file for bankruptcy of financial institutions, Article 90 also provides that both the insurance company and its creditors may file for insolvency of the insurance company if the insurance company has statutory grounds for insolvency. Moreover, in order to maintain the safety and stability of the financial market and to prevent the turbulence and abuse of the insurance market caused by the commencement of insolvency proceedings in practice, the Insurance Law also grants the insurance regulatory authority the right to consent to and approve the filing for insolvency of the above entities. However, new problems have arisen as a result, namely that the right to initiate the insolvency of an insurance company is essentially monopolized by the insurance regulator, and the power of other subjects to initiate the insolvency of an insurance company is essentially denied in disguise in the event of inaction by the insurance regulator.

3. ISSUES IN INSURANCE COMPANY RISK DISPOSAL PRACTICES

In practice, China has repeatedly adopted various risk disposal measures to address the risks posed

being uted. Where a financial institution is under bankruptcy, the State Council may, according to the present Law and other relevant laws, formulate the corresponding measures for implementation."

[4] "Where an insurance company falls under any of the circumstances prescribed in Article 2 of the Enterprise Bankruptcy Law of the People's Republic of China, upon approval of the insurance regulatory body under the State Council, the insurance company or any creditor thereof may apply to the people's court for reorganization, reconciliation or bankruptcy liquidation of the company; the insurance regulatory body under the State Council may also apply to the people's court for reorganization or bankruptcy liquidation of the company."

[5] "Where an insurance company overhauled or in receivership falls under the circumstances as prescribed in Article 2 of the Enterprise Bankruptcy Law of the People's Republic of China, the insurance regulatory body under the State Council may apply to the people's court for reorganization or bankruptcy liquidation of the company."

[6] "Where the insurance operation permit of an insurance company is revoked for the illegal operations, or the solvency of an insurance company is lower than the standard prescribed by the insurance regulatory body under the State Council, and the order of the insurance market will be seriously endangered or the public interest will be seriously damaged if the company is not abolished, the insurance regulatory body under the State Council shall abolished it, make an announcement, and legally form a liquidation group to conduct liquidation in a timely manner."

by insurers with insufficient solvency. However, inadequate resources will lead to regulatory loopholes, and existing legislation makes it difficult to provide a perfect legal exit route for Chinese insurers. Typical problems are the lack of a hierarchical approach to risk disposal due to over-regulation after risks have been exposed, and the encroachment of the executive on the judiciary.

3.1 Measures Used to Disposal Risk are Not Hierarchical

In practice, over-regulation refers to the fact that after the risk exposure of insurance companies, the regulator does not take progressive regulatory measures from low to high in severity, but directly uses receivership measures in exchange for more freedom of action, which leads to the suspicion of "paternalism" supervision. As mentioned above, China has established a regulatory system that moves from a low level of regulation to a high level of regulation, similar to the US, Japan and the UK (Xiong, 2011, 167). However, observing the risk disposal practices of China's insurance companies shows that when insurance companies face insufficient solvency crises, regulators have repeatedly and directly adopted a single regulatory measure of strong administrative receivership. The receivership of four insurance companies by the CBIRC in 2020 is used as an example to illustrate this. On 17 July 2020, the CBIRC imposed one-year receivership on four insurance companies, including Tian'an Property and Casualty Insurance Company Limited, Huaxia Life Insurance Company Limited, Tian'an Life Insurance Company Limited and Yi'an Property and Casualty Insurance Company Limited, for triggering the conditions for receivership under Article 144 of the Insurance Law. From the date of the receivership, the shareholders' meeting, the board of directors and the supervisory board of the institution under receivership cease to perform their duties and all relevant functions are assumed by the receivership team. The receivership group appointed by the CBIRC exercises the management rights of the institution under receivership and the head of the receivership group exercises the duties of the institution's legal representative.[7] Although all four insurance companies were loss-making at the time of the receivership, there was a legitimate basis for the regulator to take receivership measures against the insurers. However, before the acquisition was announced, according to the solvency disclosure information in the first quarter of 2020, the core solvency adequacy rating of the four insurance companies were over 50% and the comprehensive solvency adequacy rating were over 100%, and even the risk composite ratings of Tian'an Life and Yi'an Property & Casualty Insurance were both in the B category, which is a solvency-compliant company. [8]Therefore, the imposition of direct receivership measures without the publication of the solvency rating and risk composite rating for the second quarter is clearly contrary to the original intention of the legislator and does not reflect the process of gradual increase in the intensity of supervision. Moreover, the CBIRC justified the receivership of the four insurance companies by stating "the conditions for receivership under Article 144 of the Insurance Law of the PRC were triggered", without further explanation as to how these conditions were triggered.

3.2 The Issue of Administrative Encroachment on Judicial Power

The insurance company's right to commence insolvency proceedings is essentially exclusively possessed by the regulator, raising questions about the erosion of judicial power by administrative power. As mentioned above, under Section 90 of the Insurance Law, the consent of the regulator is required before an insurance company or its creditors, other than the regulator, may file a petition with the court for the insolvency of the insurance company. In addition, according to Article 148 of the Insurance Law, if a reorganized or taken-over insurance company has the circumstances stipulated in Article 2 of the Bankruptcy Law, the supervisory authority may, in accordance with the law, apply to the court for the rehabilitation or liquidation of the insurance company. The literal meaning of the term is inferred from the fact that when an insurance company being reorganized or placed in

[7] See Announcement of the China Banking and Insurance Regulatory Commission on the Implementation of receivership of Tian'an Property and Casualty Insurance Company Limited and Six Other Institutions in accordance with Law http://www.cbirc.gov.cn/cn/view/pages/ItemDetail.html?docId=917190&itemId=925&generaltype=0,Oct,22,2023.

[8] According to the information that has been disclosed, in the first quarter of 2020, the core solvency adequacy ratios of Huaxia Life was 113.83% and the comprehensive solvency adequacy ratios was 130.26%; the core solvency adequacy ratios of Tian'an Property & Casualty Insurance was 191.74% and the comprehensive solvency adequacy ratios was 237.24%; the core solvency adequacy rating of Tian'an Life was 112.01% and the comprehensive solvency adequacy ratios was 128.27%, with a risk composite rating of B. The Comprehensive Solvency Adequacy Ratio and core solvency adequacy ratios of Yi'an Property and Casualty Insurance were both 175.19%, with a risk composite ratios of B.

receivership has reasons for insolvency, the regulator can continue to reorganized or place it in receivership instead of initiating insolvency proceedings in court (Gao, Lei, 2023, 44). As a result, the consequence is that the right to commence insolvency is in fact exclusively held by the regulator, which aggravates the negative effects of "paternalistic" regulation. For example, in the case of Tian'an Property and Casualty Insurance Company, which was taken over by CBIRC, Tian'an Property and Casualty Insurance Company was already in a state of serious insolvency at the end of the receivership period, with assets of RMB14.401 billion and liabilities of RMB15.255 billion, which met the technical requirements for insolvency. Instead, the regulator attempted to resolve the risk through the transfer of the insurance business asset package. In addition, the appropriateness of the exercise of regulatory power was questioned as the transfer of the asset package did not go smoothly and the risk resolution of Tian'an P&C has not yet been completed.

4. ANALYSIS OF THE DIFFERENTIATION OF INSURANCE INSOLVENCY STANDARDS FROM AN INTERNATIONAL PERSPECTIVE

The Insurance Law and the Bankruptcy Law are the two basic laws to be followed in dealing with the insolvency of insurance companies, but as higher-order laws, they can only provide general provisions on general matters through legal articles, and it is difficult for them to provide a detailed design for specific issues related to the insolvency of insurance companies. The absence of legislation on the insolvency of insurance companies and the lack of practical experience will be an obstacle to the courts' conduct of insolvency proceedings in practice. Due to the special characteristics of insurance undertakings, the question of whether they should have the same insolvency limits as normal undertakings is the most fundamental and worthy of theoretical study.

4.1. Analysis of Types of Insurance Company Insolvency Standards and Their Contemporary Trends

An overview of the causes of enterprise insolvency in the international arena shows that there are three main types of legislation in the international arena, namely generalization, enumeration and statutory regulatory standards, also known as 'capital requirement insolvency' or 'regulatory requirement insolvency' (Wang, 2009, A13). China has adopted a generalist legislative approach, with "inability to pay debts as they fall due" as an important component and core element of the causes of insolvency in its insolvency law (Zou, Zhou, 2013, 61). In practice, the courts generally adopt the asset-liability standard and the cash-flow standard as the criteria for judging the insolvency of enterprises, but the insolvency of financial institutions focuses more on maintaining financial security than the insolvency of ordinary enterprises, and it is difficult for the general causes of insolvency to realize the pursuit of the above-mentioned value objectives. Therefore, the question of whether regulatory standards should be introduced as a consideration for the causes of insolvency of financial institutions, especially insurance companies, is an issue on which the academic community has focused its attention. In the following paragraphs, we will review the two existing standards separately and compare their respective characteristics and shortcomings in considering whether there is a need to introduce regulatory standards in China.

(1) Cash-flow standards: It focuses on whether or not the creditor-debtor relationship can be maintained, which can show the solvency of the debtor in a more intuitive way, so it is common practice in countries around the world to take it as the cause of the debtor's insolvency. However, the cash-flow standard has a lag in the start time, because by this time it has already been indicated that the debtor is unable to repay the due debt, which is already in a continuous state, not temporarily unable to pay or subjectively refusing to pay (Wang, 2010, 16-27), and using it as a reason for the insolvency of an insurance company has many drawbacks. First, the bankruptcy mechanism does not necessarily have to solve the cash flow problems of insurance companies. Whether a debtor lacks solvency cannot be judged solely on the basis of the amount of assets it owns, but should be determined by a combination of the various means available for solvency. Generally speaking, solvency is a combination of a debtor's assets, credit, labor and other factors, and even if a company is struggling to pay, it can rely on its good creditworthiness to take on new debt to pay off old debt without being declared insolvent. Second, it would increase exposure, risk and even loss by delaying the time to bail out insurers by judging their health on this basis. As a consequence, the cash-flow standard is not conducive to improving the cure rate of business distress because of the "backwardation of start-up time" and the inability to provide early relief to insurers in distress.

(2) Asset-liability standards: This standard is usually based on the entity's balance sheet as a preliminary judgement that the entity is in a situation where the

sum of its liabilities exceeds the sum of its assets and there is a likelihood that it will be unable to meet its liabilities. It will also prevent the company from continuing to borrow in bad faith in order to escape a potential or existing insolvency situation. However, the use of the asset-liability standard as the insolvency standard for insurers is also flawed because insurers are financial institutions that provide protection against risks to policyholders and insured persons in the form of an insurance policy, with the risks being those that might occur in the future. Based on the uncertainty of the occurrence of risks, it is noted that the composition of the debt of insurance enterprises is composed of a large proportion of contingent liabilities and the debt leverage is quite high, which greatly affects the accuracy of the balance sheet in reflecting the financial position of insurance enterprises. In addition, an asset is valued on a static basis and when it is put up for sale in an actual bidding process, the accounting criteria are not precise and there may be a large gap between the carrying value of the asset and the actual market value, depending on the buyer's bidding factors and the manner in which the asset is sold. Therefore, the simple use of the asset-liability standard as a criterion for assessing the insolvency of insurance companies also lacks a certain degree of rationality. It is also difficult to identify the hidden dangers of insurance company insolvency in advance.

Given the deficiencies of the cash-flow standard and the asset-liability standard in determining whether an insurance company has a cause of insolvency, Chinese scholars have focused their research on whether regulatory standards should be introduced to consider the cause of insolvency of insurance institutions (Zou, Zhou, 2013, 297). Regulatory standards are a set of indicators designated by financial regulators to manage security and risk assessment of financial institutions. It has been argued that the regulatory standard for insurance companies is focused on the solvency of the insurance company, and even if the assets and liabilities of the insurance company show that its capital is positive, the insurance regulator can determine that the insurance company is insolvent on that basis, provided that the insurance regulator considers that the insurance company does not meet the regulatory requirements and that its financial position is no longer safe and sound (Sai, 2020, 67). Solvency, on the other hand, is an important regulatory indicator of an insurer's capital adequacy at a given point in time and an insurance company's ability to meet its claims obligations to policyholders. Maintaining adequate solvency is critical to the sound operation of insurance companies and the protection of insurance consumers.

4.2. Analysis of the Legitimacy of a Regulatory Standard as the Standard for Insurance Company Insolvency

Research on regulatory standards around the world began in the 1970s, when the insurance industry in developed countries was growing rapidly and increasing internal and external risks were leading to a high incidence of insurer insolvency. For example, in the period 1970-1986, the life insurance industry in the United States suffered a major crisis under the double impact of the reform of the marketisation of interest rates in the insurance industry and the failure of life insurance companies' investments, which triggered a wave of insurance company bankruptcies, with nearly 300 companies declaring insolvency because they were unable to overcome their debt problems. Based on this, insurance researchers worldwide have begun to shift their attention to the study of regulatory standards centred on the solvency of insurance companies. Take the United States, Japan and the UK as examples.

The United States is a typical highly regulated country, with the modern insurance regulatory framework dating back to the 19th century, when the State of New Hampshire appointed the first commissioner of insurance in the history of the United States in 1851. In 1871, state insurance commissioners in the United States formed the National Insurance Commission (NAIC) to regulate the insurance industry through the establishment of a uniform financial reporting system, an auditing system and the development of financial standards. Under the guidance of the NAIC, state insurance commissioners use a variety of tools to assess the financial condition of insurance companies in order to prevent the occurrence of solvency deficiencies. These tools include the Insurance Regulatory Information System (IRIS), the Financial Analysis and Solvency Tracking System (FAST), the Minimum Risk-Based Capital Requirements (MRBC), the Risk-Based Capital Requirements (RBC) for property and casualty insurers, the Dynamic Financial Analysis of the Insurance Industry (DFA), and a variety of routine and non-routine on-site examinations. In the solvency assessment metrics for the U.S. insurance industry, regulatory interventions taken by insurance commissioners are judged primarily on the basis of the RBC regulatory standards. The basic content of the RBC regulatory standard is that an insurance company, when conducting insurance business, should have minimum capital commensurate with the scale of its business and the level of risk, and its assets should not be less than the value derived from the calculation method prescribed by the RBC, so as to ensure that it has sufficient solvency. RBC classifies an insurer's risk into

(Table I—RBC LEVEL)

RBC Ratios	RBC Level	Regulatory Action
≥200%	NO Action	NO
150%-200%	Company Action	Insurers are required to submit an RBC plan to the commissioner within 45 days, including a rationale, corrective actions (e.g., to increase capital or reduce risk), financial projections, etc.
100%-150%	Regulatory Action	The Commissioner has the power to require an insurer to submit or revise an RBC plan and may conduct financial examinations of an insurer's assets, liabilities and operations, etc.
70%-100%	Authorized Control	The Commissioner may initiate reorganization or liquidation proceedings to enforce the supervision of insurers. Insurers are entitled to the protection of summary proceedings and still have the right to decide on the company's business development.
≤70%	Mandatory Control	If necessary, the Commissioner may place an insurance company under his mandatory supervision in accordance with the State laws on the reorganization and liquidation of insurance companies.

five risk-based capital levels (RBC levels) by calculating the insurer's risk-based capital ratios, namely the No Action Level, the Regulatory Action Level, the Authorized Control Level and the Mandatory Control Level. Generally, the commissioner is empowered to take action to rehabilitate or liquidate an insurer if the risk-based capital requirement (RBC) for solvency is between 70% and 100%, and is obliged to rehabilitate or liquidate an insurer if the risk index is below 70%. Table I [9]shows the solvency action standard under the US RBC regulatory regime:

Since the 1970s, Japan's insurance industry has grown by leaps and bounds, becoming the world's second largest insurance market after the United States in the 1980s and 1990s. However, the bursting of Japan's economic bubble in 1990 triggered a severe economic crisis, plunging Japan into its longest postwar recession. Under the circumstances of plummeting stock and property prices, book losses became a major obstacle to the development of insurance organizations, insurance companies' total assets shrank sharply, new premium income declined rapidly and many insurance companies experienced financial difficulties. Against this backdrop, Japan began to amend the Insurance Law, loosening restrictions on entering the insurance market and establishing a solvency-based regulatory model based on the US RBC standard, allowing the insurance market to emerge from insolvency. During the period 1997-2001, a total of seven life insurance companies and two property and casualty insurance companies in Japan declared bankruptcy and underwent rehabilitation (Sun, Fei, 2017, 83-87). At the same time, in order to strengthen the regulation of the financial sector, the Financial Supervisory Agency (FSA) was established in Japan in June 1998 to take over the supervision of the banking, securities and insurance industries from the Ministry of Finance. In July 2000, the Financial Supervisory Authority became the Financial Services Authority, separating the financial management programmes and legislative powers formerly held by the Ministry of Finance, and ensuring the independence of the Director of Finance through his direct appointment by the Prime Minister.[10] In the Comprehensive Supervision Guidelines for Insurance Companies formulated by the Financial Services Agency, the supervisory authority classifies supervisory actions for insurance companies into four levels based on solvency ratios with corresponding corrective measures, and the specific regulatory actions are shown in Table II:

The financial sector in the UK, including insurance companies, securities firms, etc., is regulated by the Financial Services Authority (FSA) under the Financial Services and Markets Act (FSMA).[11] In March 2016, the

[9] See RISK-BASED CAPITAL (RBC) FOR INSURERS MODEL ACT § 3-6. https://content.naic.org/sites/default/files/inline-files/MDL-312.pdf

[10] The Ministry of Finance is the central government financial organ of Japan that existed until 2000 and was in charge of Japan's treasury, finance and taxation. On 6 January 2001, the central ministries and offices were reorganized and restructured into the Ministry of Finance and the Financial Services Agency.

[11] The FSA was split into the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA) in 2012. The former is responsible for regulating the conduct of business of all types of financial institutions, while the latter is responsible for the prudential regulation of all types of financial institutions, including banks, building societies, credit unions and insurance companies. See Financial Conduct Authority, at https://www.fca.org.uk/, Oct, 11, 2023.

Solvency Ratio	Regulatory Level	Regulatory Action
≥200%	1	NO
100%-200%	2	Require insurers to submit feasible business improvement plans
0%-100%	3	Proposing feasible plans to increase the solvency of insurers; prohibiting or limiting the distribution of dividends to insurers or policyholders; changing the predetermined interest rate for new insurance contracts; limiting the use of funds; restricting the types of business; and adjusting the percentage of ownership in subsidiaries, among others.
≤0%	4	Ordering all or part of the company to cease trading and applying for insolvency.

(Table II—Solvency Regulatory Standards)

PRA introduced The Prudential Regulation Authority's Approach to Insurance Supervision and updated in July 2023, section 210 of which details how it will deal with problematic insurance risks. For the purpose of analyzing the solvency level of insurance companies, the regulator also adopts a hierarchical regulatory model, whereby insurance companies are classified according to the risk assessment made earlier, and the risk level is classified into five stages, namely low risk to viability of firm, moderate risk to viability of firm risk to viability absent action by the firm imminent risk to viability of firm firm in resolution or being actively wound up, and liquidation and insolvency, in descending order, and corresponding risk management measures are established.[12] While the PRA has, since its inception, mostly adopted less mandatory disposal measures such as reporting orders and plan submissions, the Regulatory Approach explicitly provides for a "no insolvency-free" approach, whereby the PRA will initiate appropriate insolvency proceedings to properly regulate an insurer's exit from the market, if necessary.

5. LEGISLATIVE SUGGESTIONS TO IMPROVE INSOLVENCY STANDARDS FOR CHINESE INSURANCE COMPANIES

International experience shows that the establishment of specialized insolvency laws has gradually become a modern trend in the development of insolvency legislation models for insurance companies worldwide. China's insurance company insolvency legislation should be based on the existing structure of the Bankruptcy law, and the State Council should formulate special insurance company insolvency regulations in accordance with the principle of "division of business, division of management, division of insolvency", insisting that the insolvency of an insurance company is different from that of ordinary enterprises.

5.1. Establishing Regulatory Standards as an Important Consideration in the Insolvency of Insurance Companies

As mentioned above, the existing standards for determining the causes of corporate insolvency do not reflect the concept that the legal design of insurance company insolvency should focus on prevention and rescue. Therefore, there is an urgent need to introduce regulatory criteria in the design of Chinese legislation with reference to foreign regulations. However, when it is introduced, it should also be based on China's legal reality. It is doubtful whether it is possible to directly copy the provisions of developed Western countries and directly establish the regulatory standard as the cause of the insolvency of an enterprise, leaving the final determination of the cause of insolvency to the insurance company's supervisory authority. First, using regulatory standards as a cause of insolvency essentially places the determination of the cause of an insurer's insolvency in the hands of the regulator rather than the courts. As a result, there are few countries where regulatory standards are directly specified as the cause of an insurer's insolvency in most countries with legislation that adopts the "judicial insolvency" model for insurance companies. Some scholars argue that the regulator's power to approve insolvency applications already reflects compromise of judicial power over administrative power. The administrative disposition process reflects a special regulatory tool for regulators of financial institutions with high business risks, and the judiciary can only be passively involved in judicial

[12] See The Prudential Regulation Authority's approach to banking supervision, Box 5: Stages in the Proactive Intervention Framework.

review proceedings at this stage (Huang, 2009, 867-884). Therefore, from the point of view of maintaining the authority and unity of the rule of law, the causes of insolvency of insurance companies should not have extralegal jurisdiction over the causes of insolvency of other enterprises (Lei, Sun, 2014, 14). Second, the use of an insurance company's solvency ratio as a criterion for initiating insolvency proceedings is reasonable to a certain extent, but the criterion is an ongoing process of change that also places higher demands on the capacity and work of the regulator and is difficult to apply in practice. Finally, China's current solvency regulations do not reflect the full and accurate asset position of an insurance company. In the "2022 Life Insurance Quarterly Solvency Ranking" published by CBIRC, an insurance company called "Huahui Life" has a very high consolidated solvency ratio of 2,270 percent, which is due to the fact that the company has just been established and has not yet had the opportunity to fully utilize its premium income. At this point, the higher the solvency ratio of an insurance company, the more premium income it has retained, and a too high solvency ratio may indicate that the company has problems such as slow development and unused capital that cannot be reasonably used, and does not completely reflect the true solvency of the company. Therefore, the violation of regulatory standards is not equivalent to the insolvency of insurance companies, and the cause of insolvency should still be based on the solvency of the debtor in the sense of jurisprudence, without all the differences depending on the type of business, but only the means of determining the cause of insolvency can be different. Where an insurance company fails to meet certain regulatory standards, this may be used as a special ground for rehabilitation and the court may consider that there is a "clear risk of insolvency" and initiate insolvency rehabilitation proceedings on the application of the applicant.

5.2. Clarifying the Liquidation Path of a Cancelled Insurance Company

cancellation of liquidation is an administrative act authorized by the State Council to be carried out by the insurance supervisory authority, and as Article 149 of the Insurance Law does not provide for the path of revocation of liquidation, it is unclear whether the Company Law or the Bankruptcy Law applies to liquidation. As can be seen from Section 148, which provides that a reorganized or taken-over insurance company may be subject to insolvency proceedings at the request of the regulator only if the circumstances specified in Section 2 of the Bankruptcy Law are present, a cancellation company does not ipso facto enter into insolvency proceedings, but only if the circumstances specified in Section 2 of the Law on Bankruptcy are present. As for the legal application of the cancellation of liquidation, this paper holds that based on the characteristics of insurance companies as quasi-public enterprises, in order to protect social public interests and maintain the order of the insurance market, it is more appropriate to apply the idea of administrative liquidation in the Regulation on the Risk Disposal of Securities Companies (Regulation on the Risk Disposal of Securities Companies, 2023, art.21)[13], to the securities companies that have been canceled, and to carry out administrative liquidation procedures led by the regulator. Furthermore, in order to ensure the effectiveness and independence of the cancellation of liquidation, the shareholders of the insurance company may be excluded from the scope of the liquidation group, drawing on the experience of the risk disposal of securities companies.

5.3. Redefining the Right to Apply in Insolvency

Given the incomplete insolvency legislation and lack of practical experience in China, it is reasonable and justifiable to give the regulator the power to agree and approve insolvency filings made by insurance companies or debtors. First, it is a specific application of financial regulatory theory to the field of insurance regulation. Second, it can achieve the regulator's goal of maintaining stability and balancing the interests of all parties involved in the insurance company. Finally, the regulator has stronger professional skills and judgement than other subjects, and the court will not object to granting the regulator some insolvency approval power in the process of insolvency. However, in order to remove the excessive discretionary power of the regulator and to ensure the right of other subjects to file for the insolvency of insurance companies, this paper argues that the situation of filing for insolvency as an insurance company or as a creditor can be discussed in a different context. In the case of an insurance undertaking's insolvency reorganization, the insurance undertaking or creditors may apply directly to the court for the opening of the insurance undertaking's insolvency reorganization proceedings without the

[13] "To cancel a securities company, the securities regulatory agency under the State Council shall make a decision of cancellation, select professional agencies including law firm and accounting firm to form an administrative liquidating group in accordance with the prescribed procedure, and subject the company to administrative liquidation."

consent and approval of the supervisory authority. In the case of the insolvent liquidation of an insurance undertaking, the insurance undertaking or the creditors may apply to the court for the commencement of insolvent liquidation proceedings only after obtaining the consent of the supervisory authority. Furthermore, in order to further limit the encroachment of administrative power on judicial power, Article 148 of the Insurance Low should be amended to provide that if a reorganized or taken-over insurance company has grounds for insolvency, the regulator shall apply to the court for the reorganization or insolvent liquidation of the insurance company.

5.4. Setting up a Robust Mechanism for Monitoring the Authority

At present, the law has extremely limited provisions on the supervisory powers of the insurance regulator, and the practice of "strong administration and weak justice" in the insurance industry will lead to the abuse of administrative power, the deprivation of creditors' litigation rights and the breeding of moral corruption. "Good law is a prerequisite for good governance", therefore it is necessary to adopt legislation to guide and regulate the right to supervise insurance companies in the areas of risk disposal and market exit, and to guide insurance companies in solvency crises to improve their operations through consolidation and receivership under the Insurance Law, or to exit the market through the reorganization, reconciliation and liquidation procedures under the Bankruptcy Law, in accordance with the law, in order to get out of their predicaments. Relying on the theory of economic law, in safeguarding the public interests of society and the legitimate rights and interests of market participants, legislation must be empowered to regulatory bodies, but as Montesquieu said, "all those who have power are prone to abuse it", to prevent the abuse of regulatory power and the inaction of regulatory, it is again necessary to supervise the regulatory power granted to regulatory authorities. The Chinese legislature should also follow this legislative logic and establish an insurance regulatory system that integrates the functions of authorization and supervision, regulates the conduct of the regulator and promotes the efficient and effective exercise of its supervisory power over the insurance industry.

6. CONCLIUSION

If there is "freedom" but no "order", the market will be "alive" but "chaotic". If there is "order" but no "freedom", the market will not be "alive", although it will not be "chaotic" (Jiang, 2010, 5). In order to achieve "viability" of the insurance market while keeping it "uncluttered", legislators need to address issues related to insolvency standards for insurance companies. First, on the determination of the cause of insolvency, it affirms the legitimacy and reasonableness of the solvency-centred regulatory standard as the consideration of the cause of insolvency of insurance companies, but opposes the direct determination of the regulatory standard as the cause of insolvency under the "judicial insolvency" mode of legislation implemented in China. The relevant entity may apply to enter into reorganization proceedings on the grounds of insufficient solvency. Second, as regards the choice of the liquidation path for the revoked insurance company, an administrative liquidation process led by the regulator will be implemented. Third, the circumstances in which an insurance company or creditor files for insolvency should be discussed separately. Finally, a regulatory system should be in place, with a combination of authorization and control functions, to regulate the conduct of regulators.

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