

A Research on Substantive Merger Bankruptcy Rules

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Abstract

The emergence of related enterprises is the inevitable outcome of the rapid development of market economy. The independence of law and the closeness of economy make the bankruptcy of affiliated enterprises more complicated than that of ordinary enterprises. The establishment of the substantive merger bankruptcy rule is to deal with the special situation of the bankruptcy of the affiliated enterprises, through the substantive merger of the properties of the affiliated enterprises, the creditors will pay off the merged property in proportion, so as to protect the interests of the creditors. In view of the current legislation and judicial interpretation of China has not established the substantive consolidated bankruptcy rules, this paper analyzes the value of the substantive consolidated bankruptcy rules and the problems in judicial practice on the basis of clarifying the relevant concepts and puts forward some legislative suggestions for the application of the rules and the initiation of procedures.

Keywords: related enterprises, substantial merger, bankruptcy, applicable standard

1. Introduction

At present, the substantive consolidated bankruptcy rule has not been incorporated into the system of China's Enterprise Bankruptcy Law (hereinafter referred to as the Bankruptcy Law), but there is no lack of bankruptcy cases using this rule in judicial practice. According to the cases collected by the National Enterprise Bankruptcy and Reorganization Information Network, from 2016 to 2019, 102 cases of affiliated enterprises were tried under the substantive consolidated bankruptcy rules, which indicates that the substantive consolidated bankruptcy rules have been feasible to a certain extent. Considering that substantive consolidated bankruptcy will involve the interests of many parties, and the applicable standards of the rules and the initiation of procedures have not yet been determined, this paper will base on the problems in judicial practice, and make suggestions for the perfection of substantive consolidated bankruptcy rules and the amendment of bankruptcy Law.

2. The Particularity of Associated Enterprises and the Connotation of Substantive Merger Bankruptcy Rules

Associated enterprises are the logical premise for the application of substantive merger bankruptcy rules. To study the application of the substantive merger bankruptcy rules, we should first understand the concept of affiliated enterprises and the historical origin of the substantive merger bankruptcy rules, so as to carry out the subsequent elaboration of the application of the rules and reveal the intention of the consolidated bankruptcy.

2.1 Connotation and Characteristics of Associated Enterprises

So far, affiliated enterprises have not formed a unified and rigorous legal concept in the academic circle of China, but more often describe the phenomenon of affiliated enterprises from the perspective of economics. At the same time, compared with other countries or regions, it can be found that the definition of affiliated enterprises is different. Among them, the United States takes the realization of substantial control between enterprises as the criterion for the judgment of affiliated enterprises. It is clear that if more than 5% of the voting shares of an enterprise are directly or indirectly controlled by another enterprise, the two enterprises can be identified as affiliated enterprises. Most of the affiliated enterprises under The German Stock Law are translated as "affiliate enterprises" by Chinese scholars. The Law makes detailed provisions on the affiliated enterprises, affirms the independent status and affiliate relationship of the affiliated enterprises, and distinguishes various types of affiliate enterprises according to the closeness of the connection. (Note 1) Among them, the most typical is The Konzern enterprise, including inter-enterprise control and controlled Konzern, enterprise contract konzern and

attachment Konzern. (Wu, Y., 2001) The Corporation law of Taiwan China takes control and subordination relationship and mutual investment relationship as important criteria to identify affiliated enterprises.

However, in mainland China, the term "associated enterprises" is used in the legal text of regulating tax collection and administration, but this definition is only derived from the perspective of tax objects, which inevitably has certain limitations. (Note 2) The current Company Law of the People's Republic of China (hereinafter referred to as the Company Law) does not directly define associated enterprises but gives an explanation of the meaning of "associated relationship". (Note 3)

According to the above analysis, although different countries and regions have different definitions of related enterprises, some commonalities can still be obtained. Through these commonalities and experience in judicial practice, we can summarize the characteristics of related enterprises for subsequent analysis. First of all, an associated enterprise should be a consortium composed of two or more enterprises. There is a relationship between the control and controlled in fact or in law among the related enterprises. Secondly, the members of each associated enterprise must have independent legal personality. Although in fact, the affiliated enterprises have formed unequal subordination and dominance relationship, but still maintain independent legal status. Finally, a community of interests is formed among the related enterprises, which is concentrated in economic interests. Enterprise group is one of the more common forms.

2.2 The Origin and Historical Evolution of Substantive Merger Bankruptcy Rules

Substantive consolidated bankruptcy is a precedent rule created by American courts. Its theory originates from the entity Theory of business proposed by Professor Adolf Berle in 1947. According to this theory, whether an enterprise is independent should be judged according to whether the facts of the company are consistent with the facts of the entity. If several companies operate the same business, they are essentially equivalent to different departments under the same enterprise and should be regarded as a whole entity according to the legal facts. The application of the theory will lead to the associated enterprises as a whole entity to take responsibility for the debts of some member enterprises.

1941 The U.S. Court ruled in *Sampsel v. Imperial Paper & Color Corp.* In this case, the substantial consolidated bankruptcy rule was adopted for the first time, and it was confirmed that the unsecured creditors of malicious affiliates no longer enjoyed priority in the case of substantial consolidated bankruptcy. (Note 4) In 1966, in the case of *Chemical Bank New York Trust Co. v. Kheel*, the court proposed two applicable standards. First, the relevant debtors were owned or controlled by the same manager. (Note 5) Second, it takes a lot of time and money to clear up the relationship between debtors and distinguish their assets and liabilities, which may affect the rights and interests of creditors. The seven judgment criteria established in 1980 in *Re Vecco Construction Industries, Inc* (Note 6) and the reaffirmation and limited application of judgment criteria in 2005 in *Re Owens Corning*. (Note 7) The substantive consolidated bankruptcy rule has gradually developed into a more mature system in American bankruptcy law.

3. The Realistic Value of Substantive Consolidated Bankruptcy Rules

The essence characteristic of the associated enterprises lies in its independent legal status and compactness of economic interests, which is both the form of the affiliated enterprise the economic rationality, also for the associated enterprises abuse control relation, providing a space for dishonest gain conveying, substantial consolidation bankruptcy rules is in response to the particularity of affiliated enterprise bankruptcy, It is of great significance to standardize bankruptcy activities of related enterprises.

3.1 Preventing the Debtor From Using Affiliated Enterprises to Evade Debts

As mentioned above, when a member enterprise of an affiliate loses its independent legal personality, it is easy to induce the transfer of interests among affiliates and evade debts. In judicial practice, some of the enterprise group in order to achieve the benefit maximization, through a series of related transactions, the debt is concentrated in the group in the name of one or several companies, by their ACTS as the "shield" of the debt, if the bankruptcy proceedings, bankruptcy respectively ways will obviously not conducive to be at the expense of a firm's creditors; However, the consolidated bankruptcy procedure combines the assets and debts of the affiliated enterprises together for unified external repayment, which can effectively avoid the behavior of debtors using the affiliated enterprises to evade debts.

3.2 Ensuring Substantial Equity Among Creditors

In the process of operation, enterprise groups often use complex control and affiliation to effectively improve the overall market competitiveness of enterprises, but under the legal system of corporate personality independence and limited liability of shareholders, the corresponding risks are also transferred to creditors. In this context, if

still on each member enterprises liquidation, respectively, is bound to increase found the difficulty of the illegitimate interests transmission between affiliated enterprise, many members of the enterprises under the control of enterprise overall arrangement already "shell", a lot because of the associated enterprises suffered losses of transfer assets creditors would be difficult to obtain effective relief. The introduction of substantive merger bankruptcy rules can restrain the above behaviors, regulate the improper transactions of affiliated enterprises, and ensure the realization of substantive fairness among bankruptcy creditors.

3.3 Reduce the Bankruptcy Cost of Affiliated Enterprises and Improve the Bankruptcy Efficiency of Affiliated Enterprises

The substantive merger bankruptcy rule can not only guarantee the fair settlement of creditors in substance, but also reflect the pursuit of efficiency in procedure. Due to the special features of the affiliated enterprise bankruptcy, member enterprises in such aspects as property, management, and personnel are highly confusion, there are a lot of complex related party transactions, if you want to insist to separate bankruptcy of enterprises involved, the selection of the enterprise bankruptcy administrator, operation cost is high, and each enterprise bankruptcy and liquidation of bankruptcy administrator homogeneity serious; At the same time, each related enterprise is appointed to the jurisdiction of different administrators or courts, which will also waste judicial resources. On the other hand, if all of the assets and liabilities of the affiliated enterprise "packaging" as a whole, the manager will not clarify different ownership in the chaos of the assets, the judge also need not for each single enterprise bankruptcy ruling, largely simplified the cognizance of the relation between affiliated enterprise and guaranteed creditor's rights debt, clean up, help to save the economic costs, Improve the bankruptcy efficiency of affiliated enterprises.

In a word, the introduction of the substantive consolidated bankruptcy system is to solve the personality confusion and fraud of assets, liabilities, finance, management and other related enterprises in the operation process of enterprise groups. The basic legislative objectives of bankruptcy law, such as fair compensation, can be achieved by merging the related enterprises that have lost the ability to pay their debts independently.

4. The Problems of the Substantive Merger Bankruptcy Rules in the Judicial Practice

Indeed, the substantive merger bankruptcy rule has played its unique value in judicial practice, to break the judicial deadlock, promote the process of bankruptcy trial, safeguard the legal rights and interests of creditors and social public interests to provide a possible rule path. However, at present, China's legislation on bankruptcy law there is no real merger in the text of the concept and the related provisions, as a statute law country, the lack of legal norms can lead to the direction of the judge in the process of interpretation, it faces many questions and challenges, especially about substantial consolidation bankruptcy rules judgment standard that, caused widespread discussion.

4.1 The Procedure of Substantive Merger Bankruptcy Rules Lacks Clear Legislative Guarantee

Up to now, the actual consolidated bankruptcy rule is still in the state of legislative blank. For this reason, the Supreme People's Court has drawn up a draft of judicial interpretation for soliciting opinions, but it has not been issued yet. It was not until March 2018 that the Supreme People's Court issued the "Minutes of National Court Bankruptcy Trial Work Conference" (hereinafter referred to as the "Minutes"), which made some provisions on the bankruptcy of affiliated enterprises for the first time. Although these provisions have some practical guiding significance, the lack of clear legal document guidance can lead to judges' hesitation in applying the rules. Since substantial merger bankruptcy will greatly adjust the original pattern of interests, the certainty and predictability of the application of the rule should be emphasized. At the same time, as the applicable subject and premise of the substantive consolidated bankruptcy rules, the current law of Our country only qualifies from the perspective of tax collection and administration and the standard of identifying the association in the Company Law and does not clearly define the concept of the associated enterprise from the perspective of the bankruptcy law.

4.2 The Standards of Applying Substantive Consolidated Bankruptcy Rules Are Not Unified

At present, the applicable standards of substantive consolidated bankruptcy rule in China show a trend of diversification. In the bankruptcy liquidation of Minfa Securities Co., Fuzhou Intermediate People's Court merged Minfa securities and four affiliated companies into bankruptcy on the grounds that the company had mixed personalities, according to a case published on the Internet. (Note 8) In addition, in the case of merger and reorganization of Zhejiang Zongheng Group Co., LTD and its affiliated companies, Shaoxing Intermediate Court also paid attention to the guarantee relationship within the group and the equitable settlement of creditors and other factors. (Tao, J.-L., & Shi, H.-X., 2012) In the warren Group merger and liquidation case, the court not only considered the factors of corporate personality confusion, but also took into account the difficulty of asset

separation, and paid attention to the efficiency of bankruptcy procedures and the realization of creditors' interests. (Note 9)

So, there are many applicable standards for substantive merger bankruptcy rules in China, but the burden of proof for each standard, the degree of proof and its influence on the final application of substantive merger are still vague, and still depend on the discretion of the court. While at the discretion of the court in this twilight zone is clearly stipulated in the text of the judicial principle of "prudence", but what is undeniable is that the present stage of our country's real merger applicable rules there is still a strong uncertainty, perhaps this is what "bankruptcy law" and so on legislative text have not respond to the rules of the important reasons. (Note 10)

5. Legislative Proposals on Substantive Consolidated Bankruptcy Rules of Affiliated Enterprises

In view of the practical problems faced by the substantive consolidated bankruptcy rule and its value in judicial practice, the legislature can consider incorporating it into China's legal system, make more detailed institutional arrangements for the application of the rule, and enhance the accuracy and predictability of the application of the rule. Therefore, the following part will put forward relevant legislative suggestions from the realization path and application standard of substantive merger bankruptcy rules.

5.1 Applicable Standards for the Substantive Merger Bankruptcy of Affiliated Enterprises

The substantive merger bankruptcy rule can achieve the equality among the creditors of the bankruptcy of affiliated enterprises to a large extent, and its positive value has been preliminarily affirmed. However, it is still not clear under what conditions the rule can be applied. In order to find a reasonable and orderly regulatory path in the complex structure of interest distribution and ensure that the liability chain can be extended within a reasonable range, this paper suggests that the application basis of the substantive merger bankruptcy rule should be divided into two categories, namely independent application standard and auxiliary application standard.

5.1.1 Independent Application Standard -- Limited Application Scope

First, the personality of the legal person of the associated enterprise is seriously confused. In the case of substantial merger of affiliated enterprises, the serious confusion between affiliated enterprises should be regarded as the primary criterion for the court to judge whether to approve the substantial merger. Among them, the key to judge personality confusion lies in the independence of legal person's will and legal person's property. (Xu, Y.-G., 2017)

Firstly, the serious loss of the independence of legal person property is the core element of identifying personality confusion. Independent property is the basis of enterprise operation. If there is the phenomenon of mixed property between shareholders and enterprises or affiliated enterprises, it not only violates the basic principles of the Company law, but also easily leads to the expropriation of company property and debt transfer, which seriously endangers the interests of enterprise creditors. From the static point of view, it mainly refers to the sharing of production facilities, business sites, or shared accounting books between affiliated enterprises. From the dynamic point of view, it refers to the allocation of funds between affiliated enterprises, arbitrary transfer of property and debt, mutual lending and mutual guarantee between enterprises, that is, the serious confusion of assets and liabilities. (Xiao, B., 2021)

Secondly, the serious loss of independence of corporate will is mainly manifested in the confusion of organizational structure and business. The confusion of organizational structure is reflected in the personnel appointment and decision-making mechanism among affiliated enterprises. The core controlling enterprises almost control the appointment of key personnel and the decision-making results of the shareholders' meeting or the board of directors. Business confusion refers to the same business scope, but more importantly, the businesses of related enterprises cross each other and act as different roles in the transaction link under the control and deployment of the core enterprise. However, in practice, almost all group enterprises are bound to more or less exist the above phenomenon to a certain extent, so the key is to see whether the affiliated enterprises seriously lose the independence of legal person property. (Wang, X.-X., 2019)

Second, fraud. According to the bankrupt enterprise group treatment method "(hereinafter referred to as the "method"), here to fraud as an independent standard, obviously different from the common civil contract fraud, it is the company set up in escape debts for the purpose or the company set up after essentially engaged in delaying debt, transfer of assets and other unfair business practices. (Note 11) Some fraudulent behaviors may be similar to the manifestation of denial of corporate personality, but the difference between the two lies in that the former has obvious subjective intention of fraud, that is, the establishment of the company is to evade debts, while the latter is only objective evidence formed in the highly integrated operation process of enterprise groups. In view of the subjective malignancy of debtors in this case, we can refer to the guidance of the Measures to include

them in the independent application standard of China's substantive consolidated bankruptcy rules in the future bankruptcy legislation.

5.1.2 Auxiliary Applicable Standards -- Give Individual Cases Room for Discretion

Under the condition of meet the personality confusion and fraud, the division between affiliated enterprise property of the high cost, combined treatment significantly improve the efficiency of trial judge standard, should be regulated in the future legislation, by the judge and managers in applicable under the guidance of the principle of prudence, weighing other applicable conditions to determine rules applicable or not. For the high cost of assets to separate judgment, for example, if a division between the members of each property, will guide the long-term management in auditing, accounting work and high cost, the creditors can get repayment rate greatly reduced, affiliated enterprise bankruptcy cost is much higher than produced by separation for the benefits of creditors, bankruptcy can be identified as to distinguish the cost is too high.

It should be emphasized that the establishment of the substantive consolidated bankruptcy rules is to ensure that creditors can receive fair compensation, and the court still needs to take this as the basis of judgment when hearing such cases to achieve the balance of interests of all parties. The establishment of any standard is inseparable from the goal of maximizing the interests of creditors. If a standard is established only to simplify the work process of the court or administrator, but actually damages the legitimate interests of the whole creditors, it should be excluded from application.

5.2 *The Path to Realize the Substantial Merger and Bankruptcy of Affiliated Enterprises*

5.2.1 Program Startup Mode

Substantive merger system is a special system in the field of bankruptcy law, which is different from the traditional bankruptcy law of the single subject bankruptcy, so in addition to the provisions of the bankruptcy law on the applicant, there should be exceptions, that is, the combination of the application doctrine and the doctrine of authority.

First of all, the eligible subjects of application should be limited to the following categories of subjects. For one thing, creditors. Creditors who have claims against any bankrupt member enterprise can become eligible subjects for applying for substantial consolidated bankruptcy, and it is not necessary for them to have claims against all member enterprises. For another things, the debtor. In addition to the debtors who use the behavior of evading debts of affiliated enterprises, the general debtors have the best understanding of their own operating conditions, so that they can promote the process of substantive consolidated bankruptcy, which can not only reduce the cost of exercising rights, but also effectively reduce the cost of bankruptcy. Third, managing people. In the bankruptcy of the affiliated enterprise, the administrator can fully understand the economic situation of the bankrupt member enterprise, so as to make a scientific judgment on whether to apply for substantive merger. Therefore, it is reasonable for the administrator to be the eligible subject with the right to apply for substantive merger, which helps to reduce the work burden of the court. (Wang, X.-X., & Zhou, W., 2011)

Secondly, traditional monomer in the bankruptcy proceedings, the court need to start the bankruptcy process based on the application from the party, but in essence merger mode only by the application of the parties is not enough, for example, for some controlled affiliated enterprise of the debtor, its voice often don't have to file for bankruptcy, the creditors in the application may be limited by the difficulty of onus probandi, Although the administrator is endowed with the right to initiate, the exercise of his right will also be restricted by the creditors' meeting. Therefore, in order to realize substantive justice, the court accepting bankruptcy application can be initiated in accordance with its authority after the case is accepted or in the process of case processing when each subject fails to put forward the request for substantive merger due to various obstacles.

5.2.2 Determination of the Competent Court

The provisions on jurisdiction of bankruptcy cases in the current bankruptcy law cannot be directly applied to the consolidated bankruptcy proceedings. The reason is that if multiple members of the affiliated enterprise group apply for the initiation of bankruptcy proceedings, and the domicile of these members may not be in the same place, different courts may have jurisdiction over them, which will undoubtedly cause jurisdictional conflicts. Here, in terms of the jurisdiction of the substantive merger, legislators can refer to the provisions in the "Summary", that is, to take the core control enterprise as the main, the location of the main property as the supplementary standard to determine the jurisdiction of the merger bankruptcy court. (Note 12)

5.2.3 Creditor's Right of Objection

After substantial merger and bankruptcy, it will inevitably break through the principle of personality

independence of legal person and limited liability of shareholders and may damage the interests of individual creditors. Therefore, the court should protect the creditor's right to know and right of objection when making the ruling of merger bankruptcy. Prior to the commencement of the proceedings, creditors should be notified in a timely manner to ensure that they have a full understanding of the case; After the start of the procedure, if the objecting creditor disagrees with the court's ruling, it can be given the right to apply for reconsideration to the next higher court. Moreover, in future legislation, it is necessary to improve the detailed provisions after reconsideration to protect the legitimate rights and interests of the creditor. (Wang, X.-X., 2019)

6. Conclusion

Because the substantive merger bankruptcy rules break through the traditional corporate law of personality independence and shareholders limited liability, the principle of prudent application should be consistent. At the same time, the construction of substantive consolidated bankruptcy rules should take the value objective of bankruptcy law as the starting point, enhance the certainty and predictability of the rules, and ensure fair and reasonable compensation of creditors. As for the application standard of substantive consolidated bankruptcy rules, it should not only consider the two independent application cases of serious personality confusion and fraud of affiliated enterprises, but also formulate the corresponding auxiliary application standard, so as to give the judge the discretionary space to comprehensively weigh the interests of all parties and give full play to the system value of substantive consolidated bankruptcy rules.

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Notes

Note 1. Article 18 of the German Share Law: "An affiliate refers to an enterprise with an independent legal status that forms an affiliate relationship with each other, including: (1) an enterprise majority-owned by an enterprise and an enterprise majority-owned by the enterprise (Article 16);(2) Subsidiary and controlling enterprises (art. 17);(3) The Konzern Enterprise (art. 18);(4) mutually owned enterprises (art. 19) or enterprises which are parties to an enterprise contract (art. 291, 292).

Note 2. According to Article 51 of The Detailed Rules for the Implementation of the Law of the People's Republic of China on The Administration of Tax Collection (2016 Revision), "Affiliated enterprises refer to those directly or indirectly owned or controlled by a third party in respect of capital, operation, purchase and sales, etc. Or other companies, enterprises and other economic organizations having related interests."

Note 3. According to Item 4 of Article 216 of the Company Law of the People's Republic of China, "Association relationship refers to the relationship between the controlling shareholders, actual controllers, directors, supervisors and senior managers of a company and the enterprises directly or indirectly controlled by them, as well as other relationships that may lead to the transfer of the company's interests. However, state-owned enterprises are not only related to each other because they are controlled by the state."

Note 4. *Sampson v. Imperial Paper & Color Corp.*, 313 U.S.(1941).

Note 5. *Chemical Bank New York Trust Co.v. Kheel*, 369F.2d 845(2d Cir.1966).

Note 6. In re Vecco Construction Industries, Inc,4 Bankr. (BankrE.D, Va.1980). The seven criteria established in the case include: first, the degree of difficulty in determining and distinguishing independent assets and liabilities; Second, whether there are consolidated financial statements; Third, profitability as a whole; Fourth, the confusion of assets and business; Fifth, the degree of unity of interests and ownership among business entities; Sixth, there is a debt guarantee between the parent company and the company; Seventh, assets are not transferred in accordance with the company.

Note 7. In re Owens Corning,419F.3d 195,210(3d Cir.2005).

Note 8. Passing "The case of merger, bankruptcy and liquidation of Minfa Securities Co., LTD., Beijing Chenda Technology Investment Co., LTD., Shanghai Yuan sheng Investment Management Co., LTD., Shanghai Quan sheng Investment and Development Co., LTD., and Shenzhen Tianji Heyuan Industrial Development Co., LTD." <http://gongbao.court.gov.cn/Details/f04a1a627a795d844ad67f33db1c87.html>, access date: on December 20, 2020.

Note 9. Refer to Zhejiang Fuyang Intermediate People's Court (2009) Hangzhou Fushang broken Word No. 2 civil adjudication.

Note 10. Article 32 of Minutes of National Court Bankruptcy Trial Work Conference: "Prudent application of substantial consolidated bankruptcy of affiliated enterprise. The people's court shall, in trying enterprise bankruptcy cases, respect the independence of the personality of the enterprise as a legal person and follow the basic principle of making a separate judgment on the reasons for the bankruptcy of the members of the affiliated enterprise and applying a single bankruptcy procedure. When there is a high degree of confusion between the members of the affiliated enterprise as a legal person, the cost of distinguishing the property of the members of the affiliated enterprise is too high, or the creditor is seriously damaged to pay off the interests of the creditors in a fair way, the case can be exceptionally applied to the substantive merger bankruptcy of the affiliated enterprise."

Note 11. "The artificial zeroing of a single enterprise into several distinct entities is intended to separate a single enterprise. Insulate it from potential liabilities; Failure to treat the members of the Group as separate legal entities, including disregarding the limited liability of the members of the Group or mixing personal assets with company assets; Or the enterprise group structure is purely a disguise or cover, for example, in the form of a company as a means to evade legal or contractual obligations." *Uncitral Legislative Guide on Insolvency Law, Part III, Treatment of Insolvent Business Groups*, English, Publications and Libraries Section, United Nations Office at Vienna, August 2012, p. 56.

Note 12. Article 35 of the Proceedings of the National Bankruptcy Trial Work Conference: "Substantive consolidated trial jurisdiction principles and conflict resolution. Where a bankruptcy case of an affiliated enterprise is tried by means of substantive merger, the case shall be under the jurisdiction of the people's court of the place where the core controlling enterprise of the affiliated enterprise has its domicile. If the core controlling enterprise is not clearly defined, it shall be under the jurisdiction of the people's court at the place where the main property of the associated enterprise is located. In case of a dispute over jurisdiction between more than one court, the dispute shall be submitted to a common people's court at a higher level for designation of jurisdiction."

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