

V. Case of transferring Shanghai * Port Industrial Co., Ltd. from bankruptcy liquidation to bankruptcy restructuring

[Case Number] Guiding Case No.214

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[Adjudicating Court and Collegial Bench Members]

First instance: The Third Intermediate People's Court of Shanghai Municipality

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[Keywords]

Civil / Application for bankruptcy liquidation / Application for bankruptcy restructuring / Pollution treatment / Common benefit debts

[Essence of Judgment]

1. When hearing a bankruptcy restructuring case involving port and wharf operators in river basins, the people's court shall take environmental pollution control as an important consideration in realizing the value of restructuring. The court shall urge prompt actions to eliminate environmental pollution that may otherwise affect the continued validity of the qualification for wharf operation.

2. Where environmental pollution has resulted from the lack of construction or maintenance of relevant infrastructure by the wharf operator, and the failure to promptly remediate such pollution may affect the value of bankruptcy restructuring of the business, the administrator shall undertake pollution control measures in accordance with the law. If the administrator requests the relevant environmental remediation expenses shall be recognized as common benefit debts to be repaid at any time from the debtor's assets, the people's court shall support the request in accordance with the law.

[Basic Facts]

Shanghai * Port Industrial Co., Ltd. (hereinafter referred to as the "Shanghai * Port Company") was established in September 1993, with its main business being wharf leasing, warehousing, loading and unloading services, etc. It was located adjacent to the Yangtze River estuary, bordering the Shanghai Waigaoqiao Port and Free Trade Zone in the east and the Huangpu River in the west. In November 2019, upon application by creditors, the Shanghai Third Intermediate People's Court decided to

accept the bankruptcy liquidation case of the Shanghai * Port Company. Through investigation by the administrator, it was found the wharf lessee was in a state of chaotic operation and management, with outdated and aging facilities and equipment, posing significant environmental pollution risks. When the case was heard, environmental protection and traffic control departments jointly issued a rectification notice, demanding that the sewage and dust treatment facilities at the wharf to be rectified within a prescribed period, otherwise the operation license of Shanghai * Port Company would be revoked.

The Shanghai * Port Company held intangible assets such as shoreline usage license and port business license, and had a 150-meter shoreline. The water depth at the wharf front control line is deeper than 2 meters but less than 5 meters, with an annual cargo throughput of around 2 million tons. To preserve the operational value of the Shanghai * Port Company and protect the interests of all creditors, the court ruled the company shall be transferred into the restructuring procedure upon application.

Under the guidance of the court, the administrator urgently communicated and coordinated with environmental protection and traffic control departments on the specific requirements on environmental protection rectification in one aspect, and quickly entrusted a third party to carry out construction rectification in the other aspect, building and upgrading facilities and equipment such as sewage sand settling tanks, ditches and floors to ensure that surface rainwater, sprinkling water and other water were all collected into the sewage sand settling tanks. After sedimentation treatment, the water was recycled for in-port sprinkling, significantly improving the port's sewage recycling rate and effectively preventing direct discharge of sewage into the river. In addition, the walls were built, the sand and gravel materials were added and the loading water spray devices were installed to effectively control dust around the wharf and prevent excessive air pollutants in surrounding areas. Considering that the taken-over property was insufficient to cover the engineering expenses and valuation costs, the administrator coordinated with a third party to advance the service valued at CNY 587,068 without payment. The amount shall be repaid as common benefit debts according to Article 2 of the Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the Enterprise Bankruptcy Law of the People's Republic of China (III) once the restructuring funds were in place. Some of the expenses were paid when the tenants were coordinated to carry out rectification from time to time by means of rent deduction.

Meanwhile, in accordance with Paragraph 1 of Article 15 of the Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the Enterprise Bankruptcy Law of the People's Republic of China (III), environmental problems in the operation of the wharf were fully disclosed through a special proposal at the creditors' meeting, and restoration and treatment expenses and corresponding solutions were explained, which were approved by the creditors' meeting through

voting. It effectively addressed the problem of insufficient funds for environmental protection rectification, enhanced the efficiency of environmental improvement and ensured the operation of the wharf in a green and environmental-friendly manner. When recruiting investors, the investors' willingness and capability in green operation of the wharf was taken into account in addition to investors' financial strength and business background. After two rounds of market-oriented public recruitment, investors were introduced to invest over CNY 87 million, and the subsequent environmentally-friendly operation plan of the wharf was emphasized to be included in the draft of the restructuring plan. After the restructuring, the company would boost the operational capability of the wharf from three dimensions: transformation and upgrading of facilities and equipment, standardized and intelligent management of the wharf, and environmentally-friendly and green operation, and would provide solid supporting services for the Waigaoqiao Free Trade Zone and the Port. Upon voting at the creditors' meeting, the investors' group failed to vote within the prescribed time limit after all the methods of service had been exhausted and the public announcement had been made. The guarantee creditors' group, the tax creditors' group and the common creditors' group all voted to adopt the draft restructuring plan. Hence, the administrator requested the court to approve the draft restructuring plan for the Shanghai * Port Company.

[Judgment]

The Third Intermediate People's Court made the civil ruling coded [2019, Shanghai 03, Bankruptcy, No.320-6] on 10 August 2022: 1. Approving the revised Restructuring Plan for the Shanghai * Port Industrial Co., Ltd. (Draft); 2. Terminating the restructuring procedure of the Shanghai * Port Company. When the restructuring plan was implemented, the company smoothly solved problems of expiry of the business license and expiry of the wharf operation license with the assistance from the court and the administrator.

[Grounds for Judgment]

The effective judgment of the court held that the review and approval of the draft restructuring plan shall respect the autonomy of the creditors' meeting and adhere to the principle of legality review, while also considering whether it could achieve the maximum social value based on balanced interests. In this case, the repayment rate of the common creditors' group increased compared to zero repayment under the simulated liquidation. Given the serious insolvency of the Shanghai * Port Company, a restructuring plan that adjusted the equity of the investors' group to zero would be fair and reasonable. The business plan in the draft was feasible, which could effectively continue the operational value of the Shanghai * Port Company, and was conducive to recovering the business capacity of the Shanghai * Port Company. The application of the bankruptcy administrator, which complied with the law and was conducive to achieving the effects of both sustainable development of the company

and ecological and environmental protection, shall be supported. The people's court should give full play to its bankruptcy trial functions, integrate the concept of green development into the entire judicial process of restructuring, and explore the establishment of a flexible and efficient working mechanism from aspects such as the restoration and governance of environmental issues, cost arrangements, formulation and implementation of restructuring plans, so as to make restructuring an effective solution to promoting transition of enterprises caught in a dilemma towards green and low-carbon development. In details:

First, regarding the nature of the environmental pollution treatment responsibilities and costs of restructured enterprises. In accordance with relevant laws and regulations such as the Environmental Protection Law of the People's Republic of China and the Port Law of the People's Republic of China, as well as the principle of "whoever pollutes, whoever treats", a company's responsibility for environmental pollution treatment shall continue after its bankruptcy is accepted. Where a port and wharf company under restructuring has caused environmental pollution due to the lack of construction and maintenance of relevant infrastructure, it shall be the main body responsible for environmental governance to carry out rectification. As the executor of bankruptcy affairs, the administrator shall be responsible for taking specific actions for rectification. This act enables the debtor company to retain its business qualifications, maintain its operational value and enhance the repayment interests of all creditors. Expenses incurred from the rectification are for the benefits of all creditors. If the administrator requests to recognize the expenses as common benefit debts in accordance with Article 2 of the Provisions of the Supreme People's Court on Several Issues Concerning the Application of the Enterprise Bankruptcy Law of the People's Republic of China (III), the people's court shall support such request.

Second, regarding solutions to environmental pollution treatment during the restructuring period. Wharf pollution involved in this case mainly focused on water and air pollution. Under the guidance of the court, the administrator lawfully and collaboratively advanced the environmental pollution treatment and restructuring procedures: First, carrying out coordination between the government and the court. The court and the administrator visited the local sub-districts, towns and environmental supervision departments to fully understand the environmental protection responsibility requirements and subsequent planning prospects of the wharf shoreline involved. Through communication and coordination, the relevant departments extended the rectification period, leaving more time for environmental pollution treatment. Second, carrying out treatment in advance. When the rectification notice was issued, the debt administrator had not yet taken over the receivable rent and other funds. In order to complete all environmental pollution control measures within a short period of time and maintain the business operation qualifications of the company, the administrator communicated with lessees of the wharf and entrusted a third-party professional institution to conduct rectification accordingly in advance. The problem of untreated rainwater and site sewage seeping into the environmental

water body was solved by expanding and upgrading the sewage sand settling tanks and the ancillary facilities, and the sewage recycling rate was increased as a result. The atmospheric dust pollution was reduced by installing dust and noise reduction equipment to ensure air quality meet standards and improve the ecological and environmental quality of the Yangtze River ports and basin. Third, acquiring sufficient funds. The lessees made an advance payment for the main expenses, which would be settled through common benefit debts once the restructuring funds were in place, so as to solve the financial problem in the rectification. Fourth, information disclosure. The creditors' rights to information, participation and supervision were fully respected. In accordance with Paragraph 1 of Article 15 of the Provisions of the Supreme People's Court on Several Issues Concerning the Application of the Enterprise Bankruptcy Law of the People's Republic of China (III), environmental pollution treatment was taken as a major issue of property disposal to be determined by voting, and the process of environmental pollution treatment and the bearing of costs were disclosed in the draft restructuring plan, so as to strive for the support and cooperation of creditors in the restructuring work.

Third, regarding the relationship between environmental pollution treatment and maintenance of the restructuring value. In this case, the environmental pollution treatment was closely related to the company's restructuring value and was a key factor determining whether the company could realize its restructuring value. Once a company violates relevant laws and regulations on environmental pollution prevention and control and faces the penalty of being deprived of administrative license qualifications, it will lead to the loss of its restructuring value. Therefore, when hearing a bankruptcy restructuring case involving a port and wharf company, it is necessary to pay attention to the effective combination of environmental pollution treatment and maintenance of the company's restructuring value, promptly eliminate environmental pollution that may affect the continuation of the wharf operation license, and take environmental pollution treatment as an important factor when realizing the restructuring value.

Fourth, regarding the formulation, approval and implementation of the restructuring plan. The green development principle should be reflected when formulating a restructuring plan. Investors should be guided to incorporate environmental protection operation plans and environmental protection commitments into the plan and pay attention to whether the company can fulfill its environmental responsibilities in the future and promote the coordinated development of the economy, society and the environment. When reviewing and approving the draft of the restructuring plan, legal factors such as the liquidation value of the company and the legality of the procedures, as well as social factors such as the sustainable development of the company and the protection of ecology and environment, should be comprehensively considered. During the implementation of the restructuring plan, efforts should be made to coordinate and resolve the company's obstacles of continued operation. It should aim to achieve source governance for pollution reduction and carbon emission reduction

in the Yangtze River basin and green and low-carbon transformation of enterprises by exploring a new mechanism for the coordinated promotion of bankruptcy trials and judicial protection of ecology and environment, so as to promote the effective unity of ecological and environmental protection, rebirth of the enterprise, and maximization of creditors' interests.