

Research on the Priority of Environmental Tort Obligation in Bankrupt Enterprises under the Background of Low Carbon Economy

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Abstract

As the important subject of developing low carbon economy, enterprises should fulfill the development idea of low carbon economy in the normal operations or at the stage of bankruptcy liquidation. The arrangement of repaying order of environmental credit in China's Enterprise Bankruptcy Law is not conducive to protect environmental creditor's interests and also doesn't match the aim of low carbon economy. Environment credit is mostly related to people's life and health, properties security and social benefit, so giving priority claim to environmental tort liability is not only the inner demand to realize the fair distribution of bankruptcy property, but also the inevitable choice to develop low carbon economy.

Keywords: Low carbon economy, Bankrupt enterprise, Environment credit, Prior compensation

Low Carbon Economy and Environmental Tort Obligation

1) The connotation of low carbon economy and the development of the concept of low carbon

Under the guidance of principle of the sustainable development, low carbon economy is built to adjust energy structure, reduce the consumption of high-carbon energy such as coal, oil and the carbon dioxide emissions by means of technology innovation, industrial structure adjustment and new energy development, in order to reach a kind of economic state of win-win between economic and social development and environmental protection.

After entering 21 century, low carbon economy has become a kind of burgeoning economic progress mode that every country copes with environment crisis. As the forerunner for the development of low carbon economy, United Kingdom Government published a energy white paper on 'Our energy future –Creating a low carbon economy' and proposed the concept of low carbon economy in 2003; The America put forward Low Carbon Economy Act in 2009, showing low carbon economy had become American important strategic choice in the future. At the climate summit in Copenhagen on December 7, 2009, Chinese Government officially announced the target to control greenhouse gases emissions and decided to cut carbon dioxide emissions per unit of GDP by 40% to 45% by 2020 than 2005, and thus it became the first public commitment to quantify reduction target without attaching any strings(Tonight Daily, 2009).

The core that whether every country achieves their target of low carbon economy and implements their commitments to develop low carbon is the fulfillment of environment responsibilities in enterprises as main body. Developing low carbon economy requires while enterprises pursue the maximization of their own interests, they should assume their responsibilities of environment protection consciously. With the implementation of "Enterprise Bankruptcy Law" in China, corporate environment responsibilities in the stage of bankruptcy should be paid more attention to.

The particularity of environment tort obligation in bankruptcy enterprises

The article 107, paragraph 2 of "Enterprise Bankruptcy Law" clearly defines that, after a debtor is declared bankrupt, the claims established against the debtor at the time when the people's court accepts an application for bankruptcy is known as bankruptcy claims. The provision shows the time of the establishment of bankruptcy credit but there is no provision about its property and type. In the classification of credit in article 82, it also does not provide a single type of environment credit as bankruptcy credit. From the provision of "Enterprise Bankruptcy Law" we can see comprehensively, environment credit belongs to a kind of common claims. Taking environment credit especially environmental tort obligation as common claims not only is different from other countries' bankruptcy laws and ignores the characteristics of environmental tort obligation, but also virtually encourages certain enterprises to escape from their environmental responsibilities through bankruptcy and damage the benefits of the victims of environmental tort, contrary to the fairness and justice.

Compared with other bankruptcy, environmental tort obligation has its particularity. Firstly, the positions of

creditors and debtors has inequality. Most of the main body of environmental tort is large enterprise or corporate group and most of victims are disperse, uncertain vulnerable groups in short of the resistance ability. Secondly, the causal relationship has complexity. Thirdly, the results of environmental damage has chronicity, accumulation and latency. Fourthly, the results of damage has sociality. Because of the particularity of environmental tort obligation, some countries give priority claim to environmental tort obligation in bankruptcy act or judicial precedents.

The current situations of legislation on repaying order of environmental credit in China

The repaying order means marshalling of credits stipulated by law according the properties and positions of each bankruptcy credits. According to the order, in the assignments of bankruptcy credits, some credits has priority claim while some one have to claim later on. Only after the former credit is satisfied, the later one has right to claim. (Han, Changyin, 2002)

The repaying order in China mainly embodies in the provisions of articles 43, 109 and 113 of "Enterprise Bankruptcy Law". The article 43 of the law defines that all the bankrupt expenses and community liabilities are repaid anytime by debtors' assets. The article 109 of the law defines that the specific property of the debtor to enjoy the right secured claims has priority claim to the specific property. The article 113 of the law defines that, The bankruptcy property shall, after the expenses for bankruptcy proceedings are defrayed and the debts incurred for the common good of creditors are repaid first, be liquidated according to the following order: (1) the wages, subsidies for medical treatment, injuries and disability and the pensions for the disabled and the families of the deceased which the bankrupt owes, the basic old-age insurance premiums and the basic medical insurance premiums which he owes and fails to enter in the employees' personal accounts, and the compensations which should be paid to the employees as prescribed by relevant laws and administrative regulations; (2) the social insurance premiums which the bankrupt fails to pay, other than the ones which are specified in the preceding subparagraph, and the taxes which the bankrupt fails to pay; and (3) the common bankruptcy claims.

For the particular environment credit, the chapter eight of the Tort Liability Law in China make a provision for the responsibility of environmental pollution in form of exclusive chapter. The article 42 of Environmental Protection Act stipulates the compensation for damage from environmental pollution applies to specific prescription period, which is three years; The supreme court's some rules about the evidence in the civil procedure stipulates the lawsuit of environmental pollution damage compensation adapts to the principle of the inverted burden of proof. By contract, China's relevant legislation about bankruptcy is lag behind. Bankruptcy Law does not differentiate the properties of environmental credit but takes most of environment credits as common claims to be repaid.

After enterprises enter bankruptcy procedures and bankruptcy properties cut prior compensation payment including bankruptcy expenses, wages of staff and workers and labor insurance expenses that are owed by the bankrupt enterprise, and taxes owed by the bankrupt enterprises, the remaining general credit often is difficult to get compensation. What's more, in face of huge environmental debt, some enterprises transfer their properties or sham bankruptcy. After bankruptcy liquidation finish and avoid remaining debt, they reopen based on efficient assets of former enterprises. This action of avoiding the debt increases the damage for the interests of environment creditors. In addition, the compensation in order of general credit is the important reason that enterprises ignore environmental costs and continue to operate in mode of of high consumption, high emissions and high pollution.

The legitimacy of priority of claim to environmental tort obligation

Creditors' fair repay is the basic norm of China's bankruptcy law, but fairness does not mean that all the creditors gain the compensation in proportion uniformly, which can achieve formal fairness only but cannot reach real fairness, so the priority of claim to environmental tort obligation has legitimacy.

Conform with the just value of law

The generation of bankruptcy system firstly comes from the satisfaction of the requirements of fair distribution, which is the primary aim to bankruptcy legislation. Compared with enterprises, individual power of environmental creditor is very tiny without doubts so its ability to take risks is also limited (Fan, Jian, 2002). Because of the chronicity, latency and complexity of environmental damage, compared with other creditors, the protection of the interests of environment creditors is particularly difficult. Environmental tort is more related to people's life and health closely. When enterprises cannot pay the due debt, and their assets are insufficient in paying all the credits or obviously lack of ability to repay so that they enter bankruptcy and liquidation procedures, giving prior compensation of claim to environmental tort obligation is beneficial to realize the justice of bankruptcy distribution. In addition, the prior compensation of claim to environmental tort obligation also embodies the pursuit for the value of environment justice.

Conform with the principles of environment responsibility and environment priority

The manifestation of the principles of environment responsibility

The principles of environment responsibility means peoples' duty on environment and resources protection, or

the principle that people should bear legal liability because they cause pollution or damage for environment and resources. Its core is under the premise of social fairness, and the responsibilities of handling and preventing pollution is undertaken by polluters. So even though enterprises is in the state of bankruptcy or declares bankruptcy, as environment creditor, they also shall bear corresponding compensation liabilities. Otherwise, not giving prior compensation of claim to environment credit is similar to allow enterprises to make use of bankruptcy to escape from the assumption of environmental responsibilities, on the way a great deal of environmental responsibilities will be shift to country and society, and environmental resources inevitably become corporate free cost, which obviously does not conform with principle of environment liability in China and is also not conducive to the development of low carbon economy.

b. The reflection of the principle of environment priority

The paramount duty of Congress is to balance interests. As a kind of new type of interest, environmental interests is inevitably in conflict with other interests in its development process. The principle of environment priority means to establish the legal status of ecological environmental protection priority when dealing with the problem of the relationship between economic growth and ecological environmental protection. Establishing the principle of environment priority is the development tendency of environment act in the world. America took the principle of environment priority the foundational principle of environment act in National Environmental Policy Act in 1969(Cao, Mingde, 2007). Japan revised Pollution Countermeasures Basic Law et.al in 1970, deleting the provision that maintaining life environment coordinates with economic development and establishing the principle of environment priority (Christopher E.Langer. 2006). Although China didn't establish the principle of environment priority directly in legislation, the Regulations on the Management of Landscape and Famous Sceneries and Law of the People's Republic of China on Evaluation of Environmental Effects in 2006 reflected the spirits of the priority of environment interests. The prior compensation of claim to environment credit conforms to the principle of environment priority.

The reconstruct of repay order of environmental tort obligation

Compared with environment breach obligation and other property tort obligation, the generation of environmental tort obligation is not based on the agreement of the parties, and environment creditors is in the weak position in all the creditors in bankrupt companies. Modern society often strengthens the protection of the interests of environment creditors in bankrupt companies through such provisions as the inverted burden of proof, causation presumption and so on. In the aspect of responsibility assumption, the article 4, paragraph 2 of the Tort Liability Law in China stipulates if the tort liability, administrative liability and criminal liability should be assumed because of the same act, when tortfeasor's assets is insufficient in paying, he should assume the tort liability firstly. The provision is an important reflection that China's legislation has priority over protection of environmental tort obligation. China's enterprise bankruptcy law also makes necessary response to give priority compensation of claim to environmental tort obligation.

The compensation of property environmental tort obligation

The property environmental tort obligation should be paid off prior to general credits. The reasons for that lie in: firstly, the reasons for the generation of credit are different. The former one is based on the generation of the tort act, but the later one is mostly generated based on the consent of the parties. Secondly, the prevention and taking capacity of risks are different. Because the causality of environmental tort has complexity, the occurrence of pollution accidents are often the result of the interaction between multiple pollution sources, therefore, the victims often are difficult to predict and bear the results of the tort. They often have no choice to evade the risk of realizing debt through negotiation with debtors. In the debt of contract, creditors often investigate the other party's business reputation, operating circumstances and conditions of assets and they have clear cognition of the risks that the realization of credit may exist. For the latent risks that credit realizes they also can solve them through signing complete contract provisions or requesting the other party to provide guarantee. Thirdly, the effects of the right protection are different. Generally speaking, the target that the two parties sign and fulfill contract is to realize value-added wealth. The compensation of breach still reaches the goal of the contract directly or indirectly. But for the tort liability, the tort damage compensation is a kind of next-best remedies that has to adopt. When the remedies for tort have to prevent the damage of victims of tort by means of the compensation of money, the compensation means the goal that victims expected falls (Han, Changyin, 2002).

The compensation of personal environmental tort obligation

Prior to labor credit

Compared with labor credit, personal environmental tort obligation has priority of compensation. The reasons are: firstly, the properties of two kinds of credit are different. Labor credit is generated based on the labor contractual relations between labors and bankrupt companies, whose property belongs to contractual obligation; personal environmental tort obligation is generated based on the tort liability relations between creditors and bankrupt companies, whose property belongs to tort obligation. Secondly, two kinds of credit are different in relief means. The relief means of personal tort obligation is very simple, while labor credit not only can be remedied through social insurance, but it also has become a necessary tendency of the development of legislation to solve the

problem of guaranteeing staff's rights of survival through perfect social security system. In Australia, Germany, and other countries, bankruptcy law has not given the wages of staff the priority to compensation, replaced by social security system in order to guarantee staff's wages credit. Thirdly, two kinds of credit has different abilities to supervise company. Labors are participants of the activities of production and management in company, so supervising company is their right and duty. The priority compensation of personal tort obligation over labor credit, may strengthen labor responsibility and risk awareness, consciously resist to the company's act of blind production at the cost of environment and defend all the creditors' interests.

b. Inferior to the bankrupt expenses and community liabilities to be repaid

The bankrupt expenses and community liabilities are generated in order to ensure the smoothly operation of bankruptcy procedure and defend all the creditors' interests. The bankrupt expenses and community liabilities must be discharged anytime firstly, otherwise the creditors are unwilling to have a legal relationship with bankrupt company in order to realize his own credit, which will hinder the bankruptcy procedure and there will be phenomena including that bankruptcy cases are difficult to be accepted, bankruptcy assets are difficult to be recovered, evaluated, managed, changed price and distributed, and so on. Finally the creditors' interests are damaged and environment credit is also not repaid. So the compensation of claim for the damage of environmental tort is inferior to the bankrupt expenses and community liabilities to be repaid.

Generally, the repaying order of bankruptcy should be as set as follows: secure claims-- bankrupt expenses--community liabilities--personal environmental tort obligation--labor credit--other social insurance costs and taxes credit--property environmental tort obligation--general bankruptcy credit.

Conclusions

Environment credit is a particular bankruptcy credit, and should be given priority of compensation of claim, but in consideration of China's specific situations, it's not appropriate to include all the environment credits in the range of prior compensation. China should adopt to the line step by step, giving prior compensation of claim to environmental tort obligation especially its personal damage compensation and then gradually continuing to expand the range of protection of environment creditors' interests in bankrupt enterprises, urge enterprises to adopt to the development mode of low carbon economy consciously in order to reduce the risk of environment responsibility.

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