

Research on the Bankruptcy Standard of Commercial Banks in China

Yang Tian¹, Wei Long²

¹Chengdu College of Arts and Sciences, College of Arts and Law, Chengdu, Sichuan, China

²Sichuan University of Arts and Sciences, Intellectual Property College, Dazhou, Sichuan, China

Abstract: *Crisis of commercial banks has been reported frequently, and it is normal for them to fail and quit in the market competition. In order to maintain the national financial order and prevent systemic crisis, it is of great significance to improve the legal system of commercial bank bankruptcy to deal with the problematic commercial banks in a timely manner. Commercial bank insolvency standards as the application of commercial bank insolvency legal system, scientific and reasonable commercial bank insolvency standards is the key to commercial bank insolvency legal system to play a useful role. At present, the bankruptcy of commercial banks in China applies the general corporate bankruptcy standard. Based on the special characteristics of commercial bank insolvency, the introduction of regulatory standards and the establishment of diversified commercial bank insolvency standard system can be considered.*

Keywords: Commercial bank bankruptcy, Regulatory standard, Diversified standard system.

1. Introduction

Competitive failure is a normal phenomenon under the conditions of market economy. As one of the subjects of market economy, commercial banks, after failing in the process of competition, withdraw from the market, which is also in line with the laws of market economy. Unlike the market exit of general companies, commercial banks have an irreplaceable role in the economic operation of the country and society as a whole, so their exit from the market will bring certain social impacts, and in serious cases, it may even lead to a systemic financial crisis.

The essence of the socialist market economy is the rule of law, the rule of law for financial institutions to exit the market to provide the rule of law is the proper meaning of the rule of law economy. China has launched a legislative exploration of the exit system for financial institutions. General Secretary Xi clearly pointed out in the Fifth National Financial Work Conference in July 2017 that financial supervision should be strengthened, with systemic financial risks as the bottom line, and the construction of relevant laws and regulations should be accelerated. On August 8, 2017, the CBRC issued a response to the recommendations of the Fifth Meeting of the Twelfth National People's Congress, stating that, at present, the CBRC is in the process of drafting Regulations on Disposal of Bankruptcy Risks of Commercial Banks [1]. In October 2017, the report of the 19th CPC National Congress proposed to "improve the financial regulatory system and hold the bottom line of no systemic financial risks" [2]. The Supreme People's Court, in the Minutes of the Work Conference on Bankruptcy Trial of National Courts published in March 2018, explicitly proposed that bankruptcy be used to improve the rescue and exit mechanism of market entities to resolve financial risks. In the Reform Program to Accelerate and Improve the Exit System of Market Entities issued by the National Development and Reform Commission and other central ministries and commissions in 2019, it is explicitly pointed out that it is necessary to establish and improve the market exit mechanism for financial institutions, and to improve the relevant laws and regulations. From 2020 to 2024, the Commercial Bank Law was included in the annual legislative program of the Standing Committee of the

National People's Congress (NPC) as a project for preparatory consideration. From the perspective of legislative and policy trends, research on the legal system of commercial bank bankruptcy is necessary.

The research on the bankruptcy of commercial banks cannot be separated from the clarification of the bankruptcy standard of commercial banks. As the "key" of the bankruptcy system, the bankruptcy standard is the key to the application of the bankruptcy system. Under the conditions of market economy, the bankruptcy of commercial banks following the objective financial laws can inhibit the emergence of moral hazard of commercial banks. Commercial bank bankruptcy can further dissolve the financial risk, improve the awareness of the whole population to prevent financial risk, but also to speed up the reform of China's financial system, the establishment of a sound legal system of commercial bank bankruptcy is the way of China's banking industry to open up to the outside world and the internationalization of the road [3]. The research on the bankruptcy standard of commercial banks is a key step to improve the bankruptcy legal system of commercial banks, which is of great significance in preventing the occurrence of systematic financial risks and safeguarding national financial security.

2. Overview of Insolvency Standards for Commercial Banks

2.1 Concept and Specificity of Commercial Bank Insolvency

2.1.1 The concept of commercial bank insolvency

Commercial banks occupy an important position in a country's economic system and are also an important part of a country's banking industry. There are many types of commercial banks in China, specifically including state-owned or state-controlled commercial banks, national or local commercial banks and urban or rural commercial banks. Compared with other types of banks (e.g., central banks responsible for currency issuance or market monetary aggregate regulation and control and macro monetary policy formulation, policy banks established on the basis of national

policies and accomplishing specific policy objectives), commercial banks aim to maximize profits, protect shareholders' rights and interests for the purpose of operating in accordance with the commercial model, and the functions and risks they assume are also different. Based on the fact that commercial banks have their own profit-seeking objective and also have the function of providing financial services to the public, it is more prudent to consider the bankruptcy of commercial banks.

According to different bankruptcy paths, there are two understandings of bankruptcy: one is bankruptcy in the broad sense, which refers to three kinds of bankruptcy procedures, including bankruptcy reorganization, bankruptcy liquidation and bankruptcy settlement; the other is bankruptcy in the narrow sense, which refers to bankruptcy liquidation only. As far as commercial banks are concerned, there are different expressions in China's laws on the meaning of bankruptcy of commercial banks. Article 134 of the Enterprise Bankruptcy Law [4], it is clearly stipulated that if a commercial bank meets the criteria for bankruptcy, it can be filed with the People's Court by the Financial Supervisory and Administration Agency of the State Council (i.e., the China Banking and Insurance Regulatory Commission (CBIRC)) for bankruptcy and reorganization or bankruptcy and liquidation. In the Enterprise Bankruptcy Law, the broad concept of bankruptcy applies to the bankruptcy of commercial banks, but the Enterprise Bankruptcy Law has not responded to the question of whether or not commercial banks can directly apply the bankruptcy and settlement procedures [5]. And in Article 71 of the Commercial Banks Law [6], it is stipulated that when applying for the bankruptcy of a commercial bank, the application shall be approved by the financial supervisory and regulatory authorities under the State Council, and the people's court shall declare its bankruptcy. It can be seen that the bankruptcy of commercial banks here applies to bankruptcy liquidation in the narrow sense. In this paper, the bankruptcy of a commercial bank means that when a commercial bank is unable to repay its past debts as they fall due, and its assets are insufficient to repay all its debts or it obviously lacks solvency, the applicant can file a bankruptcy application to the People's Court with the consent of the banking supervisory authority, and the People's Court accepts the application according to the law and initiates bankruptcy procedures to reorganize the commercial bank or carry out the legal procedures of liquidation. It is due to the fact that commercial banks are closely related to the economic and social interests of a country, when it comes to the bankruptcy of a commercial bank, the banking regulator will intervene in a timely manner to dispose of it, so as to ensure the economic stability and financial security of a country, and to avoid causing an economic downturn and social upheaval [7]. Therefore, commercial bank bankruptcy also becomes a kind of regulatory insolvency, and this feature becomes the typical characteristic of commercial bank bankruptcy, which determines that there are many differences between commercial bank bankruptcy and general company bankruptcy [8].

2.1.2 The Special Characteristics of Commercial Banks' Bankruptcy

Because of their special functions in a country's economy,

commercial banks need special consideration in bankruptcy. As a whole, commercial banks have three main functions: first, intermediary function, commercial banks in the whole social economy as a credit intermediary, can be absorbed in the public deposits to further realize the financing of funds; second, the payment function, the commercial society due to the flow of goods will produce funds settlement, and commercial banks in this process can provide settlement services, that is, through the settlement in order to realize the transfer of money; third, policy Third is the policy function, such as in the country through the monetary policy to intervene in the economy, commercial banks that is to become the monetary policy "conveyor belt", but this function in real life is easy to be ignored. It can be seen that because of the important role that commercial banks play in the economy, there are serious negative impacts when commercial banks fail. For this reason, we need to better understand and grasp the specific differences between commercial banks and companies in general when they go bankrupt.

China's legislation currently applies the same bankruptcy standards to commercial banks and general companies, which are uniformly stipulated in the Enterprise Bankruptcy Law. Compared with the general company bankruptcy, the difference of commercial bank bankruptcy lies in the following: Firstly, the general company bankruptcy involves fewer subjects. The object of commercial bank services is oriented to the public, and the contents of its services are closely related to the daily life of the public, therefore, the subjects involved in the bankruptcy of a general company can hardly exceed those involved in the bankruptcy of a commercial bank. Secondly, the subjects involved in supervision are different. Commercial banks are supervised on a daily basis by the Banking Supervision and Administration Bureau of the State Council and the Central People's Bank of China, and when an operational crisis occurs, the aforementioned subjects also decide on the disposal measures, which is not the case for general companies. Thirdly, the bankruptcy procedure is different. Commercial banks need the consent of banking regulators before bankruptcy, while general companies do not need bankruptcy. Fourth, there are differences in the pursuit of value. The bankruptcy of commercial banks must first consider the stability of China's financial system as a whole, and prevent the emergence of systemic financial risks, followed by the priority to protect the rights and interests of depositors, while the general corporate bankruptcy is considered to be a fair settlement. Finally, from the point of view of the nature of the power involved, commercial bank bankruptcy is full of administrative power to intervene and dominate the color, while the general corporate bankruptcy is dominated by the judicial power. Since there are many special features in the bankruptcy of commercial banks as compared with the bankruptcy of general companies, it is worthwhile for us to think deeply whether the same bankruptcy standard should be applied to both.

2.2 Concept and Classification of Insolvency Standards for Commercial Banks

2.2.1 The concept of bankruptcy standard of commercial banks

Bankruptcy standard, which can also be called bankruptcy boundary and cause of bankruptcy, refers to the real property condition when the debtor loses the ability to repay debts, and it is the fact or condition that the debtor has the ability to declare bankruptcy [9], which is also one of the elements necessary for entering into bankruptcy proceedings. It can be said that the bankruptcy standard is the objective state of the debtor's loss of solvency, "which is not only the premise of all the problems solved by the bankruptcy law, but also the basis of the legitimacy of the initiation of bankruptcy proceedings" [10]. In this paper, the bankruptcy standard of commercial banks refers to the objective standard of the applicant's application to the court for the bankruptcy of commercial banks, and the court's initiation of bankruptcy proceedings accordingly. Accordingly, it can be seen that: on the one hand, the commercial bank insolvency standard is the prerequisite for the application of insolvency proceedings, that is, the objective standard that must be reached before the commercial bank enters into insolvency proceedings; on the other hand, reaching the insolvency standard does not mean the commencement of insolvency proceedings, and the applicant needs to apply to the court after the court to further judge the subject of the application to see whether it meets the insolvency standard stipulated in the law. In our country, the application for commercial bank bankruptcy also needs to go through the banking supervision department's consent before applying to the people's court for bankruptcy.

The bankruptcy standard of commercial bank is the core of the whole bankruptcy procedure. Firstly, it is the operational yardstick to start the bankruptcy procedure in terms of judicial practice; secondly, it resides in the middle position in the whole process of commercial bank bankruptcy disposal, linking the early crisis disposal measures (or bankruptcy prevention procedure) [11] and judicial bankruptcy procedures; finally, it is also the intersection of administrative and judicial powers, the same as the norms for the exercise of both. Therefore, for the bankruptcy procedure, the bankruptcy standard of commercial banks is both the factual basis for the applicant to apply for the bankruptcy of commercial banks according to law and the necessary condition to reflect the real property condition of commercial banks and declare bankruptcy accordingly.

2.2.2 Classification of Bankruptcy Standards of Commercial Banks

In the context of insolvency standard, there are two kinds of doctrine in international legislation as to how to judge the debtor's loss of solvency: one is generalization doctrine, the other is enumeration doctrine, the former refers to the description of insolvency standard in abstract terms, represented by Japan [12]; the latter refers to the specific enumeration of the circumstances of bankruptcy, represented by the United Kingdom [13]. However, regardless of the legislative approach, in international practice, there are three criteria for determining whether a commercial bank is able to enter into insolvency proceedings: firstly, the liquidity criterion; secondly, the asset and liability criterion; and thirdly, the regulatory insolvency criterion [14]. In judicial practice both at home and abroad, the liquidity standard and the asset-liability standard are also the standards applicable to general corporate insolvency.

Liquidity standard, which can also be called cash flow standard, refers to the standard for judging the bankruptcy of a commercial bank based on whether it can pay its debts as they fall due. According to the meaning of the liquidity standard, the bankruptcy of a commercial bank is subject to the following conditions: firstly, the debts and liabilities are determined according to law; secondly, the debts have become due; and thirdly, they have not been fully discharged. Under normal circumstances, as long as the debtor has defaulted on overdue debts and the cash flow is insufficient to support normal operations, the debts owed can be regarded as meeting the bankruptcy criteria.

The asset-liability criterion, which can also be called insolvency or debt over, refers to the determination of whether the criteria for insolvency have been met by calculating the difference between the amount of liabilities and the amount of assets on the balance sheet of a commercial bank. If the amount of assets is less than the amount of debts on the balance sheet of a commercial bank it can be considered that the bankruptcy standard has been reached [15]. The application of the asset and liability standard has higher requirements on the financial information of the subject of bankruptcy, which needs to meet the requirements of openness, accuracy, comprehensiveness and specificity of the financial information. In the case of meeting the aforementioned conditions, the application of the asset-liability standard is a more appropriate choice for the bankruptcy of commercial banks. In addition, for the daily management and supervision of commercial banks by banking regulators, the real situation of assets and liabilities is also a necessary choice for grasping their financial or operational status.

Supervisory standards refer to the criteria used by commercial bank regulators to determine whether a commercial bank can enter into bankruptcy proceedings. In other words, even if a commercial bank does not meet the conditions for bankruptcy according to the balance sheet standard or the liquidity standard [16], however, as long as the regulator determines that the commercial bank does not meet the sound and safe operating status, it can directly determine that it has lost its solvency based on this standard [17]. Usually, the regulator, in addition to considering the cash flow, assets and liabilities of the commercial bank, will also make a comprehensive judgment in conjunction with other circumstances (e.g., capital adequacy ratio, leverage ratio, etc.) to determine whether the commercial bank should enter into insolvency proceedings. In the international arena, regulatory standards were first introduced by the United States and are used specifically for the banking industry [18]. The use of regulatory standards provides another path to solve the problem of commercial bank insolvency, and the rational basis of its existence lies in the specificity of commercial bank insolvency. The legal significance of the regulatory standard for commercial bank insolvency is mainly reflected in the following: first, the regulatory standard itself has a regulatory value. At present, the international community attaches great importance to the safe and sound operation of the entire banking industry, especially after many financial crises, in order to prevent the occurrence of systemic financial crisis, timely intervention in the problem banks to take appropriate bankruptcy measures, in order to minimize the cost of

disposal of the problem banks, which in itself is the embodiment of the value of the regulation. Secondly, the operability of regulatory standards is more in line with the characteristics of the banking industry. The banking industry is characterized by complexity and professionalism, so the adoption of supervisory standards is conducive to the regulator's judgment of the bank's risk level and the adoption of timely bankruptcy measures to avoid the spread of risk. The content of daily supervision and management of banks by regulatory agencies can provide reference or guidance for the establishment of regulatory standards, or even be incorporated into the content of regulatory standards, so that the abstract regulatory standards can be materialized into objective indicators. In addition, supervisory standards also provide the basis for the supervisory body to draw objective and real "medical examination conclusions" in the prudent assessment of the bank's operating conditions [19]. Thirdly, the threshold between public and private rights has been clarified. In the commercial banks themselves face operational risks when the regulator can judge whether to intervene in the disposal to take bankruptcy measures according to the regulatory standard, if the regulator of the problem banks premature forced intervention will destroy the bank's independent operation, resulting in the bank that could have been saved successfully into the judicial bankruptcy process, and then disrupt the order of competition in the financial market. At this point, regulatory standards are crucial for demarcating private and public rights and for maintaining the sound functioning of the entire economic market.

In short, there are many differences between liquidity and asset-liability standards and regulatory standards. First, the specific content is different. The liquidity and asset-liability standards focus on the solvency and asset-liability status of the insolvent entity, while the regulatory standards focus not only on the solvency and asset status of the insolvent entity, but also on other factors such as the capitalization rate and the leverage ratio, and on the whole on whether the insolvent entity meets the requirements of safety and soundness. Secondly, the applicable objects are different. The liquidity standard and asset-liability standard have a wider scope of application and can be applied to general corporate bankruptcy and bank bankruptcy, while the regulatory standard is a specialized standard for bank bankruptcy. Third, the division of rights is different. In the liquidity and asset-liability standards, the judiciary dominates and completes the entire insolvency process; whereas in the regulatory standard, there is intervention and interference by the administrative power, which requires the judicial power and the administrative power to cooperate and coordinate with each other.

3. Legislative Status and Problems of the Insolvency Standards for Commercial Banks in China

3.1 Legislative Status of Bankruptcy Standards for Commercial Banks in China

China has not yet formulated a special law on the legal system of commercial bank insolvency, and the norms of commercial bank insolvency standards are scattered in a number of laws and judicial interpretations. Article 2 of the Enterprise

Bankruptcy Law and Article 71 of the Commercial Bank Law stipulate the specific contents of the bankruptcy standards of commercial banks, and Articles 1 to 4 of the Judicial Interpretation (I) on the Application of the Enterprise Bankruptcy Law promulgated by the Supreme People's Court elucidates the contents of Article 2 of the Enterprise Bankruptcy Law. According to the provisions of the current laws of China, the bankruptcy standards of commercial banks are as follows: firstly, the bankruptcy standards stipulated in the Enterprise Bankruptcy Law are, firstly, the inability to repay debts as they fall due and the insufficiency of assets to repay all the debts; and secondly, the inability to repay debts as they fall due and the obvious lack of solvency. Commercial banks that meet the two aforementioned criteria can apply for bankruptcy reorganization and liquidation, in addition to the possibility of applying for bankruptcy reorganization if there is a clear lack of solvency. Secondly, the bankruptcy standard stipulated in the Commercial Banks Law is that the bank is unable to repay its debts as they fall due, and it can apply for bankruptcy and liquidation with the consent of the banking supervisory authority. It can be seen that the consent of the supervisory authority in the Commercial Bank Law is a precondition for bankruptcy application.

The bankruptcy standards of the Enterprise Bankruptcy Law and the Commercial Bank Law are the same in that both of them stipulate the liquidity standard for the bankruptcy standard of commercial banks, i.e., inability to repay debts as they fall due; the difference lies in that the former also stipulates the asset-liability standard (assets are insufficient to repay all the debts) and the obvious lack of solvency as the bankruptcy standard of commercial banks, while the latter stipulates the liquidity standard as well as the liquidity standard, which is the precondition for the bankruptcy of commercial banks. The latter, in addition to the liquidity criterion, also stipulates the precondition for the bankruptcy of commercial banks, i.e. the consent of the banking supervisory authority. The bankruptcy standards for commercial banks stipulated in China's legislation include the liquidity standard, the assets and liabilities standard and the obvious lack of solvency. Compared with the bankruptcy standards of commercial banks in international practice, China's legislation mostly stipulates the standard of obvious lack of solvency, but not the regulatory standard. In addition, in accordance with Article 134 of the Enterprise Bankruptcy Law, the State Council has been authorized by the Law to formulate measures for the implementation of the bankruptcy of commercial banks, but as of now, there is no query on the methods available for reference. In addition to the Commercial Bank Law, the bankruptcy of commercial banks should also be subject to the Enterprise Bankruptcy Law. Obviously, from the legislative level, the bankruptcy standard of general companies is also applicable to the bankruptcy of commercial banks. For this reason, we need to further consider the applicability of general corporate bankruptcy standards to commercial bank bankruptcy.

3.2 Problems Existing in the Bankruptcy Standard of Commercial Banks in China

3.2.1 Problems at the level of legislative logic

By summarizing the current situation of the legislation on

bankruptcy standards of commercial banks in China, it is clear that there are three standards for judging whether commercial banks reach the bankruptcy threshold in China at present: one is the two standards stipulated in the Enterprise Bankruptcy Law, i.e., the asset-liability standard and the liquidity standard, the liquidity standard and the obvious lack of solvency; and the other is the one standard stipulated in the Commercial Banks Law, i.e., the liquidity standard and consent of the supervisory authority. This paper argues that the three commercial bank insolvency standards stipulated in China's legislation all have certain limitations in judging whether a commercial bank should be insolvent.

Firstly, the liquidity standard and the asset-liability standard have certain limitations as the bankruptcy standard of commercial banks. According to the liquidity standard, when a commercial bank fails to repay its debts as they fall due, it can be recognized that the bankruptcy standard stipulated in the law has certain problems. As far as the business of commercial banks is concerned, a liquidity crisis may be temporary and can be resolved in a variety of ways. The inability of a commercial bank to repay its creditors or depositors in a timely manner may itself be a normal business risk for the bank. Commercial banks are inherently more liquid and hold a wide variety of assets, and the fact that they may be in liquidity difficulties due to temporary asset disposal problems does not mean that they are on the verge of insolvency. If a commercial bank encounters a temporary liquidity crisis, it can borrow from interbanks to quickly replenish cash flow, or it can activate reserve funds if it meets regulatory requirements, or it can apply for refinancing from the central bank to solve the problem in the event of a widespread liquidity problem. The asset-liability criterion, which determines whether a commercial bank should go bankrupt based on the fact that the amount of assets on the bank's books cannot cover all of its liabilities (i.e., all assets are less than all liabilities), is somewhat problematic. Liability operation is the industry characteristic of the whole banking industry. Commercial banks take in public deposits to lend to needy units or individuals, which is itself characterized by liability operation. The asset and liability standard cannot accurately determine whether a commercial bank has reached the bankruptcy standard and commercial banks mostly conduct business with the business model of future payment, so it is not reasonable for commercial banks to apply the asset and liability standard without distinguishing between maturity and non-maturity. From the point of view of asset types, commercial banks hold a wide range of assets, including movable or immovable assets, tangible or intangible assets, etc., and among these asset types, some of them have a low probability of immediate realization. If they are temporarily sold off because of a banking crisis there is the question of whether the commercial valuation is accurate or not. Both the asset-liability standard and the liquidity standard have certain limitations in judging the insolvency of commercial banks, and our legislation lacks consideration in combining the two as one insolvency standard. Specifically, it takes a lot of time to judge whether a commercial bank has met the liquidity standard and the asset-liability standard at the same time, and it is even more difficult for the applicant to prove it. Take the asset-liability standard as an example, the asset-liability standard to judge the bankruptcy of commercial banks depends on the disclosure of property information, due to the

imperfection of the commercial bank information disclosure mechanism, even the supervisory authority cannot fully grasp the real operation of the bank [20]. Therefore, in practice, it is undoubtedly more difficult for applicants to obtain accurate property information of a commercial bank, and it is necessary to comprehensively organize the bank's property data when judging whether a commercial bank meets the asset-liability standard. As far as the property data of a commercial bank is concerned, it includes transaction data, asset data, liability data and so on, and it takes a lot of time to collect, organize, record and analyze these data. According to the provisions of China's legislation, the liquidity standard and the asset-liability standard should be used in combination when judging whether a commercial bank meets the bankruptcy standard. In this way, it is time-consuming during the applicant's collection of evidence, which can easily delay the timing of the bankruptcy, and may also lead to the expansion of losses due to the failure of the regulator to intervene in a timely manner during the process. Looking at the situation dialectically, it is possible that a bank with temporary liquidity problems and assets smaller than liabilities is operating well and is safe and sound; it is also possible that a bank that fails to meet the liquidity and asset-liability criteria is already in deep insolvency crisis. Therefore, as the insolvency criteria for commercial banks, the liquidity criterion and the asset-liability criterion have certain limitations.

Secondly, liquidity standard and obvious lack of solvency as the bankruptcy standard of commercial banks have certain limitations. According to China's judicial interpretation of the enumeration of obvious lack of solvency circumstances, it is not enough to judge whether the commercial bank should be insolvent or not. Specifically, if a commercial bank is unable to repay its debts due to serious shortage of funds or inability to realize its assets, it can conditionally activate the deposit reserve or apply for refinancing, and the inability to realize its assets immediately may only be a temporary liquidity problem, which does not necessarily have to be solved through bankruptcy. If a commercial bank is unable to repay its debts even after enforcement by the People's Court, it is also insufficient to indicate that the commercial bank has reached the threshold of bankruptcy. Considering the complexity and specialization of the business of a commercial bank, a single failure of enforcement may well send a safe, sound and well-run commercial bank into bankruptcy proceedings. If the whereabouts of the legal representative is unknown and there is no other person in charge of property management, which makes it impossible to repay the debts, it is possible to consider solving the problem through bankruptcy prevention procedures (e.g., receivership). When a commercial bank is unable to repay its debts because it has been losing money for a long period of time and is having difficulty in turning around its operations, it may also be considered to be resolved by using measures such as mergers and acquisitions. Accordingly, the liquidity standard and the obvious lack of repayment ability are not sufficient to judge whether a commercial bank should go bankrupt.

Thirdly, the liquidity criterion and the consent of the supervisory authority as the bankruptcy criterion of commercial banks also have certain limitations. The limitations of the liquidity standard in determining whether a

commercial bank should be insolvent have already been discussed above and will not be repeated here. The Law on Commercial Banks has not taken into account the fact that the liquidity standard and the consent of the supervisory authority as the insolvency standard of commercial banks have not given the supervisory authority a corresponding basis for judgment, nor has it imposed constraints on the supervisory authority in exercising its power, which may easily lead to “regulatory capture” and even undermine the authority of the law. In the absence of specific guidelines or operational rules, the condition of consent of the regulator in judging the bankruptcy of commercial banks is also easy to be of no use, and becomes an ornamental device.

3.2.2 Problems at the Technical Level of Legislation

In China's current legal system of commercial bank insolvency, there are many technical problems in the legislation of commercial bank insolvency standards, such as fragmented legislation and poor operability. Specifically:

Firstly, there is a problem of legislative dispersion in the bankruptcy standard of commercial banks. There are no special provisions on the bankruptcy legal system of commercial banks in China. Instead, the bankruptcy standards for commercial banks are dispersed in the Commercial Bank Law, the Enterprise Bankruptcy Law and judicial interpretations. The disadvantages of decentralized legislation are obvious: firstly, it is prone to duplicative legislation, resulting in wasted legislative resources. In other words, the content of legislation already provided for is repeated in other provisions. Secondly, it is prone to result in the absence of a system. The idea of decentralized legislation is similar to dismantling a systematic provision into various parts and incorporating a separate part into other norms with which it is most compatible, thus forming fragmented content, ignoring the connection between the systems between the patchwork and making it easy to cause the other parts to be missing. Finally, it is easy to cause institutional conflicts. The legislative concept and legislative value of each law varies greatly, under the guidance of different legislative concept and legislative value, different norms present different systems is the norm, on the same issue of different laws provide for different content also becomes understandable, system conflict is inevitable. For example, the provisions of the Enterprise Bankruptcy Law and the Commercial Bank Law on the bankruptcy standards of commercial banks are in conflict. While the former includes additional asset and liability standards and a clear lack of solvency as criteria for determining the insolvency of a commercial bank, the latter stipulates the precondition that the consent of the supervisory authority is required. Compared with the decentralized legislation, the unified legislation provides clearer ideas and operational guidelines for the disposal of problematic commercial banks. In the context of the legal system of commercial bank insolvency, the unification of the insolvency standards of commercial banks also depends on the realization of the unified legislation of the legal system of commercial bank insolvency.

Secondly, there is the problem of poor operability of the bankruptcy standards of commercial banks. The current legislation on the bankruptcy standard of commercial banks is

too abstract, according to the description of the bankruptcy standard of commercial banks in the Enterprise Bankruptcy Law, the insolvency and liquidity standard is used to judge whether the commercial banks should be bankrupt or not [21]. On the one hand, in addition to the limitations of the foregoing standards in judging the insolvency of commercial banks, which have been discussed above; on the other hand, the specific operation in practice is too difficult. This is manifested in the following: firstly, the implementation measures for commercial bankruptcy authorized by the Enterprise Bankruptcy Law for the State Council have not yet been formulated, resulting in the absence of specific operational norms. Secondly, according to the special characteristics of commercial banks, their complexity and professionalism are incomparable to that of general companies, yet the same standards are adopted to judge the bankruptcy of commercial banks as those of general companies. In judicial practice, judges need to face the dilemma of selection and application, which adds difficulty to the judgment in practice. Finally, according to the “Measures for Liquidity Risk Management of Commercial Banks”, the key supervisory indicators for measuring the liquidity risk of commercial banks include stable net capital ratio, liquidity matching coefficient, liquidity ratio, and liquidity coverage coefficient [22]. The bankruptcy standards are more practical and operational than those of the current legislation, but the former standards belong to the daily monitoring standards of the banking supervision and management agencies, and have nothing to do with the bankruptcy standards in the sense of the bankruptcy law. Therefore, in the case that the bankruptcy standards of commercial banks are too abstract and the specific operation norms are missing, the bankruptcy standards of commercial banks are less operable.

In short, the bankruptcy standard of commercial banks in China has many problems in the technical level of legislation. The reason for this is that the current legislation in China has not considered the special nature of commercial bank bankruptcy, and the same bankruptcy standard is applied to commercial banks and general companies. Therefore, in order to construct the bankruptcy standard of commercial banks in China, it is necessary to introduce the standard of supervisory banks with strong operability and consider the specific design of the standard of supervisory banks at the level of legislation in combination with the actual situation in China, so as to establish a diversified bankruptcy standard system of commercial banks.

4. Legislative Proposals on Insolvency Standards for Commercial Banks in China

4.1 Introduction of Regulatory Standards

The provision of regulatory standards in the system of commercial bank insolvency standards is a common practice in the international developed countries for the supervision of the banking industry. Chinese scholars believe that the bankruptcy standard of commercial banks itself does not constitute the content of the legal system of bank bankruptcy [23]. This paper believes that such a viewpoint does not have reasonableness. As a part of the legal system of commercial bank bankruptcy, the bankruptcy standard of commercial bank should belong to the content of the legal system of

commercial bank bankruptcy. The bankruptcy standard of commercial banks is the key and “key” to the application of the legal system of commercial bank bankruptcy. Even though the specific content of the bankruptcy standards of commercial banks may involve financial indicators, it cannot be assumed that the financial indicators are only the conditions of the bankruptcy legal system of commercial banks. Although financial indicators seem to have nothing to do with the legal system, they actually constitute the main content of the supervisory standards, improve the operability of the supervisory standards, help the supervisory bodies to judge whether the commercial banks reach the threshold of insolvency in practice, and also standardize the supervisory bodies' exercise of power. It is the existence of financiality indicators that makes all countries attach great importance to the role of regulators in the bankruptcy of commercial banks, because regulators can meet the professionalism of using financiality indicators.

Regulatory standards are indispensable in the construction of commercial bank insolvency standards in China, and the introduction of regulatory standards as the content of the commercial bank insolvency standards system is indeed necessary. Supervisory standard is the bankruptcy standard in line with the special characteristics of commercial banks. The main business of commercial banks is deposits and loans, which involves more public deposits, in order to protect the interests of depositors, it is necessary to be closely regulated. The content of regulatory standards is more in line with the bankruptcy standards of commercial banks in China, while the liquidity standards and asset-liability standards applicable to companies in general are too narrow in vision, focusing only on the static financial standards without paying attention to the dynamic non-financial standards. The business strategy, management ability and compliance of commercial banks all have an important impact on their bankruptcy. Liquidity standards and asset-liability standards focus on financial data with a lag, and are mostly based on past operating data, so the introduction of regulatory standards can provide regulators with evidence for timely supervision. Regulatory standards are also the basis for standardizing the power of regulatory agencies. From China's experience in dealing with problem banks, administrative power plays a decisive role in the process of dealing with problem banks. The reason for the introduction of regulatory standards lies in the fact that on the one hand, it can provide a basis for regulators to deal with the problems related to the bankruptcy of problem banks, and on the other hand, it is also to constrain the behavior of regulators with the regulatory bankruptcy standards, so as to avoid regulatory capture. Since the introduction of regulatory standards is indeed necessary, we should consider how feasible regulatory standards are in China. First of all, the regulatory standard is in line with the basic theory and fundamental principles of commercial bank bankruptcy. The bankruptcy of commercial banks need to consider the public interests of society, to protect the rights and interests of depositors, to treat the problem banks to achieve early intervention, timely disposal, regulatory standards in line with the requirements of the disposal of commercial bank insolvency. Secondly, the regulatory standards help the regulators to refer to the implementation in practice. The introduction and clarification of regulatory standards provide specific operational guidelines for regulators, and the

establishment of regulatory standards provides legitimacy for regulators to intervene in crisis banks. Finally, regulatory standards are more in line with the characteristics of commercial bank supervision, and regulators are able to make judgments from a professional perspective. Government intervention also has the phenomenon of malfunction, while recognizing the financial regulatory authorities to intervene and intervene in the bankruptcy of financial institutions, it is also necessary to accurately locate them and try to avoid the malfunction of government supervision [24]. Therefore, the existence of regulatory standards that is, provides a reasonable and scientific regulatory yardstick for regulators. In short, the introduction of regulatory standards into the bankruptcy standard system of China's commercial banks is both necessary and feasible.

4.2 Establishment of Diversified Bankruptcy Standard System

China should establish a diversified bankruptcy standard system for commercial banks, i.e., liquidity standard, asset-liability standard and regulatory standard as the content of bankruptcy standard for commercial banks. The current bankruptcy standards of China's Enterprise Bankruptcy Law are mainly liquidity standards and asset-liability standards for general companies. There is no special legislation for commercial bank bankruptcy in China, so the same standard applies to general companies, and commercial banks need to meet the two conditions of insolvency and inability to repay debts due at the same time to start the bankruptcy and liquidation procedure, and the bankruptcy reorganization procedure requires that the subject of bankruptcy obviously lacks the ability to repay debts. In this paper, we believe that the bankruptcy standard of commercial banks should be constructed into a diversified system of liquidity standard, asset-liability standard and regulatory standard. China's current legislation in the obvious lack of solvency conditions can be fully absorbed by the diversified system of bankruptcy standards. According to the provisions of the current judicial interpretation, the determination condition of obvious lack of solvency either focuses on the problem of commercial bank's fund filling or property liquidity, or focuses on the problem of company management. If it focuses on the former, it can be judged by the asset and liability standard or the liquidity standard; if it focuses on the latter, the bank's management would have been the focus of the evaluation of the regulatory standard, and it can be judged by the regulatory standard. Therefore, when the diversified system of insolvency standards can cover the criterion of obvious lack of solvency, there is no need to add an additional criterion of obvious lack of solvency. Compared with the liquidity and asset-liability criteria, the regulatory criteria are more timely and accurate, which can improve the point of intervention of the regulator and grasp the timing of the disposal of problematic banks. However, it should be mentioned that the universal liquidity standard and asset-liability standard should also be applied as underpinning standards in a diversified system of insolvency standards. After all, banks with assets greater than liabilities and the ability to pay are more convincing, and the liquidity and asset-liability criteria, which are in addition to the supervisory criteria, can also provide supervisory bodies with other regulatory perspectives. Unlike the current legislation, the diversified system of insolvency standards does not

provide for the simultaneous application of the asset-liability and liquidity standards to determine whether a commercial bank has reached the insolvency threshold, but rather stipulates that an application for commercial bank insolvency can be filed as long as either the asset-liability standard or the liquidity standard is met. This is because the simultaneous application of asset-liability and liquidity standards makes it difficult and costly for bankruptcy applicants to prove their case, and lacks efficiency and economy.

4.3 Specific Design of Regulatory Standards

Firstly, the regulatory standard should be designed as a subjective and objective standard. The bankruptcy standard of commercial banks is characterized by technicality and sensitivity. Considering the sensitivity and vulnerability of the banking industry itself, it is necessary for regulators to retain a certain degree of discretion [25]. The system of commercial bank insolvency standards should be a combination of objective evaluation indicators and subjective judgment of regulators. Usually, banking regulators make subjective judgments on descriptive criteria, but they can summarize the characteristics of insolvent banks based on international practical experience and include them in their judgments: firstly, failure or hopelessness of rescue; secondly, a large amount of capital is deposited, the quality of assets is seriously deteriorating, and the bank is in the red; thirdly, it is not able to pay its debts as they fall due, and it has already or will soon be in a payment crisis and a credit crisis; and fourthly, its internal management is out of control or in serious disarray, seriously violating the regulatory indicators. serious disorganization and serious violation of regulatory indicators. The banking regulator may make a judgment based on the typical characteristics of the insolvent bank, and if one or more of the characteristics are present, it should take immediate measures for insolvency to avoid the spread of the crisis and the expansion of losses. Objective evaluation indicators should contain complete evaluation elements and corresponding risk level measurement methods. Referring to the evaluation index of "CAMELS" of the United States, the elements in the objective evaluation index of China's commercial bank bankruptcy standard should include six core elements, namely, capital, asset quality, internal management, profitability, liquidity, and market risk, and each element should be set up with the corresponding scores and weights. In practice, the total score is calculated according to the weight and value of each element, and then the total score is used to determine the rating, and then take corresponding measures. For example, in the aspect of capital adequacy, the capital adequacy ratio is used as a quantitative index, stipulating that the ratio of capital adequacy of commercial banks shall not be less than 8%, and the capital element accounts for 20% of the weight of the whole rating. Objective evaluation indicators are mainly based on reference indicators that can affect actual operations, such as profitability, which requires attention to the asset (capital) margin of commercial banks. The liquidity situation needs to focus on the liquidity ratio and liquidity ratio. Market risk is concerned with interest rate risk sensitivity. The closer the indicators selected for objective evaluation are to the actual operating conditions of the bank, the more responsive the bank's risk level is. After quantifying the objective evaluation indicators, the risk level can be divided into 1 to 6 levels according to the scores [26]. In this

paper, we judge according to the logical relationship that the risk level is directly proportional to the size of the value and the size of the value is directly proportional to the intensity of the regulation, and take corresponding measures according to the corresponding level. This paper argues that bankruptcy prevention procedures can be initiated in levels 2 to 3 (but does not exclude the application of bankruptcy procedures), and levels 4 to 6 need to be included in the scope of bankruptcy. Although the objectivity indicators can be costly in practice, they are less costly for supervisory organizations due to the daily supervision and management of access to data on commercial banks. Objective evaluation indexes add quantifiable and operable guidelines to the descriptive evaluation of the subjective elements of the bankruptcy standard of commercial banks, and usually, when the objective evaluation indexes are seriously violated, commercial banks also manifest the typical characteristics of bankruptcy, so this evaluation method has the validity. The subjective and objective standard not only provides the regulator with certain discretionary power, but also provides operable specific indexes for determining the bankruptcy of commercial banks in practice, which constitutes the main content of the regulatory standard.

Secondly, the regulatory standard should also include exemptions from application. Supervisory standards include subjective and objective evaluation standards, is a set of standards with operability, in practice to help banking regulators to judge the commercial bank insolvency is of great significance. However, it is undeniable that the regulator may not take bankruptcy measures for the commercial banks that have met the regulatory standards. Referring to the content of foreign commercial bank insolvency standards, it is not difficult to find that there are proviso clauses such as "may cause systemic risk" and "if the regulator believes that it is not in the interest of the society" to avoid the bankruptcy of commercial banks. Systemic problems in the banking sector are considered to have arisen when the failure of a bank affects more than 20% of the total deposits of the national banking sector. The circumstances under which systemic crises are excluded from the application of the regulatory standard are based precisely on considerations of societal interest and are often the reason for government financial bailouts. In the event of a systemic crisis, the economy will experience a series of negative effects. Stopping the first bank from going bankrupt is the best way to block the spread of negative externalities of banks. Therefore, China should also consider setting up a proviso clause to exclude exceptions to the application of regulatory standards in its legislation.

5. Conclusion

As the main body of China's market economy, commercial banks fail in market competition and exit the market through bankruptcy in line with the objective law of the market. China has not established a special legal system for the bankruptcy of commercial banks, and in practice, the general corporate bankruptcy standard stipulated in the Enterprise Bankruptcy Law is too limited. Based on the special nature of commercial bank bankruptcy, it is necessary to make special disposition for it. First, regulatory standards should be incorporated into the bankruptcy standards of commercial banks. For one thing, it can give full play to the role of regulators in the process of

disposal of problematic banks, intervene in time to avoid missing the point of crisis of commercial banks and causing greater losses; for another, it can also increase the operability, economy and efficiency in practice. Secondly, the bankruptcy standard for commercial banks should be built into a diversified bankruptcy standard system. Liquidity standards, asset-liability standards and regulatory standards should be applied as the content of commercial bank bankruptcy standards. Thirdly, subjective and objective criteria and exclusions should be included in the design of regulatory standards. The subjective and objective standards not only reserve the space of discretion for the regulator, but also provide technical standards for the specific judgment of commercial bank insolvency in practice. Circumstances that exclude the application of the regulatory standard may be considered as a proviso in the legislation to increase the flexibility of the system.

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