

Reflections on the "Right of Reversal" of Shareholders' Pre-Emptive Right

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Abstract: The pre-emptive right system of shareholders restricts the freedom of transferring the company's equity held by shareholders to a certain extent, but the system is better to protect the company's human integration. But in the Judicial Interpretation of Company Law IV makes the shareholders of a company has the right to go back on our word "" in the equity transfer, the right to go back on our word" "caused the company to other shareholders in the equity transfer process almost lost his priority, and the shareholders right of first refusal as a form type of conflict and encourages the dishonest transaction behavior in the process of equity transfer. Therefore, this provision is not suitable to be directly adopted by China's Corporation law.

Keywords: Shareholder Preemption Right of Share Transfer Right of Regret

Introduction

Shareholders buy this system is in the Corporation law in 1993 has been set up, followed by modified company law about the shareholder's right of first refusal in 2005 added more rules to be perfect, in the Judicial Interpretation of Company Law IV more refined perfect multiple rules of priority right of shareholders, but the debate of priority right of shareholders of a company is never stop, Especially for the "right of reversion" of shareholders in the process of equity transfer. Scholars who support this provision believe that giving shareholders the right of reversion protects the freedom of shareholders to dispose of their own equity. Scholars who do not agree with this rule believe that giving transferring shareholders the right to renege will encourage the dishonest trading behavior of transferring shareholders in the process of equity transfer.^[1] In addition, it contradicts the definition of the pre-emptive right as the right of formation. This paper holds that to judge whether the Judicial Interpretation of Company Law IV is legitimate, we should not only consider the balance of interests of relevant parties, but also consider it under the company law and even the whole private law system.

1. The raising of the problem

Judicial Interpretation of Company Law IV the provisions of article 20 is wanted to make the maintenance companies east dispose of his own stake in free, but in the judicial practice, which the provisions of the right to go back on our word "" has become the means of assignment of shareholders, the company used to circumvent the other shareholders exercise is preferential buy right, cause it's hard to realize the original legislative purpose of the law. For example, in judicial practice, there are shareholders in the process of equity transfer ostensibly through the exercise of the "right of retraction" to withdraw the intention of equity transfer, privately raise the price of equity continue to sell the equity. For such cases, it is not in line with the original legislative purpose of Article 20 "right of retraction", and it also violates the principle of good faith. Thus it can be seen in the judicial practice for Judicial Interpretation of Company Law IV article 20 exists much abuse cases, and in the new company law of the change of whether the rule should be officially classified as to the company law of our country at present discussion is very fierce, so to benefit measure of this judicial interpretation, It is necessary to study whether it should be formally included in the Corporation law of our country^[2].

2. The nature of the shareholders' pre-emption right

The nature of shareholders' preemption right is a very controversial issue, and the main dispute is whether it should be regarded as the right of formation or the right of claim? Scholars who support the theory of right of formation believe that if other shareholders of the company advocate the right of preemption in the process of equity transfer, under the same conditions, the equity transfer contract has been successfully signed between the shareholders of the transfer of equity and the shareholders of the company who advocate the right of preemption, so as to better maintain the existing shareholder structure of the company[3]. The one in favor of the right of claim is that even if other shareholders in the company claim the preemptive right in the transfer of shares, the transfer agreement is not immediately established, and the transferring shareholder can withdraw his decision to transfer the shares. Although Chinese laws and regulations do not clearly define the nature of shareholders' preemption right, it is reasonable to characterize the nature of shareholders' preemption right as the formation right either from the perspective of judicial practice or from the perspective of legal theory[4].

2.1 At the level of judicial practice

First of all, at the practical level, the author has searched 397 cases with the keywords of "shareholders' preemption right" and "nature" on the court documents website until June 22, 2021, from which 180 cases are selected as samples, including 15 cases involving the court's view on the nature of shareholders' preemption right. In 13 cases, the court considered the shareholder's preemption right as the right of formation, in 1 case, the court considered the shareholder's preemption right as the right of request, and in one case, the judge maintained a neutral attitude and neither recognized it as the right of formation, nor recognized it as the right of request. However, in terms of the proportion of the right of formation, It is also enough to show that the theory of right of formation occupies a mainstream position in judicial practice. The following figure shows the relevant specific cases and the specific comments made by the court in the cases.

2.2 At the theoretical level

From the perspective of civil law, the right of claim is the right arising from the basic right, that is to say, the right of claim can only exist if the basic right exists first. The preemption right advocated by the shareholders of the company is based on the legal provisions, rather than on some basic rights, so the preemption right of the shareholders cannot be regarded as the right of claim. If nature to form the right of priority right of shareholders, the company of other shareholders in the equity transfer for as long as the exercise of the right of first refusal can gain the stake, maximum limit to prevent the shareholders in the company to foreign transfer its equity, also make the preemptive right of shareholders as a right of formation have legal basis^[4].

3. Reflections on arguments in favor of granting transferring shareholders the "right of retraction"

3.1 Endowing transferring shareholders with the "right of reversal" affects the inner trust basis of the company's shareholders

While inner trust is not easy to see and measure, but the author thought that may transfer to allow shareholders "all" people close to the company and does not allow the influence of shareholders "all" the influence of the people close to the company to do a comparison, as shown in the figure below^[5], if the shareholders of a company at the time of the transfer of shares is not necessarily the lack of trust between shareholders, It is possible that some consideration for their own interests, so if the equity transfer shareholders to withdraw equity transfer intention to thwart the other shareholders in the company exercise is preferential buy right^[6], does it belong to the inner lack of trust between the shareholders of a company's performance, so at this time if we allow the transfer of shareholders "all" to continue to stay in the company, It will further increase the contradiction between the shareholders of the company, which will

affect the subsequent decision-making of the company, and may also cause the deadlock of the company^[7]. Therefore, it is not advisable to give the transferring shareholders the "right of regret" from the perspective of the company's human compatibility^[8].

It is necessary to impose reasonable restrictions on the transfer of shareholders' equity not giving transferring shareholders the "right of retraction" does not undermine the right to fair dealing. When the shareholders of the company propose to transfer their own shares to foreign countries, other shareholders of the company will not immediately exercise the pre-emptive right of shareholders, and the transferring shareholders have sufficient time to negotiate the conditions of equity transfer with external third parties^[8]. In addition, the shareholders' preemptive right is expressly stipulated in our company law, and we can assume that all the owners should be aware of and abide by this right. It is not a sudden attack for other shareholders to claim the preemptive right in the equity transfer. If an external third party wants to buy the equity, it has enough time to design the terms of the contract and negotiate with the transferring shareholder about the conditions of the equity transfer that it can accept. Therefore, the exercise of the pre-emptive right of other shareholders in the equity transfer will not impair the fair transaction of the equity.

3.2 The bidding mechanism from the perspective of law and economics

In the context of equity transfer, no matter whether the equity transfer price is high or low, it is essentially the difference of interest distribution between the parties of equity transaction^[9], and it is not necessary to maximize the interests of the transferor or the transferee. Therefore, it is not justified to give the transferee the right of "regret" to maximize the interests of the transferee. Moreover, in economics, any pricing is risk-weighted, and the bidder must bear the consequences of the pricing of the transaction, including the equity transfer^[10].

4. Language

The pre-emption system of shareholders is very important to maintain the stability of the internal governance structure of a company. Therefore, we should consider its feasibility in many aspects when considering the exercise of the pre-emption right by other shareholders in the equity transfer. Therefore, the provision of "right of reversal" for transferring shareholders actually causes the fact that shareholders' pre-emption right is "empty", and at the same time, it is contrary to the original intention of the system of shareholders' pre-emption right, and in practice, it will encourage dishonest transactions in disguise. In conclusion, the judicial interpretation of this article is not only not suitable to be formally incorporated into the Company Law in the new round of revision of the Company Law, but also the application conditions of this article should be specified in detail in order to avoid the confusion of application in judicial practice.

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