

The Extension of Limited Liability

论有限责任的扩张

袁碧华/著





广东省普通高校人文社会科学重点研究基地 "广东商学院法治与经济发展研究所"资助出版

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图书在版编目(CIP)数据

论有限责任的扩张/袁碧华著.—北京:法律出版社, 2009.1

ISBN 978 -7 -5036 -9183 -6

I.论… II.袁… III.公司法—研究—中国 IV. D922. 291. 914

中国版本图书馆 CIP 数据核字(2009)第 003442 号

论有限责任的扩张

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责任编辑 刘彦沣 田会文 装帧设计 李 瞻

© 法律出版社·中国

开本 A5

版本 2009 年1月第1版

出版 法律出版社

总发行 中国法律图书有限公司

印刷 北京北苑印刷有限责任公司

印张 8.75 字数 223 千

印次 2009 年1月第1次印刷

编辑统筹 法学学术出版分社

经销 新华书店

责任印制 陶 松

法律出版社/北京市丰台区莲花池西里7号(100073)

电子邮件/info@lawpress.com.cn

网址/www.lawpress.com.cn

销售热线/010-63939792/9779

咨询电话/010-63939796

中国法律图书有限公司/北京市丰台区莲花池西里7号(100073)

全国各地中法图分、子公司电话:

第一法律书店/010-63939781/9782

重庆公司/023-65382816/2908

北京分公司/010-62534456

西安分公司/029-85388843

上海公司/021-62071010/1636

深圳公司/0755 - 83072995

书号:ISBN 978-7-5036-9183-6

定价:25.00元

(如有缺页或倒装,中国法律图书有限公司负责退换)

於有風费行的世界

有限责任的制度功能从件统的资本聚集功能发展到直接为更多的投资

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摘 要

有限责任的扩张有无序的正当性支撑。社会需要中小企业、中小企

[]派要有限责性,最有帐页生息,张斯止当(E.Z.应大体规;即被住加达时 -

,展史就是一都责任限定史,以无限责任的自身限定,至无限责任组合

现责任的限定。有极责任的扩张实际上处在人类责任限定的途中。中区

有限责任的扩张不仅仅是指有限责任由公司

有限责任的扩张不仅仅是指有限责任由公司 向合伙企业的扩张,或法人向非法人的扩张,而是 指有限责任从股份有限公司向非股份有限公司扩 张的历程,由于非股份有限公司一般为中小企业, 所以,也可称之为有限责任向中小企业的扩张。按 照扩张中对传统有限责任制度的突破尺度,有限责 任的扩张又可划分为向中小公司的扩张和向合伙 企业的扩张两个阶段。前一阶段的扩张虽然突破 了"两权分离"适用条件,但尚局限在法人和公司制 度框架内,后一阶段的扩张则完全突破了法人框 架,即有限责任的享有不以企业具有法人资格为前 提。在有限责任扩张的制度构建中,需要注意,由 于有限责任的传统理论是建立在股份有限公司基 础上的,有限责任的许多制度内涵是股份有限公司 所特有的,而不是有限责任制度本身所具有的,应 予以剥离。

张中,有限责任的法理内涵也发生了变迁。首先,

有限责任的制度功能从传统的资本聚集功能发展到直接为更多的投资者提供责任限定的保护;其次,有限责任的适用条件也发生了变化,"两权分离"和"法人资格"都不再是有限责任的适用条件;再次,有限责任的价值取向也发生了微妙变化,从效率至上,发展到注重公平对效率价值的衡平。

有限责任的扩张有充分的正当性支撑。社会需要中小企业,中小企业需要有限责任,是有限责任扩张的正当性之最大体现;而责任形态的发展史就是一部责任限定史,从无限责任的自身限定,至无限责任到有限责任的限定,有限责任的扩张实际上处在人类责任限定的途中;不仅如此,有限责任的扩张并非洪水猛兽,并不会带来严重的权利失衡,以致对债权人及整个社会带来很大的冲击,而是多种利益考量下的一种最优制度选择。

在有限责任向中小企业扩张后,由于中小企业资本小、两权分离程 度低以及封闭性等特征,对债权人具有更大的负外部性。但是,其负外 部性能否变为现实,或在多大程度变为现实,以及如何保护,需要区分自 愿性债权人和非自愿性债权人具体分析。按照有限责任的契约理论,对 于自愿性债权人而言,有限责任实际上是投资者与企业债权人之间达成 的责任分配契约,是双方意思自治的产物。因为,无论是面对有限责任 公司、一人公司,还是有限合伙企业、有限责任合伙企业,自愿性债权人 都可以主动衡量企业的信用风险,并协商弥补信用缺陷的替代办法,甚 至选择不与之交易。而且,从市场整体来说,企业与自愿性债权人身份 是经常转换的,责任总体上是平衡的。因此,在正常情况下,有限责任向 中小企业的扩张并未额外增加自愿性债权人的风险,但有限责任的扩张 增加了有限责任滥用的风险。针对此,关键是建立适合中小企业特点的 有限责任否认制度。中小企业对自愿性债权人适用的有限责任否认制 度有三个特点:一是从法人格否认发展到有限责任否认;二是强调企业 或投资者有欺诈债权人的因素;三是合伙企业的有限责任否认有自己的 特殊性。五个工工发出所内型表面引责规律、中治

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企业的主要债权人是自愿性债权人,但最容易受到侵害的是非自愿性债权人,有限责任扩张后的外部性主要体现在非自愿性债权人上。对非自愿性债权人的保护:一是完善侵权法,建立有利于债权人保护的归责原则和扩大权利保护范围;二是一般地限制有限责任对中小企业非自愿性债权人的适用。这是对有限责任的最大限制,实际上是将投资者的有限责任限制在仅对自愿性债权人适用。因为,有限责任是一种商事责任,其功能与价值主要体现在商事活动中,侵权责任不是商事责任。非自愿性债权人不能预见企业突发的侵权风险,与企业(投资者)几乎不可能发生身份转换,更不可能事先约定信用补偿,故,有限责任对侵权责任的适用是缺乏正当性的,是极不公平的。必要的限制是为了更好地扩张。限制有限责任的适用有一定条件:对非自愿性债权人,如果穷尽其他合法手段(如责任保险以及企业所有财产),仍不能足额赔偿的情况下,应在个案中和在剩余赔偿范围内限制投资者有限责任的适用,赔偿财产追及投资者的个人财产。

运用上述原理检视我国有限责任制度扩张中的制度构建,尚存在许多问题,应予以完善。

关键词:有限责任;有限责任的扩张;中小企业;中小公司;合伙企业

regime, the article distinguishes the inherent connotation of the limited trability and the special regime of joint-stock limited companies, and concludes that some systematic connotations of the traditional limited liability came from the characters of joint-stock limited companies, not the inherent connotations of the limited liability itself. the translated from the regime of the limited liability.

Any system may be considered as the product of history, which will change with the development of society. And at the course of the extension of the limited liability, its theories have been changed too. firstly, the function of the limited liability has changed from agglomerating capital to

The extension of the limited liability doesn't means that the limited liability has extended from corporations to partnership enterprise, or from legal entities to non-legal entities. The extension of the limited liability means that the limited liability has stabling the limited extended from joint-stock limited corporations to small and middle enterprises. There are two stages of the extension of the limited liability: the first is to extend to small and middle corporations, which is still dolow million restricted in the scope of corporations and legal to be be entities, such as limited companies and one man's companies; and the second is to extend to enterprises which cannot be classified as corporations, primarily, to partnership enterprises. The extension of the limited liability in this stage has a great breakthrough, that is, the applying requirements of the limited liability have bear land to have an not included the qualification of legal entity. Based on of supersylving the reconsideration of the traditional limited liability

regime, the article distinguishes the inherent connotation of the limited liability and the special regime of joint-stock limited companies, and concludes that some systematic connotations of the traditional limited liability came from the characters of joint-stock limited companies, not the inherent connotations of the limited liability itself, which should be removed from the regime of the limited liability.

Any system may be considered as the product of history, which will change with the development of society. And at the course of the extension of the limited liability, its theories have been changed too. firstly, the function of the limited liability has changed from agglomerating capital to directly protecting investors; secondly, the applying conditions are more loose than they have been, and the power division and the qualification of legal entity are not essential conditions any more; thirdly, the value orientation of the limited liability has changed subtlety from the preference of efficiency to the balance of efficiency and equality.

Because the extension of the limited liability to small and middle enterprises is beyond the traditional logic established in the era of joint-stock limited corporations, we must find other justifications to explain the reason why we should apply the limited liability to small and middle enterprises. Firstly, the development process of civil liabilities is a process within which liabilities have continually been restrained. Under the background of the development of legal liabilities, the change of the limited liability is in the development process of civil liabilities, which displays the evolution of credit ethics. Secondly, the limitation of big corporations and the advantages of small and middle enterprises in the information age can be considered as another justification of the extension of the limited liability. To some extent, the social need for small and middle enterprises and the need of small and middle enterprises for the limited liability are the most persuasive reasons to

extend the applying scope of the limited liability. Thirdly, as far as the theoretical support of the extension is concerned, we can prove that the extension of the limited liability to small and middle enterprises is efficient by using legal economic theory; we should treat the form of liabilities as a contractual issue from the perspective of liberalism; and we must give all investors same treatment from the perspective of democracy and equality. Finally, from the social advantages and disadvantages of the extension, the most important thing is that as a regime which prefers efficiency to equality, the limited liability regime needs to balance all possible advantages and disadvantages it may bring to our society. There are many facts that can prove the extension of the limited liability to small and middle enterprises may greatly prompt the investment, improve the economic development, and benefit the whole society. This is just the fundamental reason of the dramatically extension of the limited liability.

It is true that after the extension of the limited liability to small and middle enterprises, the negative externality which the creditors may undertake is bigger than before, because of the small capital, the difficult of power division and the closeness of the small and middle enterprises. However, whether the negative externality will become reality or what extent it will be reality and how to protect needs to be analyzed respectively according to the fact that the creditors are voluntary or non-voluntary.

Firstly, protect the interests of the voluntary creditors under the extension of the limited liability. Based on the contractual theory of the limited liability, generally, the extension of the limited liability to small and middle enterprises doesn't increase extra risks to the voluntary creditors, For the voluntary creditors, the limited liability is a contractual issue which determined by the investors and the creditors of enterprises. The voluntary creditors can actively weigh the risks involved, and find alternative means to

cover the defects of credit of the enterprises by negotiation, or they can refuse to cooperate with these enterprises. But the extension of the limited liability will increase the probability of abusing the limited liability. Generally speaking, small and middle enterprises are close enterprises, which means within these enterprises, the ownership and the right of management may not be divided as be needed. The fact is convenient for these enterprises to abuse the limited liability. And then, the key method of protecting the voluntary creditors on the condition of the non-abusing of limited liability is to establish system of denying of limited liabilities. The denying of limited liabilities of small and middle enterprises to non-voluntary creditors has many characteristics, but has liams of called beautiful and noise the probabilities and provided the property of the condition of the non-voluntary creditors has many characteristics.

Secondly, protect the interests of the non-voluntary creditors under the extension of the limited liability. The creditors of enterprises are mainly voluntary creditors, but we should pay more attention to the non-voluntary creditors because they are easily infringed.

The methods of protecting the non-voluntary creditors are primarily to use tort law and limit the application of limited liability. We can determine whether the enterprises should undertake liabilities or what liabilities they should undertake according to tort law, and then, the form of liabilities can be used to determine how much money the enterprises and investors can use to undertake their liabilities.

Firstly, the key of the protection by tort law is to establish the doctrine of liability fixation which will benefit to creditors and to extend the scope of rights should be protected. Secondly, we can limit the application of the limited liability to protect non-voluntary creditors. Generally, the non-voluntary creditors are those who were damaged by torts of the enterprises. So, they cannot prevent the externality of the limited liability of the enterprises. It will be unfair if the damages of the non-voluntary creditors

which induced by the risk they cannot control or predict cannot be compensated enough. At some extent, that will deviate from the basic value of law. The application of the limited liability to non-voluntary creditors is very unfair even if the investors or the enterprises didn't abuse the limited liability. Thus, the article believes that for non-voluntary creditors, if their damages cannot be compensated enough by all other legal mechanisms, the limited liability of the investors should be denied in certain cases in order to use the personal property of the investors to compensate the non-voluntary creditors. Because of the pattern of management of the partnership enterprises and their special type of credit, the application of the regime of denying the limited liability should be more restrictive.

Finally, the book includes a legislation research of the limited liability of small and middle enterprises in our country.

Key words: limited liability; the extension of limited liability; small and middle enterprise; small and middle; corporation; partnership enterprises

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