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of A Company in Incorporation

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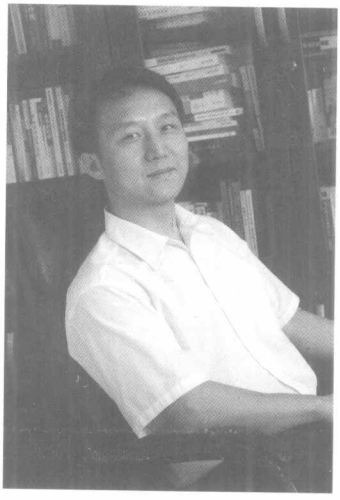

茅院生 1972 年 4 月生，安徽望江人。中国人民大学商学院管理学博士后，西南政法大学法学学士、法学硕士、法学博士。现任法律出版社学术分社社长，兼任《中国法律》杂志社（香港）总编辑，西南政法大学法学副教授、硕士研究生导师等职。大学期间曾任西南政法大学校学生会主席。工作以来曾任法律出版社市场销售部主任、中国法律图书公司总经理、董事长。先后被评为全国百优大学生、全国优秀学生干部、司法部直属机关优秀党员、司法部直属机关杰出青年、全国优秀团干、中央国家机关优秀青年。曾在《中国法学》、《法学家》、《法律科学》等法学核心期刊及《新闻出版报》、《中国图书商报》等出版业专业报刊发表法学及管理学文章十余篇。

设立中公司本体论

中文提要

公司法以规范公司的组织机构、治理机制为立法重点。在设立中公司的理论中，一般将设立中公司视为成立后公司的“胎儿公司”，即从信赖理论角度出发，设立中公司的常态应过渡为公司。可见，设立中公司对成立后公司的影响甚巨。再者，设立中公司在商事实践中广泛存在，公司设立阶段积累了大量的法律问题，其中最为重要的，也是争论最多的问题当属设立中公司的民事权利能力、民事行为能力和民事责任能力，矛盾集中体现于设立责任以及为公司成立而订立的民事合同责任的分配。这提示我们不应当忽略对设立中公司本体的探讨。基于此，本书关注的重点为设立中公司本体法律问题，即设立中公司的生存期限、法律地位、成员和机关、设立中公司向公司的过渡等。就某些问题，如行政部门的设立登记，设立瑕疵，发起人对成立后公司的资本补充责任以及发起人对公司的赔偿责任等，因之不全然属于设立中公司本体论，故本书没有涉及。

除第一章导论和结语外，本书第一部分“设立中公司本体基本理论”包括第二、三、四章，第二部“设立中公司本体建构”包括第五、六、七、八章。

导论首先提出本书的观点，主张重新认识设立中公司，明确本书的主体部分是反思设立中公司的性质、地位，构造设立中公司的内部组织，并探讨该组织体的行为。在导论中交代了研究背景，即由法经济学者展开的“公司法中的合同自由”的论战对公司法的影响；“公司以何为信用”的讨论对公司资本制度变革的影响；德国通过判例形成了设立中公司理论的影响。在此研究背景下，导论交代了文章的三条研究路径：公司设立规则的全球竞争；设立中公司组织体的独立构造；设立中公司在设立阶段的

独立行为。由于研究路径和论文的主旨所限定，导论中界定了论文的研究范围，即依照大陆法系的公司设立三要件“人、物、行为”作为设立中公司本体论的基础，并就本书不予讨论的问题作了交代。最后，导论交代了本书的研究方法，即法解释学的方法、以现行公司法的文本为研究视角等。

第二章“设立中公司的界定”。本章主要确定“设立中公司”这一全文的核心概念，其目的是为以后章节的展开作一铺垫。指出现有概念表达中一个较为明显的缺陷在于“设立中公司”这一概念的上位概念本身即具有不确定性。并且本章主张将公司设立作为一个整体，而非划分为发起人合伙与设立中公司两个阶段对待，设立中公司始于“发起人协议订立时起”。本章对设立中公司的一个基本界定是：以设立协议的订立为起始点，至公司取得设立证书（或设立清算时）止的这一个时间段内，以取得公司法人资格为目的，具有独立主体地位的非法人团体。

第三章“设立中公司的独立性”。基于对民事主体再认识的基础上赋予非法人团体民事主体地位的必要性以及设立中公司自身的特殊性，本章认为，应当承认设立中公司独立的民事主体地位。就设立中公司作为一个整体来看，虽然目前立法不可能超前到承认设立中公司的有限责任，但也不宜简单地视设立中公司为合伙组织。设立中公司因其具有一定的财产，拥有自己的意思机关和执行机关，具有受限制的团体人格，能够以自己的财产承担一部分责任，并且，考察设立中公司的外在表征，它追求和其组成成员相独立的团体构造，这和民事合伙的差异较大，和法人的性质更为接近。从设立中公司的民事能力以及设立中公司可以以自己的名义所从事的各种活动看，如果不考虑到行政机关的利益，不将登记视为主体资格取得的一个必经程序，那么，赋予非法人团体，尤其是从事商事行为的设立中公司独立的民事主体地位似无不可。

设立中公司的独立性还体现在其具有责任能力，可以对自己的行为承担责任，也就是设立中公司以自己的财产承担清偿责任。发起人承担

个人责任是因为其应当具有担保公司成立的义务。

第四章“一人公司的设立理论”。我国修订后的公司法使理论界对一人公司合法地位的争论尘埃落定,同时对我国公司的设立制度进行了补充,并对传统的公司设立观念产生了较大的冲击和修正。一人公司中股东的唯一性使得公司设立人之间的集合关系已不存在。在一人公司中,设立人和股东二者身份具有延续性。因此,一人公司的唯一股东便就是唯一的设立人。但是,设立中公司机关仍然有承认的必要,只不过是简化的机关形式而已,并且一人公司并没有与公司的出资理论形成根本背离,只是为了保护公司债权人而对其规定了较为严格的条件。

第五章“设立中公司本体建构的价值取向”。能否高效筹集公司的资金应为设立中公司制度优劣的判断标准。这个标准包含两个关键性因素:一是公司最低注册资本数额;二是出资形式的可选择范围。和成立后公司相比,设立中公司的私人强制较弱,但是设立中公司仍为一个利益交叉和利益冲突的统一体,单纯依靠发起人合伙理论难以处理复杂的公司设立事务,而将设立中公司作为和发起人独立的组织体对待,在设立责任承担和设立中公司过渡为公司等方面均具有便捷效力。

第六章“设立中公司机关”。设立中公司可以以自己的名义,而非发起人的个人名义从事设立行为,其意思的表达与实行和法人类似,均需要借助于自己的机关来完成。发起人合伙是设立中公司的主要机关,但并非唯一的机关,在设立中公司召开创立大会选举出董事会、监事会后,创立大会取代发起人合伙成为意思表示机构,而董事会和监事会分别成为设立中公司的执行机构和监督机构。就设立中公司意思机关的议事规则而言,采取“资本多数决”原则或是“人头主义”可以由意思机关来选择,不必由法律排除“资本多数决”原则的实行。而就执行机构的表决而言,“人头主义”是一个可行的选择。本章在设立中公司机关的权利、义务中,强调的是“职权”,而非单纯的发起人的“权利与义务”。各国公司法对设立规则的不同决定了设立中公司行为难易与繁简。一般地,设立中公司

的必要设立行为包括订立发起人协议；订立公司章程；初始资本额的缴纳与验资；确立公司的组织机构等。这些行为的主体均应当是设立中公司的机关。

第七章“设立中公司成员——发起人”。本章就公司发起人的人数、资格、认定进行了讨论。公司法只需对发起人的资格设定一个框架，或者是最低标准，在此基础之上，可以根据本国经济实践交由工商行政法规来对某些主体是否具有发起人身份进行法律界定。发起人责任颇为复杂，作为设立中公司成员的发起人的责任，既有发起人之间的违约责任，又有发起人对设立中公司的、债权人以及认股人的责任。

第八章“设立中公司的财产筹集和章程订立”。前两章讨论的对象为设立中公司的“人”，也即作为成员的发起人和设立中公司的机关。除此之外，设立中公司三要素：“人、物、行为”的另外两个要素即为财产和章程。鉴于中国公司法就公司资本制度做了大范围的修改，这对设立中公司财产的筹集规则也产生了影响，具体而言其财产的形成规则包括：(1)筹资必须达到法定最低注册资本数额；(2)出资标的物可以由发起人协商确定；(3)对一人公司的出资严格限制。依据大陆法系公司法对章程的认识，章程属于设立行为的复合要件。所以，章程订立不仅是设立中公司最基本的行为之一，也是公司设立行为的核心。章程虽于设立阶段订立，但它从理论上为成立后公司的运行设定了禁忌和自由活动的空间。章程的性质争论实质上是公司性质争论的延伸。本章着重讨论了公司章程的意思自由，章程选择退出公司法规则的程度取决于两个方面：一是对公司法规则的判断；二是区分公司类型，因为有限责任公司和股份有限公司对章程排除适用强制性规范的宽严态度不同。

在结束语中，重申了本书的结论。笔者认为：一方面，从设立中公司的民事能力以及设立中公司以自己的名义所从事的各种活动看，设立中公司应具有独立的主体地位；另一方面，根据目前国际最新理论，有限责任是当事人之间的一种契约，即使立法承认设立中公司承担有限责任，事

实上也不会造成债权人利益的损害。因为一旦立法做出了特定的制度安排，债权人在与设立中公司订立合同时，就会预先考虑到各种风险。这与有限合伙近年来蓬勃发展的原因一样。当然，目前我国的立法还没有必要走到这一步。但是这也并不影响设立中公司的独立法律地位。

Abstract

The Company Law takes the regulation of the organization and structure and governing mechanism of companies as the legislative priorities. The theories regarding "companies in incorporation" normally deem a company in incorporation to be the "embryo company" of the same entity after it is duly established, i. e. : from the perspective of the reliance theory, a company in incorporation shall be transformed into a duly established company. It therefore can be concluded that a company in incorporation will have significant influence on the company that becomes duly established afterwards. In addition, currently companies in incorporation have widely engaged in commercial activities and therefore a large quantity of legal issues coming up with respect to the incorporation period of companies. The most significant issue which is also the most controversial issue is regarding the civil right capacity, civil activity capacity and civil liability capacity. Such issue is concentratedly reflected through the liability division between the incorporation liabilities and the civil liabilities arisen out from the contracts entered into for the incorporation of companies. This suggests that we should not lose sight of the researches and discussions regarding the position of "a company in incorporation". In light of this, this essay focuses on the legal issues relating to the companies in incorporation, i. e. : the duration period, legal status, members and the pre-establishment governing bodies of a company in incorporation as well as the transformation from a company in incorporation into the company duly established. With respect to certain issues, although they

should also be categorized as the legal problems arisen out of the incorporation period of companies, such as the establishment registration with administrative agencies, incorporation flaws, capital complement liabilities and remedial liabilities to be assumed by promoters to companies, etc., they are not entirely within the scope of the discussion regarding the organizations of a company in incorporation, this essay therefore did not address the above issues herein.

Apart from Chapter I-Introduction and the Conclusion Part, this essay includes eight chapters in total as follows:

Chapter II-Determination of a Company in Incorporation. This chapter is to establish the core concept of "a company in incorporation" and therefore serves as the foundation for the whole essay. This chapter points out a relatively evident flaw lying in the presentation of the current concept of "a company in incorporation", i. e.: the concept at a higher lever than the concept of "a company in incorporation" has not yet been determined. In addition, this chapter proposes to take the incorporation of a company as integrity instead of dividing it into two periods, i. e.: the period of the partnership between/among promoters and the period of the company in incorporation, a company in incorporation shall start from the moment the promoters' agreement is concluded. This chapter establishes a basic concept of a company in incorporation, that is a company in incorporation is a non-legal person organization starting from the moment the promoters' agreement is concluded until it obtains the certificate of incorporation (or it goes through the incorporation liquidation process) and aims at the acquisition of the legal person status of a company.

Chapter III-The Independence of a Company in Incorporation. This chapter sets forth the necessity of entitling a company in incorporation the civil position as a non-legal person organization and the specialties of a company in

incorporation based on the reunderstanding of civil subjects. This chapter suggests the status of a company in incorporation as a civil subject should be recognized. Take the company in incorporation as a whole, even if it is not possible to recognize in advance the limited liability a company in incorporation can assume under the current legislation, it is not appropriate to deem a company in incorporation simply as a partnership. A company in incorporation has its own assets and its own determination and implementation bodies, it has the organization status that is subject to limits and it is able to assume part of the liabilities using its own assets. In addition, when looking into the external characters of a company in incorporation, it is trying to establish an organizational structure that is relatively independent from the members that incorporate the company, which is substantially different from a civil partnership and is much closer to the characters of a legal person. From the perspective of the civil capacity of a company in incorporation and the fact that a company in incorporation is able to engage in various activities in its own name, it appears to be appropriate to entitle, a non-legal person organization, especially a company in incorporation that engages in commercial activities, the independent civil subject status, if not taking into account the interests of administrative agencies and not taking the registration process as a prerequisite for acquisition of a subject qualification.

The independence of a company in incorporation also reflects on the fact that it has responsibility liabilities and is able to assume liabilities for its own activities. That is, only when a company in incorporation is unable to repay all its liabilities with its own assets, the promoters shall assume supplementary liabilities .

Chapter IV -" One-Shareholder Company " Theory on Incorporation Theories. The revised PRC Company Law regards the legal status of the one-

shareholder companies. The only shareholder of a one-shareholder company wipes off the collectivity relationship between or among founders of a company. In the case of a one-shareholder company, the identity of the founder and the shareholder shall be successive. Therefore, the sole shareholder of a one-shareholder company is the sole founder. However, it is still necessary to recognize the relevant bodies of a company in incorporation just that the form of such bodies may be simplified. The recognition to one-shareholder companies is not a fundamental deviation of the company contribution theory and just provides for relatively strict requirements for the purpose of protection the creditors of such company.

Chapter Five-Value Orientation of the Infrastructure of a Company in Incorporation. It should be a standard for judgment of the system of a company in incorporation that whether such system can assist a company in incorporation to efficiently raise funds. This standard contains two key factors: one is the minimum registered capital of a company; the other is the scope of the contribution method. Compared with a duly established company, a company in incorporation has a relatively weaker personal constraint. However, a company in incorporation is still a combination of the overlap and conflicts of the various interests and it will be difficult to deal with the complicated incorporation matters if merely using the partnership theory. Therefore, it will be more efficient and productive if treating a company in incorporation as an organization independent from the promoters with respect to assuming the incorporation liabilities and the transformation from a company in incorporation to a duly established company.

Chapter VI Preestablishment Governing Bodies of A Company in Incorporation. A company in incorporation is able to engage in incorporation activities in its own name rather than in the name of its promoters. The

presentation and implementation of its determinations are similar to those of a legal person which both need their respective own bodies to complete. Promoters' partnership is the main body but not the only body of a company in incorporation. The promoters' partnership will become the determination body after a company in incorporation convenes an establishment meeting and elects the board of directors and the board of supervisors. The board of directors and the board of supervisors therefore become the implementation body and supervisory body respectively. In terms of the rules of procedures of the determination body of a company in incorporation, promoters' partnership and the establishment meeting can adopt the "capital majority" principle while regarding the voting principles of the implementation body; "the number of people" principle may be a feasible choice. Within the various rights and obligations of the bodies of a company in incorporation, this chapter emphasizes the "responsibilities and authorities" which should enjoyed or assumed by one body instead of the "rights and obligations" of merely promoters. The different provisions contained in the incorporation rules of different countries determine the difficulty of incorporating a company in different countries. Generally, the necessary incorporation activities of a company in incorporation includes the conclusion of the promoters' agreement, conclusion of the articles of association of a company, the contribution and verification of the initial capital amount and determination of the organizations of a company. All of these shall be conducted by the bodies of a company in incorporation.

Chapter VII-Members of a Company in Incorporation-Promoters. This chapter discusses the number, qualification and determination of the promoters of a company. The Company Law only needs to set forth, a framework of the determination of the qualifications of promoters, or in other words, the lowest requirements. Based on these rules, the identities of the promoters can be

legally determined by the industrial and commercial administrative regulations in accordance with the economic practice of the home country. The promoters' liabilities are quite complicated. Such liabilities, as the liabilities to be assumed by the members of a company in incorporation of the promoters, include the liabilities for breach of the promoters' agreement and the liabilities to be assumed by promoters to the company in incorporation, the creditors of the company in incorporation as well as the subscribers.

Chapter VIII-Fund Raising and Conclusion of the Articles of Association of a Company in Incorporation. The previous two chapters discuss the "person" of a company in incorporation, i. e. : the members of promoters and the bodies of a company in incorporation. Apart from these "persons", the other two factors of the three elements of a company in incorporation, i. e. : "person, assets, activity", refer to the assets and the articles of association of a company in incorporation. Due to the revised PRC company law bring quite amendments to the company capital system , It has affected the fund raising rules of a company in incorporation. With respect to a company in incorporation, the formation rules of its assets consists of (1) the funds raised reaching the statutory minimum registered capital, (2) the contribution method being permitted to be negotiated and determined by the promoters, and (3) the strict restrictions imposed on the capital contribution of one-shareholder companies. Pursuant to the understanding of company laws by continental legal system countries to the articles of association, the articles is categorized as a composite element of the incorporation activity. Therefore, the conclusion of the articles of association is not only the most fundamental activity but also the core of the incorporation of a company. Although the articles of association are concluded within the incorporation period, it sets forth the scope of the permitted and prohibited activities of a company after it is duly established. Disputes arisen

out of the characters of the articles of association are actually the extension of the disputes relating to the character of a company. This chapter specifically discusses the freeness lying in the conclusion of the provisions contained in the articles of association. That is, the extend on which can the articles of association chooses to drop out the rules of the Company Law is determined by the following two aspects, one is the evaluation of the rules of the Company Law, and the other is to distinguish the types of the companies as the a limited liability company and a company limited by shares will take different attitudes towards the exclusion of the mandatory provisions in their respective articles of associations.