

订单农业运行机制的法律分析

王 肃◎著

LEGAL ANALYSIS OF OPERATION
MECHANISM FOR
CONTRACT FARMING

- 把订单农业看作农户与企业的一种动态合同行为，以合同内在的思维逻辑贯穿全文，从合同的性质、合同主体的特性、合同主体的锁定、合同的不完全性与履行机制、违约与其成本内在化、合同纠纷解决机制，到对弱势生产者的保护等，形成一个较为完整的框架与体系。
- 对国外保护弱势生产者（农户）法律制度进行了引入与借鉴。
- 对农户与企业履约或违约的可能性进行了深入细致的博弈论分析，并构建了模型。
- 根据贝叶斯的推断理论与农户的决策特点，构建了不完全合同下农户履约的贝叶斯推断模型。

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序

对于订单农业的研究，国内外论者云集，但大多是从经济学、法学或社会学的某一个角度来论述，而鲜有从法学与经济学相结合的角度进行透视，而这恰恰是本书的一个独特之处。经济学强调效率，法学侧重于公平，二者的和谐在于效率是公平下的效率，公平是有效率的公平，产生和维护秩序的法律是经济效率的保证。本书以法律逻辑分析为主线，运用经济学与博弈论的相关理论成果来研究订单农业，从而达到理顺其运行机制，强化订单农业的合同执行力，最终追求订单农业这种生产经营模式效率与公平的统一。订单农业的合同本性不清、对内在法律的理解与运用不一致会使得公司与农户等各主体的交易成本增加，本书对订单农业运行机制的法律与经济分析，可以在一定程度上解决这个问题。作者把订单农业运行机制视为各主体之间动态的合同过程，是一个在法律框架下合同主体的锁定、履约、违约与救济的过程，而各主体之间通常所谓的利益协调、风险分担等都反映在农户与公司或其他主体所签订的合同之中。这是对自愿交易原则下农户与公司或其他主体“交易规则”的解剖与分析，让订单农业的运行模式回归到国家预定的合同制度规范上来。同时，本书还关注到农户与公司交易可能产生的成本以及势力或利益失衡与矫正等问题，这体现在本书对订单农业的参与主体分析、法律对合同效力的有限性否定分析、履约与风

险管理分析、对美国生产者保护法的述评与借鉴以及纠纷解决机制的研究上。

本书的突出之点还在于对订单农业合同的不完全性与履行的研究上,依我看来,这是运用新制度经济学研究具体经济现象的特例。新制度经济学把约束个人行为的私人协议也视为一种制度,在外在制度的层级结构中该协议位于基层,由宪法性规则延伸出来的法律和政府条例控制着操作性层面和分权化层面上缔结出来的契约。本书对于订单农业的合同形态划分、对于合同履行的法律机制、自我履行机制、其他制度性弥补等都体现了新制度经济学的观点和方法。而对于订单农业纠纷解决机制的研究则是把博弈论、法学与经济学较为完整地结合起来的成果。结果证明这是一种有益的探索:清晰、完整、有说服力。至此可以说,本书作者运用法学与经济学的研究方法,完整而系统地揭示了订单农业的运行机制,尽管有些观点有待于进一步探讨和完善,但毕竟体现了作者独立思考、勇于进取的精神品质。

作为作者的导师,我很高兴看到这本书的出版,相信研究相关问题和从事有关工作的读者从中会有所收获。同时,我也相信王肃能在学术研究的道路上继续努力,在新的境界中创造出更多更好的力作。

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摘 要

作为市场经济的必然产物或重要的组成部分，农民要融入市场，农业要产业化，农村与城镇要一体化发展，共同运行经济循环圈，而订单农业正是这种经济运行体制的表现形式。订单农业从 20 世纪 80 年代末 90 年代初在我国诞生开始，就以合乎社会经济发展潮流的姿态获得了政府、农户、企业、农民合作经济组织、批发市场以及其他中介组织的青睐，并以“星火燎原”之势在全国范围内蔓延。农业部 2002 年对 29 个省的调查资料表明，在调查的 11 824 个农业产业化经营组织中，运用合同制的为 8 377 个，占总数的 70.9%。

但我国的订单农业却是在蹒跚前行，尽管各参与者努力探索着这种生产经营方式。对利益追逐的自利本性使参与者的行为频频出轨，步伐的混乱导致订单农业出现了失范与无序状态。例如政府主体的错位；政府监管的乏力，以至违约频发，订单履约率仅为 20%，纠纷难解、违约得不到惩罚有时反而得利；本应是履行者的农户与企业没有理性回归；对合同的认知模糊；合同签订与履行的无规；对合同农户的垄断与欺诈等等。订单农业的失范和无序挫伤了当事者继续实施订单农业的积极性，败坏了订单农业的声誉，严重影响了订单农业的扩展进程。

经济学界与法律学界专家学者在体察和赞同订单农业之于我国农业经济的重要性的同时，也敏锐地观察和感悟到了订单农业在我国的困境与无奈，他们运用古典或新古典经济学、制度经济学或新制度经济学、契约经济学、法律经济学乃至博弈论以及法律的理论与分析方法对订单农业展开多视角研究，分析订单农业

存在的价值、解剖发现的问题、寻找解决问题的路径,提出了许多极具建设性的意见和建议,为订单农业的发展提供了理论支撑。但是如果仅仅从有限的几个经济或法律角度进行研究,尚显单调、单薄,而且欠缺立体,使我们不能对订单农业进行多方面的全面审视,这会制约订单农业的顺利运行和发展。订单农业是个复杂的问题,牵涉的面极其广泛,应该运用多个学科、从多个维度去进行分析与探讨,如此才能得到对订单农业运行机制的较为完整的立体解析。基于此,本文才得以产生。

本文在研究订单农业包括运行机制在内的相关问题时,选择以法律分析为主线的方法,并运用经济学与博弈论的研究成果和分析工具对订单农业的法律经济有关内容进行了探讨。概括地说,本文运用法律的思维把各种主体从经济现象中抽象出来,把研究的重点放在订单农业如何规范有序的运行上,放在各参与主体如何从法律制度以及相关制度乃至文化中获取订单农业顺利运行的动力、激励与效用,放在法律与相关制度因素如何影响各参与主体的收入函数上,从而改变人们对订单农业合同履行的预期,指引人们按预定轨道或期望的轨道运作与发展订单农业。本文在对订单农业的运行机制进行较为全面的法律或经济与法律分析后认为,订单农业是市场经济条件下农户与企业的平等交换关系,即契约或合同关系,各参与主体要健康、顺利、稳定以及可持续运作订单农业,就必须认知订单农业合同的法律内涵以及各主体的法律定位,清晰订单农业内在的法律逻辑与履行机理,把握并学会运用纠纷解决机制,体认到包括法律在内的制度以及当事人内在的信任与信誉对于合同履行的重要性、违约惩罚对于促成合作的重要性。诚如此,包括政府在内的各参与主体才能各安其位、各行其道、各奉其命。同时,在订单农业的运行机制上,本文认为,虽然我们倡导包括法律在内的制度对于订单农业的重要度,但是基于整体观点和系统论理念,我们也阐述了其他影响因子或变量对于订单农业运行的作用及作用途径。本文把影响订单农业

运行的因素归纳为六个方面：合同性质因素、参与主体因素、合同效力因素、履约机制因素、主体势力均衡因素、违约惩罚与救济或解纷机制因素。其结构也正是按照这个逻辑依次展开的。

首先，本文在引论部分审视了订单农业的定义，介绍了国内外订单农业的缘起与发展背景，概述国内外经济与法律研究成果，以此奠定自己研究的逻辑起点。基于本文研究角度与研究方法的变换，在第一章对研究方法的选择进行了详细阐述。第二章首先剖析订单农业合同的法律本质，抛开经典的经济学契约概念，把订单农业的合同放在法律的经纬中透视，区分订单、契约与合同之不同，阐述订单农业的合同的民事法律性质及其在合同法中的归属。第三章分析了订单农业的合同主体到底是谁，有什么法律特性，各个参与主体之间有什么法律关系以及是如何联结的，并就农民合作经济组织这个重要主体的立法问题进行归纳探讨。同时，因之《农民专业合作社法》2006年10月的出台，本书对此予以述评。第四章明确订单农业的各参与主体应该如何分步骤给自己的经济行为套上“法锁”，以便双方履行承诺，达到预期的经济目的，如因自己的主观过错未予锁定，则要承担相应的缔约过失责任。

第五章与第六章重点从经济与法律角度研究订单农业的合同是什么样的，应该如何保证其顺利履行。该两章首先对不完全合同在经济与法律视角中的异同，提出不完全合同的形态划分，从一般意义上探讨了不完全合同的完善与履行途径；其次分析了订单农业的合同是“注定”的不完全合同；然后从法律规定与机理出发，研究不完全订单农业合同的法律履行机制。第六章第一节研讨了包括“以牙还牙”、建立信誉、引入第三方等在内的自我履行机制；第二节寻找其他的制度性弥补方案，认为推行合同范本制度、格式合同制度以及当事人再协商制度对于法律履行机制有重要的补充作用；第三节从风险管理的角度，就不完全订单农业合同的履约风险管理进行研究，指出订单农业的履约风险管理

措施体现在合同条款之中，其目的是为了转移、分散或降低风险及由此带来的损失，其措施应该包括履约担保、农业保险与商业保险、定价策略、期权与期货、风险基金、信用证结算、银行保函等。第六章的最后通过建立一个贝叶斯推断模型，从经济学角度来研究不完全合同下农户的自我保护性，即所谓履约，这是一个农户根据变化的信息对订单农业中出现的风险进行自我管理的模型。同时指出该模型使得农户有冲破合同制度约束的可能，为了自己的收益会冒违约的风险。这从另外一个角度提示我们，要使农户的个人理性服从集体或社会理性，必须有一个二者兼顾的制度设计以及防范违约的强制性措施。

美国对于订单农业中生产者的保护是全面而细致的，其订单农业的成熟发展也得益于对企业和生产者双方利益的平衡。第七章对美国如何保护订单农业中生产者的立法实践予以述评，并由此得出对中国的启示。第八章将注意力转移到如何化解订单农业的合同纠纷上。订单农业违约率高居不下，一定程度上与违约的收益大于违约成本有直接关联，如何使违约成本内在化，提高纠纷解决的满意度，则要在纠纷解决机制的优化上寻求答案。本章首先从经济学角度对农户与企业履约或违约的可能性进行博弈论分析，其次分析订单农业的各当事人的违约形态与违约责任，并就经济学上的效率违约理论与订单农业提出自己的观点；然后对违约后如何处理的纠纷解决机制进行研究，包括诉讼与ADR，以及二者之间的替代与互动。在该章最后，就各种纠纷解决模式的优化与组合提出自己的创新观点。

最后是结语，运用归纳分析的方法对本文进行了总结，概述了对此领域的研究进展，并针对我国订单农业目前存在的问题提出自己一些建议。同时指出研究的不足之处，展望未来可能的研究。

关键词：订单农业；法律经济分析；不完全性合同与履行；农户贝叶斯推断；弱势农户保护；订单农业合同纠纷解决机制

Abstract

The participation of farmers, industrialization of agriculture, and integration of village and towns, all as the necessities and important parts of the market economy, are working together to keep the economy circle in operation. While contract farming is just one form of this economy system. Started from the late 1980s and early 1990s, contract farming has received great interests from the government, farmers, enterprises, agricultural cooperative organizations, wholesale market and other agencies. Contract farming goes with the tide of the economic development and spreads rapidly throughout the entire country. The investigation conducted by ministry of agriculture in 2002, which covered 11824 industrialized agricultural units of 29 provinces, showed that 8377 (70.9%) were practicing contract system.

Although kinds of participants are exerting their effort, contract farming is staggering forward in China. The nature of pursuing interests enables the activity of the participators off the track frequently, which makes the contract farming in irregular and disorder. For example, misfit of the government subject, the weakness of the government supervision, frequent breach of the contract, fulfillment of the contract at the rate of only 20%, the difficulty of solving the dispute, benefits instead of penalty gained by the defaulter, no logical regression of the farmers and enterprises as the discharger, the vague perception about the

contract, the disorder during the process of signing and fulfilling the contract, the monopoly and deceit to the farmers and enterprises, etc. This irregularity and disorder discouraged the participants, destroyed reputation of contract farming, and greatly influenced its development process.

Many researchers in the area of the agricultural economy realized the importance of contract farming. At the same time, they also observed and felt the embarrassment and predicament of the contract farming experienced in China. They apply the basic theories and analytical methods of the classical and neoclassical economics, institutional and neo-institutional economics, contract economics, and game theory into the contract farming, in order to make the research from many points of view. They analyze the value of contract farming; find the existing problem and the relevant solution; bring out lot of constructive advice and suggestion, and provide the theoretical support for the development of contract farming. Compared with the research overseas, however, we still need further explore this topic. Contract farming, a complicated topic covering a wide range, needs to be analyzed and discussed in multi-dimensions, so as to get a comprehensive analysis into the operational system of the contract farming. That is just where this article comes from.

This researches into the contract farming and its operational system, is mainly conducted from the view of law analysis. And the article applies the research results and analytical tools of economics and game theory into the analysis of contract farming. That is, I intend to apply the logics of law to make the subjects abstracted out of the economic phenomena, put the emphasis on how to make the contract farming operate in regular and in order, place the

emphasis on how to make the participants from laws and other relevant institution and from culture obtain the push, stimulation, and utilization, to help contract farming act successfully, give much attention to the income function of how laws and the relevant institution factors influence the participants, in order to change people's expectation to the fulfillment of farming contract and lead the contract farming operate in expected track. After a comprehensive analysis into the operational system of contract farming from the point of view of law and economics, this article claims that contract farming is an equal trading relation between farmers and enterprises under the market economy, that is, the contractual relationship; that to ensure the healthy, successful, steady and sustainable operation of farming contract, all the participators have to realize the legal contents of the agreement and the legal position of the subject, get a clear idea of the logics and mechanism in the process of fulfillment inherent in farming contract, master the system to solve the dispute, appreciate the importance the institutions, including the law institutions, and the importance of trust and reputation from the participants to the achievement of the contract, and understand the importance of penalty to the cooperation. Based upon these points, the participating subjects, the governments included, could finish their assigned task. While in the respect of the operational system of farming contract, this article asserts the significance of the institutions; it also explores the effect of other factors and variables, and the ways in which these factors have impact, in order to make a comprehensive and systematic research. This research groups the factors which have influence on farming contract into six: legal nature of contract farming, contract subject, validity of treaty, fulfillment mechanism, balance of subject power, penalty

for breach and relief or the mechanism of solving dispute. This is also the logic order upon which this article is based.

Firstly in the introduction part, this article gives the definition of contract farming, introduces its origin and background home and abroad, and summarizes the research results of economics and laws in China and overseas, which is the logical beginning of this research. As this article involves different research angle and methods, the Chapter 1 gives a detailed introduction of the research methods. Chapter 2 analyzes the legal nature of contract farming, examines the agreement of contract farming in the view of laws, differentiates the concepts of order, agreement and contract, and discusses the civil juristic characteristics of the contract and its adscription in contract law. The third chapter studied who the contract subject is, their legal characteristics, the legal relationship of the different participating subjects, and how they are combined. This part also summarizes and explores the legislation of one important subject of agricultural cooperative organizations. Chapter 4 introduces how those participating subjects put their own activities in law shackles, in order to make the two parties fulfill their promise to achieve the expected goal. If untrammelled because of their subject fault, they should take the corresponding responsibilities.

Chapter 5 and 6 place emphasis on what the contract farming are economically and legally, and on how to ensure contract farming operate successfully. Firstly, based on the difference of incomplete contract in the view of economics and laws respectively, this part brings out the division of the incomplete contract, and generally discusses the improvement of the incomplete contract and its ways of fulfillment. Next this article analyzes the agreement of

contract farming is doomed to be incomplete contract. And then this research is conducted into the legal fulfilling mechanism of the contract, starting from the legal regulations and mechanism. The first segment of chapter 6 gives a discussion such self-fulfillment mechanism as retaliation, trust building, involvement of the third party and so on; the second segment is about some other institutional compensation plan, which is important and complementary to the legal fulfilling mechanism of the contract, such as system of the contract model, standard contract and alteration of contract. In the third segment, this article is concerned with the fulfillment of incomplete farming contract from the point view of venture management. This part points out that the measures should be manifest in the contract clauses, in order to divert, disperse, lower the venture and the resulting loss. The measures should include the fulfillment guarantee, agricultural insurance, commercial insurance, pricing strategy, options and futures, VC funds, the settlement of credit letter, the guarantee letter from banks and so on. The last part of chapter six is to build a Bayes-inferring-model, to research into farmers' self-protected agreement under incomplete contract, to explore how farmers choose the institutional arrangement of contracts according to the changing information. While it also points out that farmers are likely to break the limitation, breach the contract and pursue their own interests, which from another angle shows the necessity of a balanced institution and some compulsory measures so as to make the farmer's interests conform to the collectivity and the whole society.

In American, there is comprehensive and detailed protection measure for the producer of contract farming. The mutuality of contract farming in American largely benefits from the balance of

interests of enterprises and farmers. Chapter seven evaluates the practice of how to protect the producer of contract farming in America, and gets some corresponding hints for our country. Chapter 8 shifts emphasis on how to solve the disputes of the contract farming. The high rate of breaching contract, to some extent, has direct relation with the case that interests outweigh the costs. How to make the breaching cost internalization, and to increase the satisfaction of solving disputes, could be rooted in the perfection of dispute solving mechanism. This chapter applies the game theory into the analysis of possibility of fulfillment and breach of contract individually, then analyzes the violation forms and liabilities taken by the participants of contract farming. I give my opinion on the theory of efficient breach in economics and contract farming. Then, the article concerns on such mechanisms which are used to solve dispute if contracts are violated, as lawsuit, ADR, and on their substitution and interaction between the two. The last part of this chapter involves my innovation opinion about the perfection and combination of the dispute-solving models. Lastly, the article draws a conclusion through the inductive and analytical method, summarized the progress of this research, and put forward my own suggestion according the present problems existing in contract farming in China. At the same time, the final part points out the weak point of this research and some future research direction.

Key words: legal and economic analysis of contract farming; the incompleteness and fulfillment of contract; Bayes-inferencing-model of farmers; protection towards the weak producer (farmers); dispute-solving mechanism in contract farming

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