

ON LEGAL ISSUES OF CORPORATE MANAGER

From the View of Localization's Law to Regulate
Slothfulness and Abuse of Power

BY Liu Diankui 刘殿葵 著

公司经理人法律问题研究

——对懈怠与滥权规制的法律本土化分析



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家务管理更重视人事，而不重视无生命的东西；更重视人的德性，不重视所有物即我们所谓财富的富足。一旦他毫无德性，那么他就会成为最邪恶残暴的动物，就会充满无尽的淫欲和贪婪。

——亚里士多德

导之以政齐之以刑，民免而无耻；导之以德齐之以礼，有耻且格。

——《论语·为政》

自古皆有死，民无信不立。

——《论语·颜渊》

无恒产而有恒心者，惟士为能，若民，则无恒产，因无恒心。苟无恒心，放辟邪侈无不为已。

——《孟子·梁惠王上》

仲尼曰：君子中庸，小人反中庸。君子之中庸也，君子而时中，小人之反中庸也，小人而无忌惮也。

——《中庸》

为权利斗争，法的目的是和平，而达到其目的的手段是斗争。

——耶林

序

“人类要在二十一世纪生存下去，必须回到两千五百三十年前中国的孔子那里去找智慧”（1988年诺贝尔奖得主巴黎集会共同宣言）。当概念法学面临困境、实证法学陷于迷惘，完善的法典与周详的判例无法规制日益复杂多变的社会关系时，人们不得不反思东方的道德伦理在未来社会法律生活中的作用。

公司经理人问题是一个古老而又恒新的话题。公司经理人作为公司中的经营管理专家，在现代化大生产中，无论是对公司自身的存续和整个社会经济的发展，都具有举足轻重的作用。如何建立既有激励又有约束的法律机制，以规范公司经理人的职务行为、调动公司经理人的工作积极性、激发其潜能，是当代民商法学的一个重要研究课题。

本书作者刘殿葵是我指导的博士研究生，素以勤奋好学、刻苦自励见长。他通过二十多年的司法实践，通过对公司经理人现象的长期观察与思考，发现了其中深层次的规律性：公司经理人问题不是现有的与工业革命相适应的惩罚与激励制度体系所能根本解决的，提升公司经理人的职业道德水准才是根本解决方法。人类有限的理性与法律的保守和滞后性，使得已有的法律规则对具备高智商而诚信不足的公司经理人无可奈何，严刑峻法也无法根本遏制公司经理人不断制造公司丑闻。而中国传统的儒家文化强调人性化和制度的伦理化，可以“医治”与工业革命与生俱来的社会弊病。本书将域外成熟的公司法立法和司法经验与中国本土文化相结合，把儒家“忠”、

“信”理念引入公司经理人的制度体系,在尊重公司经理人个人价值的同时,强化其职业道德义务,落实其个人责任,使公司经理人制度高度人性化和伦理化,从而形成了本书的义利结合理论。

本书通篇追求创新,着力探索公司治理中将中国传统的儒家伦理道德法律化的道路,使人耳目一新,能够为民商法的立法、司法实践以及理论研究提供一定的启迪和借鉴。

温世扬

2007年10月22日

内容提要

在发展着的社会里,法律总是表现出滞后性与保守性,在高智商的处于社会精英阶层的公司经理人面前,法律规制显得苍白无力和漏洞百出。公司经理人能够维持较高的职业道德水准,对社会经济的发展和法律的贯彻实施至关重要。公司经理人作为公司管理专家在社会经济发展中发挥着重要作用,并且随着知识经济时代的到来,市场专业化、公司决策和执行迅捷高效,公司运营对公司经理人的专业管理知识的依赖程度越来越高,公司经理人的管理知识和才能已经成为一种与股东的出资一样重要的生产要素。这种不断增强的作用使得公司经理人开始谋求在公司权力构造中更高的地位,公司经理人的职权在逐渐扩大、公司经理人的使命日益加重。但由于私欲的膨胀,机会主义思想驱使公司经理人制造了接连不断的丑闻,公司经理人滥用职权、浪费资财、渎职欺诈现象时有发生。如何节制私欲、充分发挥公司经理人的潜能与聪明才智,最终的解决办法只能是提高公司经理人的道德修养,因为自由经济真正的敌人是道德相对主义,每一个人的良心才是真正管用的市场警察。西方发达国家已经开始重视东方的儒家伦理,接受东方重感情、重道德的新的价值取向,日本商人已经将儒家伦理发扬光大。在我国对公司经理人的规制的具体措施应当是法律的本土化与人性化,就是将儒家商业道德法律化,以法律手段推行职业道德准则;同时尊重公司经理人的人力资源价值,贯彻人本精神激励公司经理人努力创造,引入西方发达国家对抗式的诉讼机制以监督公司经理人严格履行义务。

全书共分四章,加一个绪论和一个结论与展望。

绪论部分引出经理人的主要法律问题。社会分工产生了作为企业管理专家的经理人阶层,经济的发展使得经理人的地位和作用越来越显得重要。随之而来的问题是经理人懈怠、滥用职权和欺诈。经理人问题困扰全球经济的发展,包括法学在内的许多学科都在关注经理人问题,最佳的处理方案尚未求得。经理人法律制度早在古罗马就已经以诉讼制度的形式出现,但当初处于简单的商品经济时期,企业管理远没有现在发达,当今世界的各种社会关系纷繁复杂、新问题新矛盾层出不穷,且各地区各民族独具特色,对经理人问题应结合国情寻求新的解决方法。公司经理人为包括公司分支机构主要负责人和公司首席执行官(CEO)在内的,受雇佣为公司提供管理服务且被授予经理权的高级管理人员。中国的公司经理人应当是具有良好道德修养的君子,公司经理人制度应当是将从域外移植而来的充满竞争机制的诉讼对抗模式与本土智慧相结合,是在中国传统文化背景下高度伦理化的制度。

第一章公司经理人问题规制的理论基础。现有的解决公司经理人问题的委托代理理论、信义理论、治理理论、激励理论存在不同程度的缺陷,公司经理人问题的法律规制应当追求安全、效率和人权价值。公司经理人问题的解决应当注重法律的本土化,实行“义利结合”:通过对公司经理人的精神激励可以构建公司经理人良好的职业道德,将职业道德内化为法律规范可以强制提升公司经理人的道德水准,利益机制为公司经理人提供工作动力,竞争和对抗使公司经理人感觉到社会压力,法律规范着竞争秩序,将压力转化成公司经理人的驱动力。道德的提升和利益的结合形成本书的义利结合理论,法律确定公司经理人的道义义务,以利益驱使实现公司经理人的道义,道义确保公司经理人利益的安全,实现公司经理人个人价值。义利结合使公司经理人问题得以根本解决。

第二章经理权、公司经理人的权利与利益。经理权是权力,由社团自治权派生出来,须有适当的约束和必要的扩张。竞争机制下的市场约束,迫使公司经理人加强自我约束、自我克制,节制公司经理

人滥权;经济的发展客观上要求扩张经理权以提高效率,扩张经理权并保障经理权的正常行使,以便减缓公司经理人保守与懈怠。经理权不等于公司经理人的个人权利,应当另行确保公司经理人的剩余索取权(盈余分配权和公司增值分享权)。权利和利益应当有限度,由职业道德调控。权力通过信息公开由股东会、董事会的权力加以制衡,以诉讼方式进行权力对抗实现平衡(中庸和谐),以高科技的网络信息手段建立公司经理人诚信档案以激励和约束公司经理人。借鉴发达国家的做法,以经营判断规则保障经理权的正常行使、以责任保险等措施保障公司经理人的权利与利益,消除其后顾之忧。

第三章公司经理人的义务。公司经理人的“义”,由道义上的、职业道德上的义务升格为“法律上的义务”(简称为义务或法律义务),包括对公司和第三人的忠实义务和注意义务。中国传统的忠信外延广于西方国家的忠实,包括守信内容,且更加贴近新时代精神与基本价值。忠实已为国际社会广为接受,我国的公司经理人义务仍取忠实之名,以传统的忠信为内容。公司经理人注意义务应当是专家水平的注意义务,除对公司之外,公司经理人也应对第三人承担注意义务。其注意标准为相应行业、岗位公司经理人的职业道德标准。职业道德标准可由公司、行业和相关民间组织编制,国家机关予以规范性审查、司法机关进行个案附带审查,确认其效力。公司经理人义务的确立和全面适当履行,有助于建立公司经理人的社会信任。信任带来安全与效率,公司经理人义务的设立与履行保障有助于建立法治社会的信任,中国公司经理人的社会信任应当是以亲情信任为核心、以法律的背信制裁为保障的社会信任,即以法律强制恢复传统的亲情信任,以公司经理人专家系统和高科技手段实现普遍信任。

第四章公司经理人的民事责任。公司经理人民事责任包括对公司和对第三人的责任。公司经理人的懈怠,应承担实际履行、补正履行和损害赔偿责任。公司经理人拒绝补正履行的,公司可以解除合同和追究违约赔偿责任。懈怠引起过失的侵权和不利益的法律后果。公司经理人的欺诈和滥权导致侵权和违约法律责任。将公司经理人的秘密利益归入公司,属于商事代理的结果,归入权属于公司的

消极请求权,财产归入是公司经理人违约后维护公司利益的较为稳妥的措施。归入权与损害赔偿请求权可以并存。在公司正常经营的情况下,公司经理人在职务行为中存在故意和重大过失的,应当与公司一起对第三人承担连带责任。公司没有偿债能力时,公司经理人违反义务应对第三人负直接个人责任,公司经理人对第三人承担责任时可以主张第三人债权受偿抗辩,公司经理人履行责任之后可以取得第三人的代位求偿权。建立健全公司经理人责任的保障机制和措施,包括公司经理人的集体惩戒机制和诉讼机制。集体惩戒措施增强公司经理人的责任承担能力,并通过相互监控避免责任的发生。诉讼机制提供强有力的责任保障。

关键词:公司经理人 义利结合 经理权 职业道德法律化 利益保障

Abstract

Corporate managers, as corporate managerial experts, play a very important role in social economic development. In the era of knowledge-based economy, there is an increasing demand for market specialization, fast and efficient corporate strategy-making and execution. Therefore, corporate operation relies more and more on corporate manager's management specialty. The managerial knowledge and talent of corporate managers have already become an element of the production, which is as important as the investment from shareholders. Their increasing importance drives corporate managers to angle for higher positions in administrative hierarchy of corporate. Their authority is extending and responsibilities are increasing day by day. With the desire to satisfy their personal interests' growing, managers create a series of scandals by opportunism, such as abusing power, wasting money and resources, neglecting their job responsibilities or even fraud. How to restrain managers' growing personal desire and fully develop their potential talent? The ultimate solution lies in improving their understanding of morality. The real enemy of free market economy is moral relativism. The real effective market police are everybody's conscience. Western developed countries have been already paying attention to Confucius moral thought and cherishing Chinese value of social relationship and ethics. Japanese executives have even put it into practice already. In China, the specific measures to regulate managers

is the localization and humanization of the legal system. This means to give legal sanction to Confucius business ethics and practise the professional moral code through legislation, to respect managers' human resource values and motivate them to be creative and hard-working. This book includes four chapters, with an introduction, a conclusion and future outlook, which is about 187,037 words.

In the prefix, the main legal problems of corporate managers are stated. The social division of labor resulted in the emergence of a new social class: managers who act as business managerial experts. Their status and influence are of greater importance with the development of the economy. However, it is followed by the problems of slackness in their job, abuse of power and fraud. Agency problem is troubling the development of the global economy. Many social subjects (including law) are focusing close on it. However, there has not yet been a perfect solution. The legal system concerning with managers emerged early in Ancient Rome in the form of lawsuit, but at that early stage of commodity economy, the development of enterprise management was far behind what it is now. Nowadays, there are all kinds of complicated social relationships. New problems and conflicts are always emerging. What's more, each area and ethnic groups has its own characteristics. As a result, we should look for new methods to solve the agency problem according to our own conditions. Corporate managers are senior executives who are hired to offer management service and are given the management authority. They include the chief executives of corporate subsidiaries and chief executive officers. Chinese corporate managers should be morally well cultivated and the manager system should be the one that highly adopts ethical standards under the traditional and cultural background.

The first chapter lays the theoretical foundation for regulating the agency problem. The current solutions such as authorized agency theory, theory of fiduciary, theory of governance, and theory of motivation have

different degrees of flaws. The legal regulation of corporate managers should go after the principles of safety, efficiency and respecting for individual rights and values. The solution of the agency problem should make use of the local resources and practise the combination of both moral enhancement and financial motivation: on one hand, corporate managers should be encouraged to establish excellent professional ethical standards which should be turned into legal rules so that their understanding of morality can be enhanced. On the other hand, benefit system provides them job motivation financially. Competition and conflicts give corporate managers great social pressure, but when the law regulates the competition, it will turn the pressure into the driving force to them. This is the theory of morality enhancement and financial benefits that is discussed in this book. The law specifies corporate managers' moral obligations, financial benefits helps them to realize their ethics, and ethics ensures the safety of their benefits and actualize their individual values. In this way, this theory helps to get the ultimate solution to agency problem.

The second chapter deals with the management authority, managers' rights and benefits. The management authority is the power which is derived from corporate autonomy and it must have proper restraints and extensions. Under the constraints of market competition mechanism, corporate managers are forced to strengthen their self-restraint, which can keep them from abusing their power; the economic development objectively calls for the extension of corporate managers' authority. The extension and application of managers' authority can eliminate corporate managers' conservativeness and slackness to a certain extent. The powers of management does not equal to the personal rights of managers, so there should be measures to ensure corporate managers' rights to share surplus revenues (including profit surplus and corporate value-added). There should be a limit to both rights and benefits, which are adjusted and controlled by the professional ethics. Their power is balanced by the powers

of shareholders' meeting and board of directors, using the way of lawsuit to confront their power to achieve a kind of balance (which is in accord with the Chinese value of moderation and harmony). In addition, corporate managers can be motivated and restrained by setting up corporate managers' credibility files using the high-tech internet information system. On the other hand, we can also draw from the developed countries' practices to ensure the function of corporate managers' authority by operational judging principle and to ensure their rights and benefits by measures like safe responsibilities, so that they can focus on their task without other worries.

Chapter three deals with corporate managers' obligations. This obligation has risen above the obligations morally or professionally and become the legally speaking obligation (obligation or legal obligation for short), including the loyalty and attention obligations to the corporation as well as a third party. The faithfulness in traditional Chinese meaning is different from the loyalty in Western countries. It includes keeping one's word and is more close to the spirit and basic value of this new era. Loyalty has already been accepted by the international community, while in our country, corporate managers' obligations are under the name of loyalty but with the content of faithfulness. The attention obligation is one that is at the professional level. The standards of professional ethics can be made by the corporation, the guild and related civilian organizations, and examined according to the standards by the state organs. The judicial departments can confirm its effectiveness case by case. The establishment of corporate managers' obligation is good for building corporate managers' social credibility, which brings security and efficiency. The social credibility of corporate managers in China should be built around the core of emotional trust, and ensured by legal punishment measures, which means to restore the traditional emotional trust by legal forces and realize general credibility using expert system and high-tech means.

The fourth chapter is about the civil responsibility of corporate managers. This includes the responsibility both to the corporation and to a third party. Corporate managers should take on the responsibility to actually perform or take remedial measures or compensate for any losses if they slack in their work. If a corporate manager does not take way of remedial measures, the corporation can terminate the contract and ask for compensation for breaking the agreement and the infringement of interest. To keep the corporate manager's personal property under the corporation is the result of business agency. This kind of right (disgolgineint) is the corporation's passive request and is a relatively safe measure to take when the corporate manager breaks the contract. This can coexist with the right to ask for compensation for losses. If a corporate manager makes intentional serious mistakes in his jobs, he and the corporation will be joint responsibility together to the third party when the corporation is solvent. However, when the corporation is insolvent, the corporate manager should be responsible for a third party directly and personally. Here the corporate manager can defend against the compensation to a third party and get the right for abrogation after he performs the compensation. We should establish a sound guarantee mechanism and measures for corporate managers' responsibilities, including the group punishment and the lawsuit mechanism. The group punishment mechanism is good for strengthening corporate managers' ability to take on responsibilities and avoids making mistakes by supervising each other. The lawsuit mechanism can provide strong guarantee of their responsibilities.

Key words: corporate manager, combination of moral enhancement and financial motivation, management authority, legalization of professional ethics, safeguard benefits.

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