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企业转型中的 法律保障

Legal Protection of Enterprise Restructuring

主 编 / 张 旭



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中文摘要

随着我国市场经济体制的不断完善,企业的经济行为越来越严格地受到法律的规范和约束。市场经济是法治经济,企业从设立到运行、从决策到管理方方面面都是在法律的框架下行动的。法律能够为维护企业经济利益最大化提供有效保障,没有法律的调控和保障,失控的企业必然会加重社会承担风险的限度。基于上述考虑,本书紧密联系实际,选择企业改制中所涉及的几个法律问题,对企业改制中的多层面问题进行深入研究,阐述法律如何有效地规制企业改制行为。

本书共分为八章:

第一章结合英美市场导向型(market-oriented)公司治理结构和德日组织控制型(network-oriented)公司治理结构的经验,指出我国国有企业改制后公司治理结构的不足。针对这些不足,认为在构建和完善我国的公司治理结构时,内部治理和外部治理都要给予必要的重视。一方面,我们既要科学设置公司内部的组织机构,以组织建设为中心,建立具有中国特色的以董事会和监事会为核心的二元公司治理模式。另一方面,又要充分利用市场、破产、竞争机制对公司的导向性作用,以市场为导向,通过利用资本市场来分散股权结构、强化国有股权的经营、增加机构投资者,对公司管理层进行监督和约束,建立一套适合中国国情的内部人和外部人合理分权,相互协同,相互制衡的有活力、有约束、有配合的现代公司治理结构。

第二章依据国有资产的特征和功能,阐释了企业改制中的国有资产流失问题,对国有资产流失的原因与国有资产流失的危害性作出了具体的分析。认为对国有资产的运营体制存在的问题可以从纵、横两方面来总结。在纵的方面,就是指从国资委、国有资产运营主体到国有

企业自身所存在的问题；而横的方面，是指在国有资产的政策、立法以及运营机制等方面存在的问题。国有资产流失的原因，从体制上来说也就存在于这纵、横两个方面。对于国有资产流失的治理也应当从这些角度入手，进行制度化设置，综合运用各种手段防治国有资产的流失。

第三章通过对企业改制的进程、现代企业制度下的税收政策以及税收与企业的关系进行分析，认识到现存的税收制度存在税法作为调节国家与企业之间的分配关系的工具地位不强、税法导向的目标仍不明确、税法的具体实施存在种种不规范、税法的覆盖面不广、调控力度不足等问题。针对这些问题，提出了完善的途径，包括理念和立法两方面。

第四章分析了在企业改制中侵害债权人合法权益的表现形式，从法律的角度，认为国企改革过程中企业逃废债务、侵害债权人合法权益的原因是国企改革受到地方保护主义的严重限制、国企改革立法严重滞后于国企改革实践、大型国企产权制度改革游离法外、法律的不合理规定，以及现行司法解释的不当规定。然后，在明确企业改制中债权人保护必要性的认识上，确立尊重当事人约定原则、告知债权人原则、“债随资走原则”。同时，要加强对债权人合法权益的保护，既有主观方面的对策，也有客观方面的办法；既有政府职能的转变和加强，也有法律规定的先进与完善。

第五章对国有企业改制前与改制后民主管理模式进行分析，尽管职工代表大会在现代企业形态中得以延续，但是由于企业组织结构已经发生了彻底改变，其性质和职权是否还能符合《企业法》和《条例》的规定，已经令人质疑。通过对德国与中国职工参与民主管理的形式分析，提出了完善我国职工参与民主管理制度的途径和方法。

第六章在比较借鉴的基础上，首先，指明了国企改革中所涉及的社会保障主要包括社会保险、社会救济（社会救助）、社会福利。其次，分析了企业改制中存在的社会保障具有社会化程度较低、资金来源单一、政府责任过重、缺乏专门的社会保障法、缺乏监管机制等问题。再次，

在有利于缓和职工与改制企业之间的矛盾、减少因企业改制而引起的社会保障问题对改制的阻力、加快企业改制的步伐的思想指导下,提出了企业改制中社会保障问题的对策以及职工安置问题的对策。

第七章以企业改制过程中债权人权益的保护为中心,对债转股以及企业兼并过程中的相关民事问题进行分析。认为,对债转股这一财政性政策进行分析评价以及探讨债转股的合理性,应该着眼于从债权变为股权后怎样处置这部分股权,或者说应探索债转股后企业的产权改革。进而,对企业兼并中的效力问题、无效企业兼并的法律后果、无效企业兼并的诉讼程序问题、相关主体在企业兼并中的功能定位做出了具体分析。

第八章围绕国有资产的保护,对国有企业改制中的职务犯罪进行了论述。首先,实证地分析了当前国有企业改制中职务犯罪的现状,认为这部分职务犯罪具有发案率高且呈上升趋势、犯罪行为类型较为集中、犯罪手段多样化、社会危害性大的特点。其次,分析了诱发国有企业改制职务犯罪的社会原因与个人原因,认为国有企业改制过程中职务犯罪的发生是行为人主体因素与社会客观因素互动的结果。最后,根据国有企业改制中职务犯罪产生的背景、原因、特点、规律,提出了相应的预防对策,认为应该从法律对策、社会对策两个方面去构建国有企业职务犯罪的预防体系。

关键词:企业改制 国有资产保护 债权人保护 社会保障

Abstract

As the constant perfection of the market economy in our country, the economic behaviors of enterprises are ruled by laws tighter and tighter. The market economy is a kind of economy based on law, an enterprise is ruled by law from its establishment to function, from its decision to management. Laws guarantee the maximum benefits of enterprises, without laws, enterprises will surely burden the risks that society have. Based on the above, this book chooses several legal problems in enterprise restructuring, and researches on the problems in enterprise restructuring, elaborating the problem that how do laws rule the enterprise restructuring effectively.

This book is divided into eight chapters:

The first chapter points out the shorts of management framework after the enterprise restructuring, based on the experience of market-oriented management framework in the U. K. and the U. S. and the experience of network-oriented management framework in Germany and Japan. It is suggested that when we construct and perfect the management framework of enterprises, we should equally pay necessary attention to the external management and the domestic management of them. On one hand, we should set up a scientific domestic management which is centered by the construction of organization, with the core management of directorates and boards of supervisors. On the other hand, we should make the best of orientations of the market, bankruptcies and competitions, we should regard the market as a guide and to

disperse the structure of interest by capital market, to strengthen the management of state-owned shares, to increase institutional investors, and to supervise and inspect debt managements, to set up a modern constructure of corporate governance which is fit for the current basic condition of our country and full of energy.

The second chapter is on the loss of state assets, based on the characters and functions of state assets, the chapter analyses the reason and perniciousness of the loss of state assets. The problem in the operation of national assets can be analyzed in vertical aspect and horizontal aspect. In vertical aspect, this problem exists in the State-owned Assets Supervision and Administration Commission, the subjects of state assets operation and state-owned business; In horizontal aspect, the problem exists in the policies, legislations and operations of state assets. The reasons of the loss of state assets are just the vertical aspect and horizontal aspect. To prevent the loss of State assets, we should from the vertical aspect and horizontal aspect and use various methods.

The third chapter analyses the process of enterprise reconstructing, the tax policies under the modern enterprise system, and the relationship between taxation and enterprise. And this chapter points out the problems lying in taxation, such as, the status of tax law isn't paid due attention, its covering surface isn't wide, its orientation isn't clear and it is not effective. To solve these problems, this chapter brings up several ways, including logos and legislations two basic aspects.

The forth chapter analyses the forms of infringing on creditors in the process of enterprise reconstructing. From legal respect, the reasons of welch, infringe on creditors are that enterprise reconstructing's restrict by regional protectionism, the lag of enterprise reconstructing legislation and the unreasonable judicial interpretation. Thereafter, this

chapter establishes the principles of to respect the engage of each parties, to inform the creditors and so on. At the same time, we should strengthen the protection to creditors, the ways include subjective aspects and objective aspects, and include the transform of government functions, the perfections of legislation.

The fifth chapter analyses the modes of democratic management before and after the enterprise reconstructing. Though the democratic management exists in modern enterprises, its nature and authority whether still coordinate with the current laws is doubtful. Though the analysis of the modes of democratic management in Germany and China, this chapter put up with the ways to perfect the modes of democratic management.

The sixth chapter utilizes others work and put up with the following points. Firstly, this chapter analyses the social protections in enterprise reconstructing are mainly social insurance, social assistance and social welfare. Secondly, this chapter analyses the problems of social protections in enterprise reconstructing, including the badly socialization, the single source of capital and the heavy burden of government and so on. Thirdly, this chapter puts up ways to relieve the contradictions between workers and enterprises, to reduce the obstacle to enterprise reconstructing caused by social protections, and puts up ways to solve the problems in social protections and the arrangement for workers.

The seventh chapter centers the protection of creditors in enterprise reconstructing, analysing the relevant civil law problems in the process of annexation and reorganization of enterprises. The analysis and evaluation of the debt-to-equity swap should base on how to use the interest after it turned from debt, that is, we should quest the reform of property right after the debt-to-equity swap. And this chapter

analyses the effects in annexation and reorganization of enterprises, the legal result of invalid annexation and reorganization of enterprises, the proceedings of invalid annexation and reorganization of enterprises and the functions of relevant subjects in annexation and reorganization of enterprises.

The eighth chapter is on the crimes by taking advantage of duty in enterprise reconstructing, which centers the protection of state-owned assets. Firstly, this chapter analyses the current situation of the crimes by taking advantage of duty in enterprise reconstructing, the crimes' incidence is very high and its trend is to go up, and the crime methods are various, the perniciousness is severe. Secondly, this chapter analyses the social reasons and personal reasons of the crimes by taking advantage of duty in enterprise reconstructing, the crimes by taking advantage of duty in enterprise reconstructing are the results of the interactivations of social factors and personal factors. Lastly, from the backgrounds, reasons, characters and disciplines of the crimes by taking advantage of duty in enterprise reconstructing, this chapter puts up with the ways to prevent the crimes, it is suggested to contrast the prevention systems of the crimes by taking advantage of duty in enterprise reconstructing from the two aspects of legislations and social policies.

Key words: enterprise reconstructing; protection of national asset; protection of creditors; social security

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导 论

胡锦涛总书记在中国共产党第十七次代表大会上，代表第十六届中央委员会作的关于《高举中国特色社会主义伟大旗帜——为夺取全面建设小康社会新胜利而奋斗》报告中提出：完善基本经济制度，健全现代市场体系。坚持和完善公有制为主体、多种所有制经济共同发展的基本经济制度，毫不动摇地巩固和发展公有制经济，毫不动摇地鼓励、支持、引导非公有制经济发展，坚持平等保护物权，形成各种所有制经济平等竞争、相互促进新格局。深化国有企业公司制股份制改革，健全现代企业制度，优化国有经济布局 and 结构，增强国有经济活力、控制力、影响力。深化垄断行业改革，引入竞争机制，加强政府监管和社会监督。加快建设国有资本经营预算制度。完善各类国有资产管理体制和制度。推进集体企业改革，发展多种形式的集体经济、合作经济。推进公平准入，改善融资条件，破除体制障碍，促进个体、私营经济和中小企业发展。以现代产权制度为基础，发展混合所有制经济。加快形成统一开放竞争有序的现代市场体系，发展各类生产要素市场，完善反映市场供求关系、资源稀缺程度、环境损害成本的生产要素和资源价格形成机制，规范发展行业协会和市场中介组织，健全社会信用体系。

随着社会生产力的向前发展以及社会经济关系的不断向前演进，企业在整个社会活动中的地位日益重要，成为社会经济活动的基本细胞。作为一个国家的基本经济运行单位——企业的竞争力如何，往往在很大程度上影响着—个国家的国际地位以及综合国力。企业问题在作为经济关系直接反映的法律中的地位日益突现，其中最重要的莫过于企业转型问题。在我国，企业制度是我国经济体制改革的核心，通