

公司·金融·法律译丛



Foundations of Corporate Law
Second Edition

公司法基础

(第二版)

〔美〕罗伯塔·罗曼诺 编著
罗培新 译



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“心理东西本自同”

——“公司·金融·法律译丛”总序

2009年4月14日,国务院颁布了《关于推进上海加快发展现代服务业和先进制造业、建设国际金融中心和国际航运中心的意见》,明确提出,到2020年,将上海基本建成与我国经济实力以及人民币国际地位相适应的国际金融中心。这不仅是上海未来经济建设和社会发展的战略性举措,也是促进人民币国际化、推动我国作为世界经济强国崛起的战略需要,更体现了我国促进全球金融稳定发展的大国责任。

在国家战略部署这一宏大的历史与现实背景下,法律何为?法律学者何为?我们似乎可以从素有“中国资信业第一人”的章乃器先生(1897—1977)说过的一番话中,获得些许教益。

章乃器先生在阐述金融的含义时,说过这样一段话——

“金”是一种坚硬而固定的物质,而“融”是融化流通的意思。

“‘金’何以能‘融’?这有赖于‘信用之火’的燃烧,但有时‘信用之火’烧得太猛烈了,融化的金沸腾洋溢,反而要浇灭了‘信用之火’;这就是信用过度膨胀成了恐慌的现象。”

诚哉斯语!反观当今肇始于美国并波及全球的金融危机,八十年前的这段譬喻依然鲜活。

与章先生此语异曲同工的是,美国前总统小布什在针对金融危机的演讲中称“酒是好的,但华尔街喝醉了”。其所谓之“酒”,表面上是指金融高管所分得之巨额花红,深层含义则是指支撑金融产品之“信用”——市场无节制地开发和攫取“信用”资源,最终反而走向了反面:在法律监管大大落后于道德风险的情境之下,华尔街推出的令人眼花缭乱的CDO、CDS等金融衍生产品,其信用基础何等孱弱!而其背后的利欲动机却何其强烈,以至于美国总统奥巴马大声指斥华尔街高管们“无耻、贪婪、不负责任、不够节制”,并对接受政府救助的金融公司的高管们祭出了“限薪”的大旗!

此情此境,再回想美联储前主席格林斯潘曾经说过,“保护投资者的最好方法,是蒸蒸日上的经济和股票市场”,不禁令人喟叹:不受驾驭之道德风险,彻底颠覆了格氏多年来笃信不疑的市场信条!

晚清帝王之师陈宝琛先生在哈佛大学燕京学社中曾写有这样一副对联“文明新旧能相益,心理东西本自同”。是的,人,总是贪婪的,道德风险向来不分国界;人,也是健忘的,历史总是不断在重演,金融危机从来不可能彻底消亡。然而,法律制度的设计,在抑制人类弱点、保护投资预期、维系金融稳定方面,却有高下之别。

故而,参酌海内外成功的国际经验,无论是纽约还是伦敦,建设世界金融中心的必备条件中,首屈一指的是良好的法律生态环境。在促进我国本土金融市场体系的现代化与国际化过程中,包括交易设施在内的硬件往往具有“后发优势”,而法律制度这一软环境,则必须在比较与借鉴域外经验的基础上,小心求证,务求适宜。

正因为如此,上海市政府于2009年6月25日颁布的《推进国际金融中心建设条例》中,特设“金融风险防范与法治环境建设”一章,对金融监管、金融审判、金融仲裁提出了新的要求,并强调健全金融稳定协调机制、完善金融突发事件应急预案和处置机制、加强对金融违法犯罪行为的预防和打击。

而为此提供学理及智识指引,正是法律学者可以用力的方向。

当然,任何制度均无法自给自足,其有效性不仅取决于制度本身,而且受制于文化、经济等诸多外部因素。历史多次证明,制度的有效性是相对而不是绝对的,具体的而不是抽象的,历史的而不是永恒的。故而,译介域外公司与金融法律经典论著,并本着审慎节制之立场,扬其所长,避其所短,为我所用,实乃吾辈学者之良好期许与愿景。

是为序。

罗培新

2010年6月20日

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第二版前言

促使本人将本书第一版结集出版的公司法领域的变革,在过去动荡不安的十余年间更为加剧,这使得在公司法理论和实践方面运用金融和组织经济学的复杂程度亦大为提升。本书第一版面世数年后,随着2001—2002年安然、世通和帕玛拉特等备受关注的公司纷纷曝出财务丑闻,民众的注意力再次聚焦公司治理,这一领域的研究也拓展至包括诸多新的重大问题,而且研究也进一步深化。此外,因为公司治理丑闻的影响波及全球,而且跨境交易和全球投资日益盛行,公司法的理论和实践在地理上不断扩张,促进了美国式的商事交易和法律规则在全球范围内的传播。第二版反映了这些趋势,将原书有关公司内部治理机制的章节划分为独立的三章,内容涉及公司治理的不同部分:董事会及其信义义务;投票及其他机构投资者行动主义机制;高管薪酬。此外,本书还新增了“比较公司治理”这一章。

本书前一版本的读者将会发现,除了有限责任和公司融资这两章之外,每一章都新增了大量的文献;而且包括这两章在内,本书通篇全面地更新了注释和问题。这必然使本书篇幅长得多。例如,本书第一章关于资本市场的理论包含了行为金融学的文献,这为新增的大量文献提供了理论基础,再如第五章摘自Langevoort*有关董事会的文献。第六章和第七章所选摘的文献,包含了有关提升股东权力和规制高管薪酬的必要性的更为近期的探讨。除了关注新的论辩之外,我们还选摘了一些文献来重新审视第一版发生的论争,例如第三章关于是否存在公司注册的地州竞争,第五章关于是谁受益于股东诉讼,以及第九章关于联邦证券法的有效性等等。

与第一版相同的是,正如摘自本人的文献所显示的,本人对于其中的诸多问题持有个人见解,但为了避免以偏概全,本人尽力在全文中同时引入不同的观点来抗衡本人及他人的见解。本人坚信,此种做法有利于促

* 本书除编著者罗曼洁外,人名都保留原文不做翻译,方便读者查阅相关资料。

成更好的、而且是更为愉悦的教学体验。本人进而运用在第一版中采用的编辑方法,对原来的文章进行大刀阔斧的编辑,略去了绝大部分的数学运算、脚注和参考注释,以追求可读性和阅读的宽度。当然,我们也认识到,这会损失论证的精细或者复杂性,也会牺牲技术上或者编目方面的准确性,为此,我们希望引入更为宽泛的相关文献的大量注释和问题,来弥补这一缺陷。如果本书激起了读者阅读原始文献的兴趣从而进一步探究各种理论、证据和参考文献,那么,在本人看来,删节原始文献所带来的利益的此消彼长,已经很好地实现了。在本版中,本人采取了以下数种格式规则来增强文献的可读性:略去了标识着文句断裂的椭圆函数,后者本来会出现于正文的文首或者文末,并且通篇对副标题进行了标准化处理(斜体)。与第一版相同的是,对于作者自身使用的斜体部分,本文予以保留。

纽黑文

2010年7月

罗伯塔·罗曼诺

第一版前言

过去十年来,公司法经历了一场变革。在商事组织和收购活动剧烈变革的非凡岁月里,组织经济学和现代公司金融的新的分析工具的运用,重新塑造着相关的法律学识。此种认知已经对公司实践、进而相应地对公司法教学产生着深远的影响,而且该影响力还将与日俱增。本书试图对于有关公司法的旷日持久的政策论辩,进行通俗易懂地介绍,同时对于赋予这些论辩以活力的新的学识背后的重大经济概念,提供一种直观的感受。另外,我们集中精力,广泛援引了有关公司治理的雨后春笋般的实证研究,从而真实地呈现了一幅对于许多学生而言本来相当陌生的制度图景。

正如 Adolph Berle 和 Gardiner Means 所言,公众公司的一项关键特征是所有权与控制权分离:运营公司的管理者,却不是公司的所有者。此种分离带来了大量的组织问题,其原因在于管理者的激励并非总是与所有者的利益保持一致;此类问题经常被称为代理问题。正如本书收录的文献所显示的,诸多公司法律规则的目的正在于缓解代理问题。本书所收录的文献还展示了组织及公司金融的经济理论是如何从不同侧面阐明代理问题的,它们还提出了运用法律制度以解决这一主要问题的种种方法。

关于本书的样式,值得一提的是选用文献的排列规则。本人将本书收录的文献当作本人开设的公司法及公司财务课程所用案例教科书的补充。本书的一大匠心在于,它可以成为关于公司法课程的课堂讨论的出发点。与此同时,本书包含着大量的注释和问题,这确保其完全能够被独立自主地使用。本书选摘的文献均进行过大量的编辑以增强可读性。本书略去了原始文献繁复的数学运算,当然,我们在注释部分保留或者加入了简单的算术运算以阐释概念。这样做所带来的一大危险在于,很容易丧失文献的复杂性,而且可能会传递政策制定不存异议这一错误的信息。为了降低这一风险,本人在正文或者随附的注释部分同时选用了立场迥然相异的文献。另外,本书略去了所选摘文献的参考资料及绝大多数脚注。为了增强可读性这一教学方面的利益,本书在一定程度上牺牲了准