民商法学文存

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内容摘要

股东是公司存在的基础，是公司的最主要利害关系人，保护股东权益是公司法的一项基本任务。股东诉讼作为公司法的一项重要内容，其基本功能就是解决公司纠纷救济股东权利。然而，股东诉讼的意义远不止于此。由于股东诉讼发生于股东、董事、经理、公司等内部关系人之间，股东诉讼提起和运行的过程，也就是司法介入公司内部治理的过程，所以，作为一种国家司法权力参与其中的外部作用机制，它还具有保障公司内部法人治理结构有效运作、调节公司运行等其他方面的公司治理意义。甚至可以说，股东诉讼与司法介入公司

治理是一个问题的两个方面，只不过股东诉讼突出的是其作为纠纷解决机制的一面，而司法介入公司治理强调的是作为一种外部力量的司法权力对促进公司内部治理改善的意义。目前，从纠纷解决机制层面研究股东诉讼的较多见，而从司法介入对公司治理积极作用的一面进行研究的则很少。本书正是从公司治理的多元视角出发对股东诉讼及其相关问题展开研究的。

需要说明的是，与公司相关的诉讼现象即公司诉讼包含了多种利益主体在不同法律关系中针对不同对象提起的诉讼，内容繁杂，但股东是其中的最主要利害关系人，股东诉讼无疑是公司诉讼的最重要内容，所以本书对司法介入在公司治理中作用的研究主要以股东诉讼为切入点和解析对象。

本书共分五章。

第一章，股东诉讼的基本理论。本章首先论证了股东诉讼应该具有三种基本类型，即股东直接诉讼、股东派生诉讼和特别程序的股东诉讼。由于股东诉讼的启动和进行必须以股东诉权的存在为前提，本章随后对股东诉权的基本内涵、派生诉讼中的股东诉权问题、特别程序的股东诉讼中的诉权问题以及股东诉权的性质展开了研究。本书认为，股东诉权不是股东权的当然内容，股东权是第一性的“原有权利”，股东诉权则是第二性的保护股东权的“救济权利”，二者不在同一层面上。这种辨析在理论和实践上都是有重要意义的。如果认定股东诉权属于股东权，股东权是私法上的指向公司及其他股东的请求权，这种请求权是不能够启动诉讼程

序的。但如果认定股东诉权为一种公法上的指向司法机关的请求权，则诉权就具有了把民事事件引入民事诉讼的权能。与国民的法定请求权相对应，法院就具有了不得拒绝审判的义务，亦即“有告诉即受理”。所以，法院不能以公司法及相关法律关于股东诉讼的法律规范欠缺为由，简单地拒绝受理，否则，应承担责任。

第二章，股东诉讼的公司治理作用的定位和定性分析。股东诉讼是公司治理机制的一个重要组成部分，它是公司内部治理结构发挥作用的保障，是解决现代公司治理中的两大难题的有效措施。总体而言，股东诉讼的公司治理功能表现在救济股东权利、监督控制股东和董事及其他管理人员的滥权行为、排除公司运行障碍协调公司运转以及创造良好的公司外部发展环境方面，但分别而论，三类股东诉讼的公司治理功能各有侧重。比如，股东提起派生诉讼虽也是因自身利益遭间接损害而为，但表现了很强的对公司整体利益的关心，而这种关心需要通过国家公权力对公司权力的诉讼审查来完成，其权力监督的功能引人注目；在股东提起的特别程序案件中，股东起诉的直接目的是为了实现某种权利，但在实现权利的过程中，司法权力采用了一种独特的直接介入的方式促进公司治理的改善，后者的意义是不容忽视的；就股东直接诉讼而言，股东起诉是因为切身利益遭损害，虽然也包含了司法权力对公司事务予以监督的内容，但其意义主要还是体现在权利救济制度之上。从本质上讲，股东诉讼体现了国家司法权对公司自治事务的调节和干预，当然这是一种

不同于行政调节的另外一种调节机制。这种调节如果适度、合理，将对公司的高效、持续发展起到积极的推动作用；反之，如果过多、过滥，则会干扰公司的正常经营，从而阻碍公司的发展。因此，科学平衡公司自治与司法调节的关系，合理划分二者的界域至关重要。

第三章，从权利救济角度研究股东直接诉讼。以[illegible]象为标准，股东直接诉讼主要分为股东针对公司提起的诉讼和股东针对董事及控制股东提起的诉讼。在公司中，有些权利遭损害，股东直接按照民事诉讼法的规定起诉即可，即股东的实体权利通过民事诉讼程序给予保护而已，但是，有些权利遭侵害，公司法所做出的特别规定则非常突出，股东提起诉讼，不但要遵循民事诉讼的一般规则，也要遵循公司法的特殊规定，如股东大会决议无效或撤销之诉、董事会决议停止之诉、公司解散诉讼，本章对此进行了研究。关于股东直接针对董事及控制股东提起的诉讼，其理论依据在于董事对股东及控制股东对其他股东信义义务的确立，本章对这种义务的法理基础及存在的主要场合进行了分析，同时，本书认为，英美国家的少数股东利益的不公平损害诉讼主要就是一种股东针对董事和控制股东提起的直接诉讼。在现代公司特别是上市公司中，很多情况下，权益遭受损害的股东往往呈多数状态，此时就需要群体性纠纷条件下的诉讼解决制度。本章对代表人诉讼及团体诉讼在公司领域的适用进行了分析。

第四章，从权力监督角度研究股东派生诉讼。派生诉讼

是公司法上最具特色的一种诉讼制度，虽非公司所独有，但主要也就存在于公司领域。本章首先对派生诉讼与其他相关诉讼制度的区别进行了辨析，并对派生诉讼的当事人、公司的诉讼地位以及其他股东的诉讼地位问题进行了分析。本书认为，股东派生诉讼在长期的发展历程中表现出了监督功能日趋受重视、限制门槛趋于降低、灵活处理与直接诉讼的互换关系等特点。对派生诉讼的这些发展规律进行总结，是我国成功借鉴他国经验的基础。本章的第二部分从司法审查的角度对派生诉讼进行了研究。派生诉讼是国家司法权力对公司权力进行审查监督的一种法律制度，本节首先论述了派生诉讼作为一种司法审查制度的理论基础。董事、经理及控制股东的经营权和控制权主要是一种权力，任何权力都要受到监督，公司权力虽然是一种社会权力，但也不例外。通过股东派生诉讼，利用司法权力监督公司权力不会有降格曲尊、辱没身份甚至以“强权”欺负“弱权”之嫌。我们讲分权制衡，除国家权力分工外还在于国家与社会的分权，社会权力可以监督国家权力，国家权力则应保障社会组织的基本权利和权力，并对社会权力进行引导和约束。本章随后论述了派生诉讼的司法审查原则、范围和标准，并在第三部分对我国的相关制度设计进行了构思。第四部分对二重派生诉讼的几个问题进行了探讨。所谓二重派生诉讼，即是指控制公司之股东为从属公司之利益所提起的派生诉讼。关于其理论基础，学界提出了受托人理论、法人格否认理论、不法行为人之一般控制理论和功能说等观点。与单层派生诉讼制度相

比，在前置程序、原告股东资格等方面二重派生诉讼应有变通规定。

第五章论述司法权直接介入公司治理的一种独特方式：特别程序的股东诉讼。本章第一节阐述了民事诉讼特别程序的一般理论。法院解决不具有权益争议或争议不明显的民事案件所适用的程序被称为特别程序；适用特别程序进行审理的民事案件称为特别程序的民事案件。特别程序具有职权主义、一当事人主义、不公开主义等特点，而且具有明显的命令性和管理性。在商事领域，特别程序的诉讼案件均与公司相关，其中由股东提起的此类案件本文称为特别程序的股东诉讼。从性质上讲，法院审理特别程序案件的活动仍为司法权性质的活动，由于这些案件仍属私权自治领域，由司法机关进行审理比行政机关干预更为适宜。第二节列举和阐述了公司法上几类常见的通过特别程序进行审理的股东诉讼案件，即董事的司法任免案件、异议股东行使股份收买请求权过程中的司法估价案件、股东会的司法召集案件、股东知情权的司法救济案件、公司重整的司法监督案件。第三节分析了特别程序的股东诉讼的公司治理意义。本书认为，公司仍属私权自治领域，但又非绝对的私权自治，国家需要从外部对公司事务进行干预。行政机关的活动以维护公权为目的，不适宜直接对公司内部事务予以命令、管理，司法权力则具有天然的与私权领域的密切联系，而且法院通过特别程序介入公司事务体现出了明显的对效率价值的关注，这正契合了商事活动便捷性的要求。随着公司制度的发展，司法权力通

过特别程序介入公司治理已成为一种必然的趋势，也是大陆法系的普遍做法，而在英美法系，虽然没有通常程序与特别程序的区分，但司法权力介入公司内部运行以促进公司治理改善的做法则是共同的。目前，从我国公司发展的现实来看，已经对这种司法介入制度的建立提出了呼唤。

关键词：股东诉讼　公司治理　权利救济　权力监督　司法调节

Abstract

The remedy of shareholder's right is a fundamental function of shareholder litigation system. In addition, the shareholder litigation system has some other functions of corporate governance, supervising directors' power, adjusting corporation management, for example. From these different angles of corporate governance, the author studies the system of shareholder litigation in this book.

This book is divided into five chapters.

The first chapter is about the basic theory of shareholder litigation. The author thinks that there are three categories of

shareholder litigation in the company law, and they are shareholder direct action, shareholder derivative action and shareholder litigation through special procedure. In the view of the author, the shareholder's right of action is a precondition of shareholder's submitting a suit to court. So, In the second section, the author probes into some theoretical questions which involve in the shareholder's right of action, and that includes the intension of shareholder's right of action, the theory of right of action about shareholder derivative action, the nature of shareholder's right of action, etc. In the end, the author points out that shareholder's right of action isn't the inherent content of shareholder right, and these two kinds of right aren't at the same levels. It is important to realize the difference between shareholder right and shareholder's right of action, whether theoretical significance or practical significance.

The second chapter is on the analysis of the character and status of shareholder litigation in the corporate governance. The shareholder litigation is an important content of corporate governance mechanism. It is not only a protection system of internal governance structure, but also an efficient measure to resolve the two difficult questions of contemporary corporate governance. Totally speaking, the corporate governance functions of the shareholder litigation are as follows: protecting shareholders' right, supervising directors and controlling shareholders, eliminating corporation

block and establishing the good external environment for corporation developing. However, if inspecting separately the corporate governance function of every kind of shareholder litigation, we can find that they have different important aspects of governance function. Essentially, the shareholder litigation is an external regulation mechanism for judicial authority to adjust corporation's internal action. Of course, this mechanism is different from the administrative mechanism.

The third chapter focuses on the system of shareholder direct action. According to different defendant, shareholder direct action is divided into the suit against company, the suit against directors and controlling shareholders. In the company, when some rights are damaged, it is enough for shareholder to submit a direct suit according to the civil litigation law. However, when some other rights are damaged, shareholder's submitting suit should not only conform to the general rules of civil litigation law, but also the special rules of company law, the suit for the validity of shareholder meeting, the suit for disbanding a company, for instance. As for the suit against directors and controlling shareholders, their theoretical basis is the fiduciary duty which directors and controlling shareholders must undertake in the company. This chapter analyses mainly the legal source and existing situation of directors' and controlling shareholders' fiduciary duty. At the same time, the author think, the remedy of unfair prejudice system that exists in

Anglo – American law system, is just a direct suit against directors and controlling shareholders. In the last section, the book researches the shareholder's representative action and team action. In the contemporary company, especially listed company, when a tort action come into being, a lot of shareholders will be damaged. So it is important to study the system of group action under the circumstances.

The fourth chapter researches the shareholder's derivative action. Derivative action exists mainly in the company field, and it is a characteristic legal system in the company law. This chapter is divided into four sections. In the first section, the dissertation distinguishes between the derivative action and the representative action and the litigation with subrogation, and discusses the litigant of derivative action, and analyses the status of company and other shareholders in the litigation. The author points out that, in the long term of development, the derivative action embodies some outstanding features, which are as follows: supervision function being paid attention, qualifications in litigation being widen and judicial authority's power in the procedure being strengthened. In the second section, the author studies derivative action from the angle of judicial review. In fact, the shareholder derivative action is a legal system of supervising the power of directors and controlling shareholders through judicial power. This section focus on the theoretical source, principle, scope, standards of judicial review. The

third section put forward a few of opinions on constructing the derivative action of China, and that includes establishing the principle of review, defining the scope of review, fixing the standards of review, etc. In the fourth section, the author discusses a few of questions, which are connected with double derivative action. Sometimes, in order to protect the interests of subordinate company, the shareholders of controlling shareholder submit a case to court, and this case is a double derivative action. To explain this phenomenon, some scholars put forward fiduciary theory, piercing corporate veil theory, common control theory, agency theory, etc. Comparing double derivative action with single derivative action, we can find, there must be some flexible rules in the pre – suit procedure and qualifications of plaintiff of the double derivative action.

The fifth chapter is on the shareholder litigation through special procedure. This chapter is divided into three sections. In the first section, the author discusses a few of basic knowledge and theory of special procedure. The procedure by which the court try a no – disputing civil case is called special procedure, and the case that the court try through special procedure is called special procedure's civil case. When try a special procedure's case, the court must conform to the demands for one – litigant present, no opening trying, indirect trying, etc. In the commercial field, all special procedure suits are connected with company affairs, those of which are sub-

mitted to court by shareholders are called special procedure's shareholder litigation. In the second section, this dissertation introduces some special procedure's shareholder cases that are ordinary in the company law. Mainly they are the case of director's judicial appointing and relieving, the case of court's evaluating stock price, the case of judicial calling shareholder meeting and the case of remedy of shareholders' information right. The last section probes into the corporate governance functions of special procedure's shareholder litigation. In the view of the author, although company belongs to the autonomous enterprise, it isn't an absolute autonomy region. So the country must adjust corporate internal governance structure. Because administrative authority's aim mainly is protecting public power, it isn't suitable for administrative departments to manage corporate internal affairs. Comparatively, because judicial authority's connection with autonomy of private law is inherent and natural, it is suitable for judicial power to adjust corporate autonomous affairs. In a word, the special procedure's shareholder litigation is a characteristic means for judicial authority to participate in corporate governance.

Key Words: shareholder litigation, corporate governance, remedies of right, supervision power, judicial adjusting

目录