清华大学商法研究中心·编　　王保树·主编

总第21卷

Commercial Law Review

商事法论集

2012

Volume. 21

·封闭公司之制度走向·

论闭锁公司的立法模式
——从外商投资企业法谈起　王文宇

股权激励机制与知识经济下的公司人合性创新
——我国公司法制结构性缺失的思考　范健

·公司并购制度完善·

公司负责人之注意义务与经营判断法则
——以明基并购德国西门子手机部门为例　方嘉麟

敌意并购下目标公司董事的受任人（受托）义务
——以开发金控敌意并购金鼎证券为例　刘连煜

台湾地区"企业并购法"若干问题之探讨　林国全

中国跨境并购的蓬勃发展与相关法律制度建构　朱慈蕴

法国SEB集团收购苏泊尔案分析　彭冰

·公司治理结构·

内部控制制度的建构建立健全与董事之责任　[日]山本为三郎

·公司集团发展中的法律问题·

股东账簿阅览权之跨越行使
——企业集团内部监控法制之整合研究　王志诚

日本法中母子公司法制度的现状与立法趋势　朱大明

·公司资本及其相关制度的改革·

公司资本制度：国际经验及其对我国的启示　黄辉

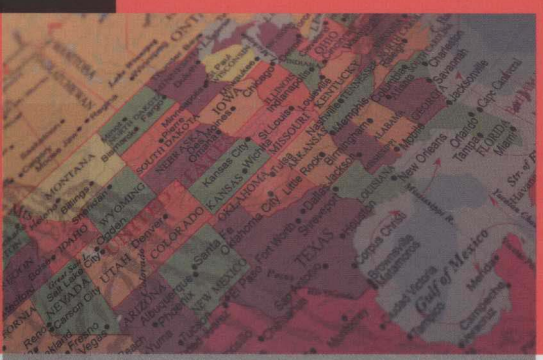
关于超额配售制度的法律思考　管晓峰

·董事义务·

《公司法》第148条第1款"勤勉义务"规定的司法裁判标准探析
周林彬　官欣荣

公司法中董事、监事、高管人员信义义务的法律适用研究
——以北京市法院2005～2007年间的相关案例为样本的实证研究
楼建波　闫辉　赵杨

论董事问责标准的三元化　朱羿锟



法律出版社
LAW PRESS CHINA

本卷主题：经济全球化中的公司法一体化走向

总第21卷

Commercial Law Review

商事法论集

Volume. 21

2012

清华大学商法研究中心·编
王保树·主编
施天涛　朱慈蕴　汤　欣·副主编

法律出版社
LAW PRESS CHINA

图书在版编目(CIP)数据

商事法论集. 第21卷 / 王保树主编. —北京:法律出版社,2012.6
ISBN 978-7-5118-3512-3

Ⅰ.①商… Ⅱ.①王… Ⅲ.①商法—世界—文集
Ⅳ.①D912.290.4-53

中国版本图书馆CIP数据核字(2012)第095920号

商事法论集 第21卷	王保树 主编	责任编辑 刘文科 装帧设计 李 瞻

开本 787毫米×960毫米 1/16　　**印张** 38　　**字数** 907千
版本 2012年6月第1版　　**印次** 2012年6月第1次印刷
出版 法律出版社　　**编辑统筹** 学术·对外出版分社
总发行 中国法律图书有限公司　　**经销** 新华书店
印刷 北京北苑印刷有限责任公司　　**责任印制** 陶 松

法律出版社/北京市丰台区莲花池西里7号(100073)
电子邮件/info@lawpress.com.cn　　销售热线/010-63939792/9779
网址/www.lawpress.com.cn　　咨询电话/010-63939796

中国法律图书有限公司/北京市丰台区莲花池西里7号(100073)
全国各地中法图分、子公司电话:
第一法律书店/010-63939781/9782　　西安分公司/029-85388843
重庆公司/023-65382816/2908　　上海公司/021-62071010/1636
北京分公司/010-62534456　　深圳公司/0755-83072995

书号:ISBN 978-7-5118-3512-3　　**定价**:78.00元
(如有缺页或倒装,中国法律图书有限公司负责退换)

卷首语

公司法的趋同和一体化是应该面对的事实，不存在人们愿意不愿意看到的问题。国际贸易的繁荣，外商直接投资的发展，加快了全球经济一体化的步伐，密切了亚洲特别是东亚各个国家和地区在经济上的联系，使其对亚洲特别是东亚市场一体化的需求越来越强烈。这种动因表现在以下诸多方面，并引导着公司法的趋同和一体化的方向：

首先，资本流动范围不断扩大。资本运作具有高度的选择性。资本“总是趋于只投入在以营利为目的的运营活动中，其目的是让资本‘生出利润’。为了使资本‘生出利润’，以营利为目的的运营活动从根本上说（不过这并非重言）是有‘选择性’的”。[①] 全球经济竞争带动了资本在全球范围内流动，且资本流动不受地域限制，需要投资法协调，也需要公司法的协调。

其次，人员和技术流动的加强。在经济一体化的大格局里，人员（旅游者、学生、研究者、企业家和工程师）是跨国界流动的；技术的转移和知识的传播也是在亚洲乃至全球进行的。

经济全球化和公司法规则的趋同是相辅相成的。由于公司经营范围越出了一国的国界，虽然公司法是国内法，但规则的趋同性是不可避免的。同时，全球范围内或地区范围内的经营也不可避免地带来法律冲突，这主要依靠国际私法解决，但公司法对其一体化的关注是不可缺少的。

实际上，公司法的一体化进程远比一体化的提出要早。不同国家之间的法律移植并不是近几年才有的事，它已有很悠久的历史。而法律移植既是一体化的基础，也是一体化的一个元素，它更是公司法一体化的一种形式。当我们关注公司法一体化的时候，很大程度上是将公司法一体化作为一个过程。不同国家或地区的公司法一直在相互影响中发展，而这种影响又通常在相互借鉴中实现。甚至，在本国实践基础上，借助对国外规则的移植。公司法一体化的进程，也是一体化不同模式的比较、完善。不能认为一体化就是一个模式，仅一种模式是不能促进公司法现代化的。即使在存在区域组织的情况下，如欧盟的存在，也有不同的规则模式，如直接适用于成员国的“规则”、“条例”，对成员国公司立法起协调作用的“指令”，通过不同模式的发展实现更高层次的一体化。

如何面对亚洲公司法一体化的问题？

（一）由于制定指令和条例都需要健全的区域组织，在没有健全的区域组织之前，制定指令和条例没有组织基础。在亚洲没有强有力的统一的政治意识，与20世纪50年代的欧洲相比较，存在着巨大的地区内差异。同时也不存在以区域内各种条约为基础的统一制度来支持以自由贸易协定为

① ［法］弗朗索瓦·沙奈：《资本全球化》，齐建华译，中央编译出版社2001年版，第11页。

首要目的的区域一体化。即使在东亚地区，自由贸易协定的谈判也刚刚启动。虽然，1980 年代人们就开始研究亚洲经济一体化和东亚经济一体化，甚至官方也提出亚洲经济一体化和东亚经济一体化，但至今没有区域组织的雏形，近期不可能将指令和条例作为实现公司法一体化的选项。

（二）商法学界在立法上对亚洲经济一体化或东亚经济一体化中的公司法一体化研究甚少，没有给亚洲或者东亚公司法一体化提供理论支撑，诸如东亚诸国或地区公司法有何共同性、差异性，哪些问题需要统一，哪些问题容易统一，哪些问题受制于政治因素或经济体制的差异，哪些问题将较长时间不能一体化，以及公司法一体化的路径与实现方式，都远没有提上研究日程。为适应东亚公司法一体化的要求，需要加强公司法区域化的研究，包括多国的合作研究。

（三）考虑到东亚经济一体化大多停留在一个愿景的状态，一体化并无实质性进程。商法学界特别是有关国家或地区的公司法专家、学者应以特有的智慧加快东亚公司法一体化的进程。我们已经注意到立法专家建议稿对立法机关的影响是不能忽视的，也注意到全美律师协会公司法委员会编纂的美国示范公司法对美国各州公司立法的实质性影响，相关国家或地区的公司法专家、学者可以组成研究会（非社会团体）拟定规划，共同调研，定期探讨，在充分讨论的基础上草拟《东亚示范公司法》，以促进公司法一体化。

COMMERCIAL LAW REVIEW

商事法论集

封闭公司之制度走向

3 **The General Tendency of Legislation of Special Corporate Rules for the Close Companies**

Chul Song Lee

9 **论闭锁公司的立法模式**

——从外商投资企业法谈起

王文宇

25 **股权激励机制与知识经济下的公司人合性创新**

——我国公司法制结构性缺失的思考

范 健

31 **非上市公司股份转让与产权市场法制完善**

吴 弘

36 **有限责任公司制度应该取消**

王 瑞

44 **对我国公司分类模式的思考**

——从法律适用的视角

蔡元庆

53 **Diversification of Business Organizations Under the 2008 Revised Draft to the Korean Commercial Code**

—Focusing on Limited Liability Companies

Soon Suk Kim

62 **Special Ownership and Governance Structures of Close Corporations**

—The American Experience

Miao Zhuang

73 封闭式公司的几个法律问题
顾敏康

公司并购制度完善

83 公司负责人之注意义务与经营判断法则
——以明基并购德国西门子手机部门为例
方嘉麟

94 敌意并购下目标公司董事的受任人(受托)义务
——以开发金控敌意并购金鼎证券为例
刘连煜

116 台湾地区"企业并购法"若干问题之探讨
林国全

129 论合并中股东保护的法理
[日]布井千博著 李秀文译

134 日本企业重建型 MBO 的法律问题
[日]酒井太郎著 卢晓斐泽

139 中国跨境并购的蓬勃发展与相关法律制度建构
朱慈蕴

151 关于商法上的营业转让的若干法律问题
姜一春

157 法国 SEB 集团收购苏泊尔案分析
彭 冰

172 公司并购的消费者权益保护机制
陈 柱

180 企业并购与反垄断审查规制之分析
姜山赫

192 企业破产重整的认知及运行问题
张 握

公司治理结构

199 Japan's Love for Derivative Actions: Revisiting Irrationality as a Rational Explanation for Shareholder Litigation
Masafumi Nakahigashi & Dan W. Puchniak

243 内部控制制度的建立健全与董事之责任
[日]山本为三郎著　陈　宇译

公司集团发展中的法律问题

253 Contractual or Legal Rules for Groups of Companies?
Helmut Kohl

260 股东账簿阅览权之跨越行使
——企业集团内部监控法制之整合研究
王志诚

284 Liability of the Parent Company for Debts of its Subsidiary
—The Dutch Approach to Veil Piercing
Loes Lennarts

296 论公司实际控制人的民事侵权赔偿责任
——三重法律关系的路径透视
郭富青

307 日本法中母子公司法制度的现状与立法趋势
朱大明

公司资本及其相关制度的改革

321 日本公司法上股份的类别及我国的引入
刘小勇

327 论类别股和类别权
葛伟军

341 公司资本制度:国际经验及对我国的启示
黄　辉

351 关于公司确定资本制度的几点思考
殷　盛

358 关于超额配售制度的法律思考
管晓峰

363 论中国职工持股模式的法律完善
赵万一　吴朝辉

375 我国首批创业板上市公司实证研究报告
孙延生

389 **累积投票制法律问题研究**
——兼评我国新《公司法》第106条之规定
黄昌军　华德根

397 **职工持股法律问题探讨**
缪　迎

董事义务

409 **Shareholders and Stakeholders: How Do Directors Decide?**
Ren. E B. Adams, Amir N. Licht, Lilach Sagiv

429 **Reforming the Structure of Directors' Duties: Lessons from the UK**
John Lowry

450 **董事的报酬规制与责任的轻减:报酬统治的现状与展望**
[日]福原纪彦

455 **由公司机关地位看股份有限公司董事之责任与义务**
陈彦良

468 **论公司高管重大经营决策失误的赔偿责任及其裁判规则**
王建文

474 **《公司法》第148条第1款"勤勉义务"规定的司法裁判标准探析**
周林彬　官欣荣

486 **Directors' Duties of Care—Issues of Classification, Solvency and Business Judgment and the Dangers of Legal Transplants**
John H. Farrar

498 **Delaware Dissolves the Glue of Capitalism: Exonerating from Claims of Incompetence Those Who Manage Other People's Money**
Daniel S. Kleinberger

519 **执行官(officer)制度的再照明**
——以2008年商法修正案为中心
崔完镇

530 **公司法中董事、监事、高管人员信义义务的法律适用研究**
——以北京市法院2005~2007年间的相关案例为样本的实证研究

楼建波　闫　辉　赵　杨

565 论董事问责标准的三元化

朱羿锟

585 董事义务在公司解散清算中的存续及其规制

张世君　陈婷婷

591 银信理财合作中的信托公司义务

倪受彬

封闭公司之制度走向

The General Tendency of Legislation of Special Corporate Rules for the Close Companies

Chul Song Lee*

I. The Choice of Corporate Forms for Small or Close Companies

A typical corporate form of an enterprise of which owners take only the limited liability for the enterprise's debt is a stock corporation. Since a stock corporation was introduced and developed as a legal vehicle for a large firm of which the capital is publicly generated (publicly held), the stock corporation involves many stakeholders such as public investors and creditors (including laborers and consumers. It basically means that the stock corporations' management should be under public monitoring and surveillance for the protection of the stakeholders and that, therefore, corporations' organization and decision – making process should be subject to the strict rules provided by law.

However, there exist many business carriers who want a corporate form the equities of which are closely owned by themselves, with a simple organization handled by themselves, while they can still enjoy the limited liability as seen in the stock corporation. Such a demand can be partly satisfied by the legislation of another corporate form—with limited liability, close ownership and simple organization: the Limited Liablity Company—in many countries. Germany which was the creator of the Limited Liability Company, and Japan as its primary successor(under the Commercial Code of before 2005) and Korea and China, as the secondary successors, provide good examples.

The limited liability company has been known to be a standard form of the small and medium sized company in Germany. More specifically, 82,533 limited liability companies are operating in Germany as of the end of 2009, while there are only 3219 stock companies. But the situation is quite different in Korea. In Korea, more than 92% of 730 thousand companies are stock companies while the limited liabilitycompanies occupy only 5%, and again more than 90% of the stock companies are small companies with the capital of 100 million Korean Won (approx. 600 thousand Yuan), more or less. The reason why the stock company is in such a high demand even among such tiny enterprises is discussed below.

The legal structure of the limited liability company is quite different from that of the stock corporation. As an example, § 545 (1) of the Korean Commercial Act as well as § 24 of the China

* Professor of Law Hanyang University.

Company Act provides that the number of the equity holders of the limited liability company cannot exceed fifty. It means that the limited liability companies should be fatally small. In other words, if the owners of a limited liability company want to make their business' volume bigger by introducing new investors exceeding fifty they have to dissolve their company and establish a stock company. Concerned about such a troublesome possibility, someone who starts business in a corporate form even with small money but with an ambition to become an owner of a large enterprise may prefer a stock company as the initial form of his or her enterprise.

In addition, since it is usually more convenient for trade partners to share the same enterprise form, there is a tendency among business carriers to follow the choice of the majority group. This may explain another reason for thepreference for the stock company in Korea, as the form is simply popular in Korea.

II. The Necessity of the Special Rules for Small and Close Companies

Even a small enterprise can be incorporated as a stock company and their investors can benefit from using this corporate form, but they have to face two demerits of the stock company. One is the compulsory openness of the management and the other is the size of the management organization. A big organization inevitably invites the complexity of procedure for handling the organization. These two demerits result in the excessive cost for maintenance of the organization and the disclosure of the firm's internal situation that the owner would not want.

Let's imagine a Chinese company X with a minimum capital of 5 million Yuan, which was contributed by only one family members consisting of Mr. Wang, his wife, and his one son. Chinese Company Act demands that a stock company should have 5 directors and 3 auditors which compose the board of directors and the board of auditors, respectively. In addition, the outside accountant's review of the financial documents is compulsory (China Company Act Section. 109, 118, 165). This means Mr. Wang has to invite at least 5 directors or auditors and one accountant from other than his family members.

I don't know how much the compensation of directors and auditors of Chinese companies would be, but it seems to be a big burden for Mr. Wang, the owner of the stock company X to pay the salaries to eight officers and the compensation for one outside accountant.

500 million Yuan's minimum capital is the additional entry barrier that seems to be unique in China. I am afraid to say but there may be millions of young Bill Gates in China who are unable to incorporate their companies because of the shortage of 500 million Yuan.

Eight officers and one outside accountant would mean wide disclosure of the enterprises' internal situation, which the owners of the business are usually reluctant to undertake when the business is small.

In sum, the general rule for the stock company itself may not necessarily be ideal for the enterprise owners who want to maintain their business privately with their close friends or family members supported by a tiny amount of capital.

For the reasons mentioned above, small enterprise owners appeal the legislators to design special rules that they can observe with a low compliance cost. To accommodate these demands, most countries provide for different rules for the publicly held company and closely held company, or for the large or general stock company and the small company. The examples are discussed below.

III. The Criterion of the Application of Special Rules

What kind of companies would be the object of the special rules? As the terms to identify them, I use the term of "small companies" versus "large companies," and "public companies" versus "close companies." And in addition, "listed companies" and "non – listed companies" also can be discussed as a criterion of application of the different rules. These three categories can be said to overlap among each other. The listed companies are usually big and their ownership and management are open, while the non-listed companies are usually small or medium sized and their equities are held by few members or sometimes one person, and the detailed information of non – listed companies are not publicly disclosed.

Since listed companies and non-listed companies are clearly differentiated by whether listed or non – listed, the designation or the application of the special rules for non – listed companies or listed companies would not be so difficult. Partly for this reason, in Korea, many special rules exist in the company law regarding listed companies. For examples, the legal requirements to exercise the minority rights in the listed companies are lowered in comparison with the general stock companies. And the Capital Market Act provides for a broad flexibility for the financial management of the listed companies; for instance, the strict rules of the Company Act to prohibit the acquisition of its own stocks by the company does not apply to the listed companies and the limitation of issuance of the non – voting stocks are mitigated for the listed companies (Section 165 – 2 Capital Market Act). Since such provisions have been introduced to favor the listed companies, however, they are thought to be irrelevant to our discussions for the close companies.

The publicly held companies and closely held companies seem to be a useful criterion for classifying companies in legislation of companies act. The Delaware General Corporation Law can be introduced as a typical legislation for close companies. This law, in addition to the general rules to be applicable to all stock companies, have special rules to allow the close companies to keep close ownership and close management.

On the other hand, Korean company law, through two times' amendments, introduced special rules to provide small companies with favorable exceptions to the general corporate rules. These rules, regardless of the closeness of ownership and management, allow the small companies to simplify their organizations and procedures so that they may save cost to maintain the formal organization and legal procedures.

Then, the Delaware law as an example of special rules for close companies and Korean law as an example of special rules for small companies will be introduced below.

IV. Special Rules for Close Companies

The Delaware General Corporation Law Subchapter XI V (Close Corporations; Special Provisions) contains special rules for the close companies. Concerning any other matters than what is covered by the special rules, even the close companies are also subject to the general corporate rules.

(1) Definition

A close corporation denotes a corporation of which shareholders do not exceed thirty, of which all stocks are subject to one or more of the restrictions on transfer, and which does not make a public offering

of any of its stocks(§ 342(a)(1),(2),(3). Del. Gen. Corp. Law). To be incorporated as a close corporation, the corporation should contain such conditions in its certificate and the certificate should have a statement that it is a close corporation(§ 343).

(2) Contents of the special rules

1) The certificate of incorporation of a close corporation may set forth the qualification of stockholders, either by specifying classes of the persons who shall be entitled to be holders of record of stock of any class or by specifying classes of persons who shall not be entitled to be holders of stock of any class or both(§ 342(b)).

2) The most notable characteristics of special rules for close corporation can be said to allow the company to exclude the doctrine of separation of ownership and management. Any written agreement among the stockholders of a close corporation holding the majority of the outstanding stock entitled to vote can be made in a way that stockholders restrict or interfere with the discretion or powers of the board of directors regarding the conduct of the business and affairs of the corporation. The effect of any such agreement is to relieve the directors and impose upon the stockholders who are the parties to the agreement the liability for the managerial acts(§ 350).

3) In addition, the certificate of the incorporation of a close corporation may provide that the business of the corporation shall be managed by the stockholders rather than the board of directors. So long as such provisions are in place, no stockholders' meeting need to be called to select directors and the stockholders shall be deemed to be directors for the purpose of applying the corporate law(§ 351).

4) Concerning any other corporate matters such as declaration of dividends, stockholders may make an written agreement that treats the corporation as if it were a partnership(§ 354).

In sum, while a close corporation holds its identity as a corporation externally, on the one hand, its autonomy and corporate nature are so diluted as to allow broad discretion of stockholders about corporate matters on the other hand. In other words, a close corporation can be said to be a corporation of which inside is filled with partnership.

A similar legislation can also be found in the Go - do Kaisha(company) of the Japanese Company Act of 2005. It denotes a company of which all investors take limited liability for corporate debts and are in charge of management themselves, and any other corporate matters are subject to partnership rules (Japanese Company Act § 576(4)). Although it has a quite similar nature with close corporation of the U. S. , they are not alternative forms because the Go - do Kaisha is not a stock company (the Go - do Kaisha are known to be introduced modeled after the limited liability company of the U. S. A.).

V. Special Rules for Small Companies

As previously mentioned, for the small companies Korea Commercial Act carves out several exceptions from the general rules. And the main purpose of the exceptions are to focus only on saving the cost for maintaining a normal size of corporate organization, not to support close ownership and close management, as also mentioned above. As the companies which benefit from these rules are small, however, they eventually belong to the category of close companies.

It was 1998 amendment that the company law (Korean Commercial Act) provided for the exceptions for small companies for the first time. At that time, the exception dealt with only the number of directors,

but the following amendment of 2009 increased the exceptions as introduced below.

(1) Definition

To identify the small company applied by the special rules, the company law provides for the standard on the basis of size of the company. Instead of using the word, " small, " the company law applies the special rules to the companies of which the capital is less than one billion Korean Won (approx. 600 million Yuan). In this paper, the " small companies" are continuously used to identify the companies belonging to this group).

(2) Special rules

1) When a company is incorporated, its certificate of incorporation should be written in a notarial deed. Since the compensation for the notary public's work is usually expensive, the notarial deed is burdensome to most incorporators. Therefore, for the purpose of encouraging creation of enterprises, the company law exempts the small companies from the requirement of the notarial deed((Commercial Act § 292).

2) To register the incorporation of a company, the incorporators should actually pay the consideration for the stocks they subscribed to a specified bank prescribed in the certificate. To simplify the procedure of incorporation, company law allows registration of incorporation if a bank deposit amounting to the capital is proved(§ 318(3)).

3) To hold a stockholders' meeting, the company should issue a written notice to the stockholders in two weeks prior to the date of the meeting (by recent amendment, the company may use electronic data instead of written notice) (§ 363(1)). The observance of the deadline of notice and making written notice are very burdensome and costly requirement for the company (in addition, as most Korean companies adopt the calendar year as their fiscal year, the stockholders meetings of companies are concentrated in March. So it is not uncommon that the delivery of notice is so delayed that stockholders complain about it).

The company law also allows the small companies to hold stockholders' meeting without written notice in advance if all stockholders agree. Additionally, written agreement of stockholders can take the place of the resolution in the actual meeting(§ 363(5)).

4) The most significant exception for the small companies can be said to be the favorable requirement for numbers of directors and auditors, because the number of directors and auditors is usually the most significant factor of cost for corporate organization. Normally, a stock company should have more than three directors and at least one auditor. But the small company may have only one or two director(s) and is allowed to select no auditor (§ 383(1), 409(4)). Since a board cannot be composed in the company where only one director is elected, the power of the board of directors assigned by the law is divided into two parts, and exercised by the sole director and stockholders' meeting respectively.

5) As previously mentioned, the restriction on transfer of equities is one of the requirements for close companies under Delaware law. Under the Korea company law, however, any company, regardless of the size of companies, can restrict on the transfer of equities (§ 335 (1)). It is natural that the listed companies cannot have any rule to restrict on the transfer of stocks.

VI. Conclusion

Most jurisdictions apply strict rules to the management of stock companies. And it is the general