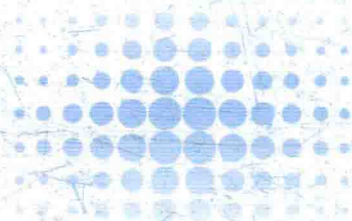


有限责任公司股权转让 限制问题研究

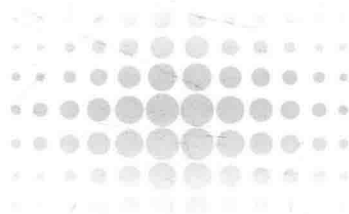
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中文摘要

对股权转让进行限制是国内外公司立法共同体现出的一种旨趣，有限责任公司则因其人合性抑或封闭性将这种旨趣演绎得淋漓尽致。然而，当学者们开始质疑并试图完善公司法关于有限责任公司股权转让限制规定，当司法实务中出现愈来愈多的有限责任公司股权转让限制纠纷且类似案件出现不同裁判，我们就应该要对有限责任公司股权转让限制问题进行一种深刻的反思抑或重构。对有限责任公司股权转让进行限制是否有合理的缘由？在设置限制的过程中应该秉持一种什么样的价值取向？除了法律规定之外有无其他形式能够容纳股权转让限制内容？有限责任公司股权转让限制又该如何以全貌示人？遵循着前述逻辑思维，本书形成了绪论加正文六章的总体结构。

绪论介绍研究背景和研究意义、国内外研究现状、研究思路以及研究方法。基于法律规定不完善、学界争议激烈和实务中纠纷频发的研究背景以及针对学理、立法、司法层面的研究意义是对该文章具有可写性的确认。国内外研究现状则全方位展示目前国内外学者就有限责任公司股权转让限制所进行的不同层面、不同视角的探讨，通过分析国内学者就有限责任公司股权转让限制的理论根基、公司章程限制股权转让条款的效力、同意规则、优先购买规则等问题进行的讨论能加深对相关问题的理解。通过分析国外学者就股份转让限制之理论或政策基础、股份转让限制的原因抑或目的、具体的股份转让限制规则、股份转让限制规则的效力、股份转让限制规则的适用以及起草股份转让限制规则应注意的事项等问题展开的讨论则使得该研究具有国际化视野的同时，为完善我国法律规定奠定重要基础。研究思路是对全书内容的总体安排，如同事先确定的行进路线，研究思路较为清晰地展示着全书从起点到终点的运行逻辑。具体来说，从理论

基础、价值意蕴到具体规则再到体系化建构，本书遵循的是一种从打地基到盖屋顶的“建房式”研究思路。研究方法对全书提供方法支撑，没有特定的研究方法，那么研究结论的可靠性就值得怀疑。文献分析法、规范分析法、实证分析法、价值分析法、比较分析法以及历史分析法为全书的每一部分提供着对应的方法支持。

第一章探讨有限责任公司股权转让限制的理论基础。本章分为两节。第一节从法哲学的角度分析有限责任公司股权转让限制的理论基础。有权利的地方就一定会有权利的边界，权利受限制具有必然性，让权利在漫无边际的时空荒野里找不到前行的方向，更容易形成权利之间的冲突，所以限制权利是为了权利更好地获得实现。第二节基于公司法理论探索有限责任公司股权转让限制的理论基础。第一个理论是有限责任公司的人合性，人合性描述的是有限责任公司股东之间互相熟悉、彼此信任的一种关系。因为要维持抑或重建这种熟悉和信任，有限责任公司股东对股东彼此之间关系的调整享有决定权。第二个理论是有限责任公司股权的身份附随性。所谓有限责任公司股权的身份附随性强调的是股权的享有者必须拥有股东资格，具备股东身份才能享有股权。而有限责任公司股东身份的取得离不开出资以及特定主体合意的形成，正是特定主体合意的形成决定新股东的加入需要得到公司以及其他股东的认可和接受，同意权和优先购买权即是这种认可和接受的权利承载。第三个理论是公司法律地位的独立性。公司拥有独立的名称、独立的意思表示、独立的法人财产并能够独立承担责任。公司的独立地位决定公司拥有属于自己的独立利益，这种利益不应该为股东利益所掩盖，所以，公司独立法律地位决定在有限责任公司股权转让问题上应该赋予公司话语权，也即公司应该享有同意权以及优先购买权。

第二章解读有限责任公司股权转让限制的价值意蕴。本章分为两节。第一节论述第一重价值意蕴——自由。有限责任公司股权转让限制看似是对自由的限制，但其实是对自由的一种首肯，或者说是对自由的确认与保障。有自由必然有限制，有自由才有限制，所以有限责任公司股权转让限制绝不是否认股东的股权转让自由，而是以确认与保障的方式体现其对自由价值的态度。允许公司章程、股东协议或者公司细则对股权转让限制另行规定，更是对自由价值的一种贯彻，所以有限责任公司股权转让限制其

实是为股东实现股权转让自由权所设定的一种程序。第二节论述第二重价值意蕴——利益平衡。权利行使本身并不一定意味着某种经济利益的实现,但是有限责任公司股权转让限制涉及包括转让股东、其他股东、受让方以及公司在内的多方利益关系,主体之利益冲突是我们必须要正视的问题。转让股东、其他股东、受让方以及公司在股权转让中本已享有的权利和履行的义务是对利益平衡价值的一种体现,前述相关主体在股权转让中应该享有的权利和义务也应朝着利益平衡的方向进行设置,这是我们在完善或者建构法律规定时不可忽视的一种价值指引。

第三章分析有限责任公司股权转让限制法定具体规则之同意权和优先购买权。本章分为两节。第一节分析同意权。尽管有学者基于同意规则不构成股权对外转让的实质障碍而主张废除同意权,但是同意权有其存在的深厚理论基础,且同意权所暗含的对于公平的深度追求非单独的优先购买权所能表达,故同意权应该保留。转让股东可以凭借口头抑或书面的方式将股权转让相关事项一次或分两次告知公司和其他股东,公司从收到告知之日起30日内以董事会决议表明自己的态度,其他股东则应自接到通知之日起30日内以过半数之人头决来显示自己的态度,公司同意加上其他股东过半数同意才意味着股权可以对外转让。同意权的行使与否对于股权转让协议的效力没有影响,但公司的同意及其他股东的过半数同意是股权转让生效的必要条件。同意权既可适用于股权对外转让也可适用于股权内部转让,但法律规定不宜强制安排同意权的适用范围,公司章程、股东协议抑或公司细则可以对同意权适用范围作出设置。第二节分析优先购买权。优先购买权有诱导转让股东违约之嫌,但交易双方应该能遇见这种风险且转让股东可以巧用法律规定化解违约可能给自己带来的重创,故优先购买权不可取代。优先购买权在民事权利体系中应该定位为请求权才能更好地实现股权转让限制之利益平衡价值,但其在商事权利体系中成就优先购买权就是优先购买权而非其他的角色定位。公司以及除转让股东之外的剩余股东均享有优先购买权,只是公司行使该项权利必须以公司有盈余为前提条件,且通常情况下,公司行使优先购买权劣后于其他股东行使优先购买权,除非公司有充分理由相信其他股东行使优先购买权会造成公司股权结构的严重失衡进而危及公司利益,公司通过优先购买权的行使只能暂时持有股权,应该在找到合适对象后应立即将股权转让出去。行使优先购买

权应受到时间制约,而且权利主体作出会否行使优先购买权的意思表示和与转让股东签订股权转让协议的时间期限应该分别规定。优先购买权的行使当以同等条件为宜,只是司法机关在认定同等条件是否形成时应综合考虑转让标的、转让标的的对价、转让价格、支付方式、支付期限等因素以及各相关主体之利益的实现。优先购买权不可部分行使,优先购买权主体受让部分股权并非基于其优先购买权而是与转让股东之间通过一般的股权转让协议实现了股权部分受让。同意权人之同意与优先购买权主体整体不行使优先购买权共同构成受让人成为公司股东的完整合意。所以如果优先购买权利人对同意权人同意转让的股权放弃优先购买权,且股权转让协议生效,则股权转让生效;如果优先购买权主体并未放弃对经过同意权人同意转让的股权行使优先购买权,即使股权转让合同有效,然而股权转让并不会生效。优先购买权还可适用于股权赠与场合,但是就股权内部转让而言,除非基于公司整体利益考虑,公司及公司内部任何其他股东不得主张行使优先购买权。

第四章分析有限责任公司章程限制股权转让的边界。本章分为三节。第一节是公司章程限制股权转让实务的多样化呈现。尽管司法实务中对公司章程强制股权转让、禁止股权转让以及就股权转让程序另行规定之效力争议较大,针对这些问题的裁判结果也存在反复,但是总体来说,司法机关对于公司章程限制股权转让规定的态度逐渐由排斥向容忍进行转变。第二节是公司章程限制股权转让理论的多元化展示。学界观点呈现出具体和抽象两种不同的思维模式,具体思维模式下,股权处分权与股权转让程序区分论、股权转让自由与限制均衡论、积极自由和消极自由区分论、公司章程和《公司法》比较论、股权内外转让区分论、具体内容具体分析论、交易相对方知悉论等观点从不同的微观角度展示了公司章程限制股权转让条款的生效要件。抽象思维模式之下,股东利益主导论、合理性判断论、法律法规强制性规定或者公共政策论以及综合判断论等观点试图为公司章程限制股权转让的边界寻找一项放之四海皆受用的标准。第三节是公司章程限制股权转让边界的确定。坚持一般原则、固守底线标准并坚持具体问题具体分析是判断公司章程设限股权转让条款效力的应有态度,所以本节将从抽象标准与具体问题之展开两个角度为公司章程限制股权转让确定边界。就抽象标准而言,合法性与合理性从理论涵盖性来看最具有说服

力。合法性是从静态角度判断公司章程限制股权转让条款的效力，是司法实务界观念在公司章程限制股权转让条款效力判断标准上的一种反映。合理性是从动态角度反思公司章程设限股权转让条款的法律效力，是美国法院长期司法经验的一种总结，具有可靠的借鉴性。而要判断公司章程限制股权转让条款是否具有合理性，则要看特定条款对于自由以及利益平衡价值的眷顾，顾及主体的自由以及利益平衡的实现则公司章程设限股权转让条款合理，反之合理性缺失。合法且合理的公司章程设限股权转让条款必定会被作出有效判断，既不合法也不合理的公司章程设限股权转让条款必定会被作出无效判断，但是合法但不合理以及合理但不合法的公司章程设限股权转让条款之效力往往就会出现亦有效亦无效的判断。在司法界，合法但不合理的公司章程设限股权转让条款通常会被认定有效，而合理但不合法的公司章程设限股权转让条款通常会被认定无效，这是由司法界坚守法律的传统所决定的，但也不排除在特殊情况下，司法界会因为对现实的积极回应而对法律规定作出能动的解释和适用。从学理的角度来看，合法但不合理的公司章程设限股权转让规定之效力却通常会被否定，合理但不合法的公司章程设限股权转让规定却常常被认为是有效的，这是由学术的批判性及其前瞻性所决定的。就具体问题而言，公司章程可以就公司法规定的程序提出更高或者更低的要求、可以就公司法规定的内容做出具体规定、可以排除公司法已有规定之内容、可以创设公司法未规定之内容，但无论如何，内容不明确的限制规定、没有附上期限的绝对禁止条款以及概括式的强制股权转让条款都应该被认定为无效条款。

第五章分析有限责任公司股权转让限制规则的另类载体——股东协议和公司细则。本章分为两节。第一节是股东协议限制股权转让。股东协议是股东之间所签订的一种合同，相比于公司章程而言，股东协议具有免受属性困扰、修改简单以及更具有可履行性的优势，但也存在容易忽视公司利益以及对人效力有限的弊端，所以股东协议尽管可以作为股权转让限制规则的载体，但是如其弱点不被克服则难以对股权转让形成有效的限制。一旦将股权转让限制规则写进股东协议，该限制规则一方面要经受住《合同法》的考验，另一方面要接受合理性与合法性标准的审查。并且股东协议只能约束到签约股东。签约股东享有自己的合同权利之时不可阻碍未签约股东享有自己的法定权利。签约股东违反股东协议则应该承担相应

的违约责任。第二节是公司细则限制股权转让。由于缺乏明确的法律指引,我国公司实务中经常出现以细则或者不以细则命名的各种公司文件,所以法律规定有必要对公司细则进行规定以回应现实需要。而且法律应该明确公司细则作为公司章程细则的法律地位,所以,承载股权转让限制规则的公司细则同样要经受合法性与合理性之审查。作为公司章程细则之公司细则与公司章程具有同样的法律效力。但就目前来看,存在名为公司细则但其实可能是股东协议的情形,此时的公司细则只能在签约股东之间产生相应的法律约束力。

第六章探讨有限责任公司股权转让限制之体系化建构。本章分为两节。第一节分析现行法律规定的理念偏差和制度缺陷。公司独立地位未获凸显、股权财产权属性被强化而身份附随性被弱化、股东自治不被重视是法律规定之理念偏差所在。制度缺陷则体现为规定的遗漏和规定的模糊两种情形,在有限责任公司股权转让限制问题上未赋予公司话语权、没有明确有限责任公司股权之身份附随性、没有允许股东就有限责任公司股权转让限制另行约定、缺乏公司细则相关规定是法律规定的漏洞所在,同意规则与优先购买规则的适用范围、具体适用问题以及适用的法律效果均存在模糊的规定。第二节分析有限责任公司股权转让限制体系化建构的总体思路 and 具体框架。有限责任公司股权转让限制体系建构的总体思路是制定法与判例法相结合并以司法解释深化对法律规定之理解。而具体建构中,公司法律规定是有限责任公司股权转让限制体系的支点,司法解释和判例法则是该体系的重要组成。其中公司法律规定在发挥其支点作用时必须以修正案完善现行法律规定,确定公司利益、明确有限责任公司股权的身份附随性、赋予股东自治权限等理念以及因前述理念引发的具体条文之修订应该包含于公司法将来的修正案中。针对拟转让股权之购买权的行使期限以及优先购买权的行使期限与行使条件应该被纳入抽象性司法解释中。公司细则限制股权转让问题则宜交由判例法解决。

Abstract

Share transfer restriction is a purport embodied in the corporation law at home and abroad, and the limited liability company (LLC is short for limited liability company) carries out the preceding objective completely because of its human joining or closure. However, when the scholars begin to question and attempt to improve the regulations relevant to LLC share transfer restrictions in the corporation law, and more and more relevant cases occur with analogous details getting different judgment in juridical practice, we should rethink profoundly or reconstruct LLC share transfer restrictions. Whether restrictions have reasonable ground, what value we should follow when setting rules, whether other files can contain rules in addition to articles of law, how restrictions show themselves as a whole. Following the preceding logical thinking, the paper forming the overall structure consisting introduction and six chapters in text.

The introduction includes background or significance、situation、thinking and methods. The background basing on incomplete rules、drastic argument and frequent cases and the significance relating to academic theory、legislation and justice affirm the feasibility of the paper. The situation show comprehensively the scholars' viewpoints on LLC share transfer restrictions from different angle and level at home and abroad. Analyzing the domestic scholars' discussions on theoretical basis of restrictions, the legal effect of the clause about restrictions in the article, approval rules and preemption rules can deepen our understanding of corresponding questions. Analyzing the foreign scholars' discussions on the basis of theory and policy of restrictions, purpose or reason of restrictions, specific rules of restrictions, legal effect of restrictions, application

of restrictions and notice while drawing restrictions provide the international vision for the study and important basis for perfecting the legislation. The thinking shows clearly the track of the paper as if the route set in advance as overall arrangement of the paper. Specifically, from theory basis, value to specific rules to systematic construction, the paper follows the thinking analogous to building a house, laying the foundation firstly and then roofing the house. The method provide the support for the paper. Reliability of study conclusion may be open to doubt without the specific methods. Document analysis, normative analysis, empirical method, value analysis, comparative analysis and historical method provide support for each chapter.

Chapter one studies the theoretical basis of LLC share transfer restrictions, which includes two sections. The first section discusses the theoretical basis from an angle of legal philosophy. Where there is a right there is a right boundary. The right is destined to be restricted. Conflict of rights will occur if the right cannot find the road in the infinite time and space. Therefore, the restricted rights will be realized better. The second section discusses the theoretical basis from an angle of corporation law. The first theory is human joining of LLC, which means a relation of trust and acquaintance between shareholders. The shareholders should have the right to determine adjusting such relation to keep or rebuild the trust and acquaintance. The second theory is the status feature of equity, which means sharing equity must depend on owning the identity of the shareholder. Only the shareholder can own equity. The conditions of becoming shareholder include investment and particular consensus. It is the consensus that determines qualification as a new shareholder is based on agreement and acceptance of the company and the other shareholders, which embodies consent right and preemptive right. The third theory is independent legal status of a company. A company owns independent name, declaration of intention, property and bears the reliability independently. The independent status determines a company owns independent interest, which should not be covered by interest of the shareholders. So a company should own such right of speech as consent right and preemptive on the question of share transfer.

Chapter two studies the value of LLC share transfer restrictions, which includes two sections. The first section discusses the first value—freedom. Restrictions seem to limit freedom, but it approves or confirms and guarantee freedom substantially. Where there is freedom there is limitation. There is limitation when there is freedom. Therefore restrictions do not deny shareholders' freedom of share transfer, but show the attitude towards freedom in the way of confirmation and guarantee. It pursuits freedom value to permit article, shareholders agreement or bylaw to include restrictions. So restrictions are substantially a procedure of share transfer. The second section discusses the second value—balance of interest. Exercising rights do not mean necessarily realizing an economic interest. We must face the problem that restrictions is relevant to interest conflicting among transferor, other shareholders, transferee and the company. The right and duty of each embody value of interest balance. The right and duty they should own and bare should be set towards value of interest balance, which is a considerable value when perfecting and construct regulations.

Chapter three studies the consent right and the preemptive right, which includes two sections. The first section discusses consent right. Although some scholars claim consent right should be abolished because of its immaterial effect on share transfer, consent right should be kept because it bases on profound ground and includes value of fairness preemptive right cannot masked. Transferor should notify the company and other shareholders of matters in writing or words once or twice. The company should express its attitude through board resolution in 30 days and the shareholders should express their attitudes through the majority of the shareholders. The company's consent and the majority shareholders' consent mean share can be transfered outward. Consent right does not matter with the agreement of share transfer, but the specific principals' consent is a requirement of share transfer. Consent right can be applicable to internal and external transfer, which should not imposed. The article, the shareholders' agreement and the bylaw can arrange it. The second section discusses preemptive right. Preemptive right with defect of inducting breaching of a contract cannot replaced because of predictability and resolution of the risk.

Preemptive right is a claim in civil rights to realize interest balance and is itself in commercial rights. Both the company and other shareholders own preemptive right, but the company exercise its right depending on surplus. Other shareholders usually exercise their rights with precedence over the company, only if the company believe fully its interest would be endangered because of unbalanced share structure due to shareholders' preemptive right. Preemptive right exist in a limit period including both spells of expressing idea and signing the agreement. Preemptive right is exercised basing on equivalent conditions, which is affirmed by judicial organ according to such comprehensive factors as object, consideration, price, payment method, payment period and interest. Preemptive right cannot exercised partly. The right holders obtain partial share through ordinary contract. Consent and giving up preemptive right form a complete consensus attaining identity of shareholders. Share transfer take effect when preemptive right is given up with the valid contract. Share transfer does not take effect when preemptive right is not given up with the valid contract. Preemptive right can be applicable to share gift but not internal transfer only if considering the company's interest wholly.

Chapter four studies the legal effect of the article including restrictions, which includes three sections. The first section discusses various restrictions in the judicial practice. The legal effect of restrictions such as forcing transfer, prohibit transfer and set additional procedure is full of dispute and the relevant judgment is unstable, but judicial organs have an attitude of tolerance descended from rejection towards restrictions in the articles generally. The second section discusses various theory about restrictions in the articles. Concrete and abstract thinking mode exist in the scholars' view. Such concrete views as distinguishing disposition from procedure, balance of freedom and restriction; separating positive liberty from negative one, comparing the article with corporation law, separating internal transfer from external transfer, concrete analysis of the specific question, the dealing party's conscious explain the requirement of validity of restrictions in the articles from micro aspects. Such abstract views as the leading position of shareholder interest, reasonableness, mandatory provisions

or public policy, synthetic judgment attempt to find a universal standard. The third section discusses the legal effect of restrictions in the articles. We should judge the legal effect of restrictions in the articles basing on general principles and concrete analysis, so the section discusses the legal effect of restrictions from macro and micro aspects. Abstractly, legality and reasonableness are the most convincing in theory. Legality, which reflects the attitude in the judicial practice, explains the legal effect of restrictions in the articles statically. Reasonableness, which comes from judicial experience in America and is a reliable reference, explains the legal effect of restrictions in the articles dynamically. Whether the restrictions are reasonable or not depends on value of freedom and interest balance of specific clauses, which are reasonable with consideration to freedom and interest balance and are unreasonable conversely. Legal and reasonable restrictions are effective. Neither legal nor reasonable ones are invalid. Legal and unreasonable or illegal and reasonable ones are usually valid or invalid. Legal and unreasonable ones are frequently valid and illegal and reasonable ones are often invalid in the judicial circle, which depends on tradition of abiding by the law, but judicial circle interpret and apply law actively to respond to reality under special conditions. Legal and unreasonable ones are frequently invalid and illegal and reasonable ones are often valid theoretically, which depends on critical and prospective academic. Specifically, the articles can include higher or lower requirement of procedure comparing with Corporation Law, solidify or remove regulations in Corporation Law, set up different items from Corporation Law, but ambiguous restrictions, no assignment without period and abstract forcible assignment are invalid.

Chapter five studies other carrier of restrictions—the shareholders agreement and the bylaw, which includes two sections. The first section discusses the shareholders agreement. The shareholders agreement is a contract among shareholders with enforceability, which is free from nature and is amended simply comparing the article. But if the defect that the agreement ignores corporate interest and has limit personal act cannot be overcome, the agreement may not play a helpful role as a carrier. Legal effect of restrictions in the agreement de-

depends on Contract Law, legality and reasonableness. The agreement only restrict the contractors, who should not impede others' interest when exercising their rights. The contractors should assume responsibility of breach. The second section discusses bylaw. It is necessary to stipulate bylaw to response to reality because of various corporate documents named after bylaw or not without clear legal guide. It is specified the bylaw belongs to the article, so the bylaw must bear the brunt of legality and reasonableness. Currently the bylaw is the shareholders agreement virtually, which is valid among contractors.

Chapter six studies systematic construction of LLC share transfer restrictions, which includes two sections. The first section discusses idea deviation and system defects in the current law. The independence of the corporation is not highlighted. The property attribute of equity is strengthened and the identity attribute is weakened. Shareholder autonomy is not thought highly of. Those are part of idea deviation. The system defects include blank and ambiguity. Specifically, the corporation is not given a louder voice. The identity attribute of equity is not set. The shareholders are not authorized to sign a contract including restrictions. The regulation about the bylaw is missing. The rules about scope of application, concrete application and legal effect of consent right and preemptive right are ambiguous. The second section discusses general idea and concrete system. It is a general idea to combine the statute and case law with judicial interpretation embodying the rules. Specifically, Corporation Law is the fulcrum of hierarchy with the case law and judicial interpretation as important components. Corporation Law needs to be perfected through the amendment that includes confirming corporate interest, clearing the identity attribute of equity, providing shareholders with autonomy and concrete provisions amendment basing on the forgoing issue. Abstract judicial interpretation should confirm the period and conditions of preemptive right. The question about restrictions includes in the bylaw should be resolved by the case law.

Keywords: Limited Liability Company; Restrictions on Share Transfer; Consent Right; Preemptive Right; Articles of Association

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