

Analysis on the Relief Path of Infringement of Shareholders' Preemption Right

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Abstract

Equity transfer disputes caused by the preemptive right of shareholders of limited companies are not rare in judicial practice, but also an important issue that is often discussed in the theoretical circle. The system design of preemption right in China has been established since 1993 and has been supplemented and revised for several times. It also has strong practicability and operability. According to the relevant provisions of the Company Law and the Judicial Interpretation of the Company Law (IV), this paper starts from the development and evolution of the right of preemption, briefly describes the legislative background of the right of preemption, and explains the nature of the right of preemption in academic disputes. This paper enumerates the common types of infringement on shareholders' preemption right, further analyzes the effectiveness of relevant contracts, and explains how to remedy the preemption right.

Keywords

Preemption Right; Right of Contravention; Validity of Contract; Right Relief.

1. Development and Evolution of Shareholders' Preemption Right

The preemptive right of shareholders was first mentioned in official legal documents in The Company Law of the People's Republic of China in 1993 (hereinafter referred to as the Company Law), paragraph 2 of Article 35, which stipulates that "under the same conditions, other shareholders shall have the preemptive right to the capital transferred with the consent of shareholders."

Then in 2005, China made a large-scale revision to the Company Law of 1993, in which a total of 91 articles were revised, among which 44 articles were added and 13 articles were deleted. A new allocation principle was added in this revision when multiple shareholders simultaneously requested to exercise the preemptive right. As well as the company's articles of association can make other provisions on the transfer of equity of the company's flexible provisions.

In order to deal with the increasingly complex disputes of shareholders' preemptive right in judicial practice, the Supreme People's Court issued the Provisions on Several Issues concerning the Application of the Company Law of the People's Republic of China (IV) (hereinafter referred to as the Judicial Interpretation of The Company Law (IV)) in 2017. Article 16 to Article 22 of the judicial interpretation further details the procedures and rules of exercising the shareholders' preemptive right. This paper mainly focuses on article 17 and Article 20 of the Judicial Interpretation of Company Law (IV), which mainly stipulate the procedures of equity transfer, the provisions of shareholders' preemptive right and the right of withdrawal of transferred shareholders.

2. The Legislative Purpose of Shareholders' Preemptive Right and the Jurisprudence Behind it

(1) Guarantee the personal compatibility of the limited company

The preemptive right of shareholders refers to the right of other shareholders of a limited liability company to have the priority to receive the transferred shares under the same conditions when the shareholders are ready to transfer their shares.

The proposal of shareholders' preemptive right is based on the characteristics of joint venture and joint venture of the limited liability company, aiming to maintain the joint venture of the limited liability company, so as to ensure that the work of the company can be carried out in an orderly manner and maintain the stable operation of the limited liability company. On the other hand, limited liability company internal shareholders usually do not change, with relatively closed, equity liquidity is relatively stable. In this case, the company's shareholders trust each other more strongly and pay more attention to the integrity of shareholders, which is also the necessary condition for the limited company to maintain its stability. If the equity can be easily transferred to a third party other than the shareholders of the company, the human compatibility of the limited company will change, and correspondingly, the trust between shareholders will also be reduced, which is not conducive to the operation of the limited company. Therefore, it is necessary to impose reasonable restrictions on equity transfer, and then introduce the preemptive right of other shareholders.

So, from the point of the legislative purpose of this system, its desire to protect the primary object of other shareholders should be within the company, rather than the assignor and the assignee, want to maintain the company's internal cohesion and stability, the system designed is intended to grant other shareholders in particular condition occurs with unilateral action to accepting the equity rights, On the one hand, non-transferable shareholders are allowed to unilaterally decide whether to transfer the shares to maintain the stability of the company; On the other hand, as the law sets the requirements and restrictions of "equal conditions" for the pre-emptive right of shareholders, the economic interests of the transferred shareholders can also be effectively guaranteed.

(2) Reduce transaction costs

Although the establishment of shareholder preemption does objectively restrict shareholders' right to freely transfer their equity, in the long run, the establishment of shareholder preemption system can greatly reduce transaction costs. The main performance is as follows:

First of all, as shareholders who acquire shares through equity transfer after the establishment of the company, their operation and management philosophy may be largely different from that of the original shareholders of the company. Therefore, it is easy for the two parties to have different opinions on the daily operation and development plan of the company, thus increasing the instability of shareholders' business activities and increasing transaction costs.

Secondly, after the external third party who has obtained the equity enters the company, the agreement between the original shareholders may not be fully recognized, so the third party and the original internal shareholders may sign a new agreement together. The signing of a new agreement may prevent the original shareholders from cooperating with others. In addition, it should also be taken into account that if the original internal shareholders do not fully trust the external person who receives the equity, then the internal shareholders will have the possibility to withdraw funds, thus causing adverse effects on the company, increasing transaction costs, which is not conducive to the stability of the company and the maintenance of a good market environment.

(3) The original shareholders may control most of the equity of the company to prevent the outflow of equity

During the operation and existence of the company, any shareholder hopes to obtain absolute control of the company, so as to gain greater say and absolute control of the company. The existence of the preemption right system gives the possibility of the company's shareholders to continuously expand their equity.

Although the system of shareholders' preemptive right limits the original shareholders' right to transfer the equity, it gives the original shareholders a greater opportunity to obtain the equity, and through this opportunity, the original shareholders are likely to obtain the control of the company. At the beginning of the establishment of the company is developed by the original shareholders, it should be reasonable to protect the rights of the original shareholders, including shareholders' control rights.

(4) Balancing the interests of all parties concerned

At the beginning of the establishment of the Company Law, the main purpose of the company law is to make all kinds of stakeholders in the company law receive equal protection. When the legitimate rights and interests of different subjects may conflict, the legitimate rights and interests of all parties should be balanced as far as possible. As one of the most important systems in company law, the design of shareholder preemptive right perfectly embodies this value pursuit. The system of shareholders' preemptive right mainly solves the relationship among transferring shareholders, other shareholders and the third party, and plays a balancing role, thus reducing the conflicts of interest among the three. Freedom, according to the principle of party autonomy in the company law, shareholders according to the legal form of investment in the company with others, then, the shareholder has the freedom of the transfer of equity, of course, but due to the particularity of inherent co., LTD., co., LTD was established at the beginning of the original shareholders established close sex, possible damage with the exit of original shareholders, In order to protect the interests of the limited liability company, the system is not only established through various forms of agreement between the original shareholders, but also legislated by legislators to establish the system in law and become a legal right of the original shareholders. On the surface, the system to some extent does limit the rights of the free transfer of shares of original shareholders, is violation of company law autonomy, harm the interests of intervene between the people, but in the long run, the system to maintain the stability of a limited liability company, is advantageous to the original shareholders united, joint efforts, business company, to maximize the shareholders' interests.

3. Nature of Shareholders' Preemptive Right

There has been a great controversy about the nature of shareholders' preemptive right in academic circles. This paper mainly discusses three mainstream viewpoints, including the theory of claim, the theory of formation and the theory of special rights.

(1) Claim theory

According to article 20 of judicial Interpretation of Company Law (IV), if the shareholder who transfers the equity does not agree to transfer its equity after other shareholders exercise the preemptive right, the people's court will allow the transfer of the shareholder's request in the absence of the provisions of the company's articles of association and otherwise agreed by all shareholders.

The right of claim refers to the civil right that the obligee can request others to do or not do certain acts. According to the above judicial interpretation, the exercise of the internal shareholders' preemptive right shall be carried out in two stages: first, the shareholders claim their preemptive right to the transferring shareholders after being informed of the "equal conditions for equity transfer". Then the transferring shareholders accept the same conditions provided by internal shareholders and sign the equity transfer contract with internal shareholders. At this time, both sides of the equity transfer was established. The claim theory

holds that after the same conditions are met, the shareholder claiming preemptive right claims preemptive right to the transferring shareholder, and makes an offer to the transferring shareholder, intending to conclude the transfer agreement contract. After the transfer of shareholders agree to its request, to its commitment, the contract was established. That is to say, the exercise of the shareholder's preemptive right is limited by the intention of the shareholder to transfer.

According to the definition of the right of claim, the shareholder who wants to transfer the equity cannot express the right to transfer the equity unilaterally, but can only obtain the right with the consent of the transferring shareholder. Therefore, it is reasonable that the legal nature of the shareholder's preemptive right belongs to the right of claim. From this point of view, the preemptive right really accords with the main characteristics of the right of claim. However, it should also be noted that this system design is a relatively negative way of relief for other shareholders inside the company, so as to maintain the stable operation of the company in the process of share transfer. From this point of view, the claim theory does not coincide with the purpose of legislation.

(2) Theory of right of formation

The right of formation theory advocates that it is more consistent with the corresponding value judgment to regard the right of formation as the right of formation based on the legislative intention of the system of shareholders' preemptive right and the human nature of the limited liability company.

Stock right does not have the nature of absolute right and can not be disposed freely by the right holder. According to the law, the exercise of equity is subject to the will of other shareholders and the company's articles of association. It is an effective method to prevent shareholders from transferring their equity arbitrarily under certain conditions.

From the perspective of maintaining corporate integrity, other shareholders are allowed to decide whether to transfer the equity by themselves. At the same time, in order to maintain the interests of transferring shareholders, the threshold that other shareholders must transfer the equity under "equal conditions" is set, so as to balance the interest demands of both parties.

According to Article 71 of the Company Law, the shareholder who intends to exercise the preemptive right must go through two procedures to exercise the right. First, if the shareholder who transfers the equity wants to transfer the equity to someone other than the shareholder of the company, it must obtain the consent of more than half of the other shareholders. Only when more than half of all other shareholders agree to transfer the equity, other shareholders can exercise their preemptive right under the rules of equal transfer conditions. In addition, if the company's articles of association or all shareholders have other provisions for equity transfer, it shall be handled in accordance with relevant provisions.

In the first stage, whenever a shareholder claims to buy a stake, it has exercised its right of first refusal, without the need for anyone's consent. The right in the second stage is the preemption right that we want to study. Although the preemption premise is different from the exercise of the right in the first stage, it is the same in nature. It is different forms of shareholders' preemption right, and its nature belongs to the right of formation.

The theory of right of formation is reasonable to explain the preemption right from the legislative purpose. However, the corporation law judicial interpretation (four) transfer of equity shareholders back right system has been added, that is to say, has previously said internal shareholders can own unilateral and accepting the transfer of equity situation is no longer sustainable, and must be approved by the grantor, this means that the judicial organs to shareholders right of first refusal attached claim power, from the point of view, This practice makes the internal shareholders of the company lose their priority compared with the third party other than internal shareholders when receiving the equity transfer from internal

shareholders, which violates the legislative original intention of the system design of the preemptive right of shareholders, and is not conducive to the protection of the company's integrity and the legitimate rights and interests of shareholders.

(3) Theory of special rights

The introduction of judicial Interpretation of Company Law (IV) makes the proposition of special rights gradually stand out in the academic circle. According to the theory of special rights, the newly added shareholder's right of withdrawal in the Judicial Interpretation of Company Law (IV) makes it difficult to perfectly explain the legal nature of this right in the previous theory of right of claim and right of formation, so the academic circle should try to break through the inherent framework of traditional civil rights and understand it based on the system itself.

It holds the view that shareholders' pre-emption rights are very procedural and cannot be fully consistent with any specific existing civil rights. The establishment of the system of right of withdrawal balances the relative closure and stability of the limited company with the protection of shareholders' right to transfer shares freely, so as to avoid excessive interference of the law on private rights. According to the above two viewpoints of claim right and formation right, other shareholders in the company may require the shareholder who wants to transfer the equity to compulsions contract or even deliver the equity based on priority, which damages the transferring shareholder's freedom of transferring the equity and increases the possibility of the transferring shareholder not performing the notification obligation. The priority of shareholders is defined as a special right in the organizational law of the company, which reflects the sequential advantage of internal shareholders compared with external transferees, rather than the right to require shareholders to compulsorily conclude a contract or deliver. This viewpoint breaks through the shackles of the traditional civil right type, focuses on the realization of the function and purpose of the preemption system itself, avoids the academic debate, and has a certain rationality.

4. Infringement of Shareholders' Preemptive Right

(1) Breach of notification obligation and infringement of consent rights of other shareholders
Article 17 of Interpretation IV of The Company Law sets up two notice procedures, and other shareholders can exercise their right of consent and priority respectively after receiving the two notices. In the first notice, the transferor informs the "matter of equity transfer" and can transfer the shares if the majority of the people support it. If the notification obligation is not fulfilled at this time, internal shareholders will be deprived of the opportunity to express their consent and purchase, thus causing damage to their rights and interests. The ways of infringement mainly include failure to fulfill notification obligation and failure to properly fulfill notification obligation.

Next, the specific situation of infringement is discussed from the aspects of notification mode and notification waiting period.

1. Method of notification

Article 71 (2) of the Company Law stipulates that written notification is the main way to fulfill this obligation. Also according to article 11 of the Contract Law, written form refers to the performance in tangible form, such as contract, letters and data messages. At the same time, the Interpretation of Company Law (IV) also recognizes other reasonable methods, as long as it can ensure that the other party can understand the relevant content. At the same time, some scholars pointed out that if the transferring shareholder can prove that it has given oral notice to other shareholders and has been recognized by other shareholders, oral notice should also be allowed. Therefore, the notice shall be made available to other shareholders.

2. Notification waiting period

As for the waiting period of notice, article 17 of Interpretation of Company Law (4) has more detailed provisions. First of all, in order to fully respect the autonomy of the company, the articles of association should prevail; Secondly, if the company does not make clear provisions in the form of articles of association, it should allow the autonomy of the intention of the transferring shareholder, according to the period determined in the notice, to guard against the malicious delay of other shareholders, resulting in the unrealized equity transfer. Of course, as stated earlier, the exercise of any right is not unlimited, transfer of shareholders in the company confirmed in the notice of the other shareholders during the answer should be reasonable, in order to protect the company other shareholders have a plenty of time to consider and make a decision, in the existing laws and regulations of the duration of the exercise of power for at least 30, in order to prevent the transfer of malicious shareholders set too short time limit, infringe upon the preemption right of other shareholders. This provision, fully considering the transfer of shareholders and other internal shareholders of the full exercise of the rights of both parties, is of great significance.

(2) to damage the priority rights of shareholders by means of fraud or malicious collusion

Fraud refers to the transfer notification obligations of shareholders, did not truthfully inform internal transferred by other shareholders real content of the contract, or inform the company internal trade terms of the other shareholders and the actual trading terms, such as, any equity trading price, additional equity transfer conditions, so that the other shareholders to exercise its preemptive right. Malicious collusion means that the transferring shareholder colludes with an external third party to prevent the exercise of the pre-emption rights of other shareholders within the company. The main form of malicious collusion is Yin - Yang contract.

(3) Malicious withdrawal of the transfer shareholder

The Judicial Interpretation of Company Law (IV) sets up the right of regret system for the shareholders who sell their shares in order to fully protect the shareholders' right of free disposal of their shares. However, the transfer shareholder can not abuse this right, maliciously exercise "right of withdrawal". The so-called "malicious opt-out" refers to that after the right holder exercises the preemptive right, the transferor repeatedly exercises its opt-out right for the purpose of external transfer, so that other shareholders cannot obtain the equity. The reason why shareholders' "right of withdrawal" should be restricted is that there is a natural conflict between the freedom of shareholders to transfer their equity and the preemption right of other shareholders in the company. If the abuse of "right of withdrawal" is not restrained, the preemption right system will violate its legislative purpose and the protection of rights is out of the question.

5. Relief of Rights

(1) Realizing the right of preemption

When the shareholder who intends to sell shares violates its legal obligation to transfer the shares to a person other than the other shareholders, and has completed the necessary change registration, can the pre-emption right held by the other shareholders counter the registration, that is, can it prevent the third party other than the other shareholders from acquiring the shares? In view of this problem, article 21 of Interpretation of Company Law (IV) of Our country gives a positive answer.

It can be seen that Article 21 of Interpretation of Company Law (IV) of Our Country does not distinguish whether external third parties are in good faith or not, but gives the shareholder priority to be effective against external parties, but the exercise of this right should be limited by the legal period. This provision provides a solid legal basis for the realization of shareholder priority. According to this regulation, even if the equity transfer contract between the

shareholder who intends to sell the shares and a person other than the internal shareholder is valid, it cannot be actually performed. The change of equity based on this contract is declared invalid, the ownership status of the disputed equity is restored to its original state, and the rights are returned to the original transferring shareholder, and the other shareholders who exercise the right then realize the internal transfer of equity under the same conditions.

(2) Compensation for damages

According to article 20 of Interpretation of Company Law (IV), if the shareholder exercising the preemptive right cannot realize his right due to other reasons other than his own, then the shareholder can claim damages from the transferring shareholder. However, the application of this judicial interpretation needs to meet three conditions: first, other shareholders within the company cannot exercise priority. Because the realization of priority and the compensation for damage have the order of limitation, realization of priority is the primary way of relief, when this way of relief cannot be realized, the compensation for damage can be applied. Second, not because of the exercise of the right of preemption shareholders own reasons. If the right cannot be realized due to its own reasons, such as failure to exercise the preemptive right within the prescribed time limit or failure to exercise the right more than one year from the date of registration of the change of shares, the consequences shall be borne by the owner himself, and he shall not be entitled to claim damages from the transferring shareholder.

The shareholder who fails to exercise the preemption right due to external reasons may request damages to the transferring shareholder as well as other co-infringers. For example, in the contract of maliciously colluding to infringe upon the priority of other shareholders, the shareholders other than the shareholders who want to be transferred are the joint infringer, and the joint infringer shall bear joint liability. In addition, the company may also constitute joint infringement. For example, if the company fails to fulfill the duty of care of formal examination in the registration process of equity change and provides false resolutions of shareholders' meeting to cooperate with the registration of equity change, it shall be jointly and severally liable with the transferring shareholders.

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