摘要

2023年12月颁布的新《公司法》第180条细化了勤勉义务的概念,但仍然缺乏更为具体并且能够有效避免司法不当介入董事决策的勤勉义务审查标准以及董事责任的抗辩免除规则。鉴于勤勉义务条款长期缺乏可操作性,部分法院尝试在司法实践中引入商业判断规则,以弥补董事行为判断标准与免责出口的缺失。在立法实践相对落后的语境下,如何立足本土司法实务经验,同时有效借鉴域外立法与司法成熟经验,经由商业判断规则这一切口优化勤勉义务制度体系的建设,成为有待研究的课题。

本研究共分为四个部分:

第一部分是商业判断规则的制度价值及我国引入该制度的必要性和可行性。当前,我国董事勤勉义务制度存在司法审查标准缺失、违信责任限免条款不足的问题。美国法上的商业判断规则是法院审查董事决策行为是否违反注意义务的审查标准,具有激励董事勇于合理决策、克制司法不当介入的规范价值,与勤勉义务相互促进。该制度有助于建立勤勉义务的司法审查标准、把控司法介入公司治理的限度,完善董事责任标准、降低董事权责失衡危害,落实《公司法》"弘扬企业家精神"的立法宗旨,因此我国具备引入该制度的现实语境。并且,法律移植理论、案例指导制度、营商环境优化政策使得我国引入该制度不仅是理论上的构想,更具备现实维度的可行性。

第二部分是我国商业判断规则的司法实践。商业判断规则在我国司法适用中存在适用要件不明晰、审查模式不统一的困境,其诱因在于该制度在我国仍为学理概念,受审判能力的地域性差异影响较大,及其在我国的本真机能尚不明确。通过实证分析以期未来将该制度纳入我国法律体系时可以"对症下药",针对性地提出构建方案。

第三部分是域外商业判断规则的考察和启示。美、日两国的商业判断规则在引入路径、适用要件、审查模式、举证责任等方面为我国提供了有益借鉴。美国法上的商业判断规则,在适用要件上,可归纳出限于商业决策、善意、无利害关系、信息充足、符合公司最大利益等具体要素;在审查模式上,侧重对商业判断规则的程序进行审查,对满足上述要件的商业决策排除实质性审查;在举证责任上,首先推定被告决策行为符合上述要件,要求原告举证推翻上述要件。日本法上的商业判断规则,在引入路径上,以判例法理方式引入以保持其灵活性优势;在审查模式上,将该规则作为指导法院介入的原则,即法院在充分认可董事享有自主裁量权的前提下,根据个案的具体情形对商业判断的程序和内容进行实质审查。

第四部分是我国商业判断规则的构建。一方面,明确该规则在我国的立法定位为司

法审查规则、行为规范和抗辩规则。另一方面,该规则在我国适用的具体构想为:一是以成文法与指导性案例相结合的路径引入该规则;二是明确该规则的构成要件为限于商业决策、董事与其作出的商业决策无利益冲突、合理相信作出决策时具备充分信息基础、善意地为公司最佳利益;三是厘清该规则的适用对象为包括独立董事在内的法定董事、高级管理人员以及控制股东、实际控制人,监事不属于该规则的适用对象;四是对法定董事和控股股东、实际控制人分别适用"推定式"和"审查式"的审查模式,在"推定式"下由原告举证推翻商业判断规则的要件,在"审查式"下由被告举证其行为符合商业判断规则的要件。

【关键词】商业判断规则 勤勉义务 公司法 司法审查 本土化

Abstract

Article 180 of the new Company Law promulgated in December 2023 has refined the concept of duty of diligence, but still lacks a more specific standard of review of the duty of diligence and the rules of defense and exemption of director's liability that can effectively avoid improper judicial intervention in the director's decision-making. In view of the long-term lack of operability of the duty of diligence provisions, some courts have attempted to introduce business judgment rules into judicial practice to make up for the lack of standards for judging directors' behavior and exemptions from liability. In the context of relatively backward legislative practice, how to base on the local judicial practice experience, and at the same time effectively draw on the extra-territorial legislation and judicial mature experience, through the business judgment rule of this port to optimize the construction of the duty of diligence institutional system has become a subject to be studied.

This study is divided into four parts:

The first part is the system value of business judgment rule and the necessity and feasibility of introducing the system in China. Currently, there are problems of lack of judicial review standard and insufficient limitation and exemption clauses of breach of trust liability in the system of directors' duty of diligence in China. The business judgment rule in the U. S. law is the standard of review for the court to examine whether the director's decision-making behavior violates the duty of care, which has the normative value of motivating the director to be brave in reasonable decision-making and restraining the improper judicial intervention, and is mutually reinforcing with the duty of diligence. This system helps to establish the judicial review standard of the duty of diligence, control the limit of judicial intervention in corporate governance, improve the standard of director's responsibility, reduce the harm of imbalance of director's power and responsibility, and implement the legislative purpose of "promoting entrepreneurial spirit" of the Company Law, so our country has the realistic context of the introduction of this system. Moreover, the theory of legal transplantation, the case guidance system, and the policy of optimizing the business environment make the introduction of this system in China not only a theoretical conception, but also the feasibility of the practical dimension.

The second part is the judicial practice of business judgment rule in China. Business

judgment rule in China's judicial application of the application of the elements of the dilemma of unclear, review mode is not uniform, the cause of the system in China is still a theoretical concept, subject to the geographical differences in the ability to judge the impact of the larger, and its true function in China is not yet clear. Through empirical analysis, we hope that when this system is incorporated into China's legal system in the future, we will be able to "prescribe the right medicine" and put forward the construction plan accordingly.

The third part is the examination and revelation of extraterritorial business judgment rules. The United States and Japan in the United States and Japan's business judgment rules in the introduction of the path, the application of the elements, the review mode, the burden of proof and other aspects of our country provides a useful reference. The commercial judgment rule in the United States law, in the application of the elements, can be summarized as limited to commercial decision-making, good faith, disinterested, sufficient information, in line with the company's best interests and other specific elements; in the review mode, focusing on the commercial judgment rules of the procedure for review, to meet the above elements of the commercial decision-making exclusion of the substantive review; in the burden of proof, the defendant first of all, presumed that the decision-making behavior in line with the above elements, the plaintiff is required to In terms of burden of proof, it is first presumed that the defendant's decision-making behavior meets the above elements, and the plaintiff is required to prove that the above elements are overturned. The business judgment rule in Japanese law, in terms of the path of introduction, is introduced by way of case jurisprudence in order to maintain the advantage of its flexibility; in terms of the mode of review, the rule is used as a principle guiding the intervention of the court, i.e., the court conducts a substantive review of the procedure and content of the business judgment according to the specific circumstances of each case under the premise of fully recognizing that the director enjoys the autonomy of discretionary power.

The fourth part is the construction of the business judgment rule in China. On the one hand, it is clear that the legislative position of the rule in China is judicial review rules, behavioral norms and defense rules. On the other hand, the specific concept of the application of the rule in China is: first, the introduction of the rule by the combination of statutory law and guiding cases; second, to make clear that the constitutive elements of the rule are limited

to business decision-making, the director has no conflict of interest with his/her business decision-making, reasonably believes that he/she has sufficient information to make the decision, and makes the decision in good faith for the best interest of the company; third, to make clear that the rule applies to the target of the company, including independent directors, statutory directors, senior management, and other directors, including independent directors. Thirdly, it is clarified that the applicable objects of the rule are statutory directors and senior management, including independent directors, as well as controlling shareholders and de facto controllers, and supervisors do not belong to the applicable objects of the rule; fourthly, the review modes of "presumptive" and "review mode" are applied to statutory directors and controlling shareholders and de facto controllers respectively. Fourthly, the "presumptive" and "review" modes of review are applied to statutory directors, controlling shareholders and de facto controllers respectively, with the plaintiff adducing evidence to overturn the elements of the business judgment rule under the "presumptive" mode, and the defendant adducing evidence to prove that his or her conduct conforms to the elements of the business judgment rule under the "review" mode.

[Key words] Business judgment rule; Duty of diligence; Corporate law; Judicial review; Localization

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引言

(一) 研究背景和意义

1、研究背景

自伯利米恩斯命题提出以来,现代公司制度普遍由股东会中心主义转向董事会中心 主义,董事被赋予在经营管理中更大的自由裁量权。与此同时,各国公司法对董事权利 行使的严格限制,特别是对忠实勤勉义务的重视程度也日益提升。

《中华人民共和国公司法》(以下简称《公司法》)历经六次修订,1993 年已有忠实义务的规定,但直至 2005 年才正式引入勤勉义务。与内容和评判标准相对明确的忠实义务相比,勤勉义务条款长期仅为宣示性规定。新《公司法》于 2023 年 12 月 29 日,经十四届全国人大常委会第七次会议表决通过。在本次《公司法》修改中,强化"关键少数"的责任是立法的重要进步。其中第 180 条第 2 款细化了勤勉义务一般条款,采取了严格的客观标准,即"执行职务应当为公司的最大利益尽到管理者通常应有的合理注意"。但理性人标准的一般条款仍然具有抽象性,司法实践依然缺乏明确指引,这与目前公司治理改革目标仍然存在一定差距。

如何问责"关键少数"是一个世界性难题,问责标准的拿捏更是关键。司法实务中普遍存在"二律背反",即董事勤勉义务的"度"应在何处:当裁判标准过于苛刻时,董事可能会畏首畏尾,进而妨碍其职权的行使与商业的热情;当裁判标准过于宽松时,董事无恐会过于冒进或懈怠履职,进而导致代理成本的上升。现代社会充满着冒险和挑战,要想达到公司发展和股东投资回报的目的,董事需要具备适当的冒险精神,毕竟停滞不前终将被时代抛弃。与此同时,若在商业风险不可控的情况下,要求尽心尽力的董事承担因外部客观原因造成的公司损失,难免会打击董事工作的积极性,甚至不敢担任董事之职,这与董事会中心主义的演进、最大化公司利益和设立勤勉义务的出发点相悖。

源自美国的商业判断规则或许可为勤勉义务的判断提供新的思路,其主要价值在于明晰经营判断与司法判断之间的界限,默认法官不如董事等公司经营者了解商事经营事项,从而避免法官在案件审理中越俎代庖,对经营者的决策合理性进行实质性审查。同时承认结果上的决策失误属于正常风险,只要董事尽到合理的注意义务,出于主观善意和对公司最大利益之考量,即使最终客观上导致了不当后果,也并不具有可责性。因此,该规则是激励董事勤勉尽职、勇于决策,同时避免司法过度干预公司经营的平衡器。

尽管我国现行立法尚未明确确立商业判断规则,但实务中已有法院尝试探索并适用 该规则审理涉及董事、高管勤勉义务认定的案件。由于成文法规定的缺失,加上学界对

商业判断规则的本土化研究——以美国、日本为镜鉴

其存在多种解读,各地法院在司法实践中采用的判断标准不尽相同,进而使得判决结果 呈现出较大的差异性,这无疑对司法的统一性造成了挑战。因此,对商业判断规则进行 深入研究尤为重要。

2、研究意义

第一,完善公司治理制度的理论研究。公司治理结构是公司法律制度的重要组成部分,健全的公司治理结构不仅需要强化董事的责任义务,还要确保公司经营的稳健发展。一方面,为防止董事会职权扩张带来的弊端,应严格追究董事的违信责任。另一方面,为减轻经营决策风险和股东代表诉讼诉权滥用的负面影响,应合理追究董事责任。商业判断规则在公司治理实践中发挥着举足轻重的作用,它以尊重公司管理者的经营决策为理念,确立了董事勤勉尽责的标准,为其合理的经营决策提供法律保护,实现了董事的权责平衡。因此,商业判断规则对合理追究董事责任、完善公司治理理论至关重要。

第二,为司法裁判提供有益的参考。近二十年来,我国司法实践逐渐加强了对商业判断规则的尝试,这在某种程度上证明了该规则在解决复杂的商事纠纷中具有指导司法审判的重要价值,同时也为进一步明辨我国是否引入、如何引入该规则提供了充分的实践依据。但聚焦适用商业判断规则的实践案例,其中仍然存在诸多问题,因此亟待进一步研究,以期该规则在我国的本土化适用更为科学合理。

(二)研究现状

1、国外研究现状

美国是商业判断规则的诞生地,在理论层面,学术界对其之探讨已经形成了深厚的学术积淀,在实践层面,美国法院在运用该规则时积累了大量宝贵经验,不仅案例众多,而且具有很高的参考价值和指导意义。

在理论研究领域,Hamilton 教授的贡献尤为突出,其成果具有显著的代表性,他创新性地将"商业判断规则"诠释为经营管理者在公司治理和商业决策中所遵循的一项基础性原则。¹关于该规则的本质主要存在三种学说:第一,义务审查标准说。该学说主张,当董事在商业活动中做出决策时,法院需要依据该规则来审查他们的行为是否违反了应尽的义务。²值得注意的是,这里的"义务"特指注意义务,它强调的是董事在决策过程中应尽的谨慎和勤勉,而非忠实义务;³第二,司法回避原则说。该学说认为其

¹ [美]罗伯特·W. 汉密尔顿: 《美国公司法(第五版)》,齐东祥等译,法律出版社 2008 年版,第 339-340 页。

² Gevurtz, Franklin A. *The Business Judgment Rule: Meaningless Verbiage or Misguided Notion.* S. Cal. L. Rev., 1993, 67: 295

³ McMurray, Marcia M. *An Historical Perspective on the Duty of Care, the Duty of Loyalty, and the Business Judgment Rule.* Vand. L. Rev., 1987, 40: 628.

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