

# Brief Discussion of Creditor's Interest Protection during the Corporation Division

Nannan CHEN<sup>1,\*</sup>

<sup>1</sup>The Oriental Institute of Shandong University of Finance and Economics, Shandong, China

**Abstract:** During the corporation division, with the company assets transfer and the change of company personnel and company structure, there will have the company assets loss, the hidden transfer of property and other violations of the creditors' legitimate interests. In this situation, how to protect the creditor's interests becomes very urgent. This paper will focus on the creditor's interest protection system during the corporate division.

**Keywords:** Corporate division, creditor benefit protection, summon exhortation of creditor's objection, independent examinant system

## 1. INFORMATION DISCLOSURE SYSTEM OF CORPORATION DIVISION

### (1) Sense of creditor's objection summon exhortation

The purpose of giving creditors the objection of summon exhortation during the corporate division is to avoid the infringement of their benefits. It is possible to enable the company to pay off its debts in time or to guarantee its debts. The foreign legislation makes restrictive provisions on the conditions for creditors to exercise their objection right of summon exhortation. Only when there is evidence that the corporate division will seriously jeopardize the creditor's benefit liquidation, the creditors will be allowed to exercise their objection right of summon exhortation.

### (2).Summon exhortation system condition of creditor's objection in China

In accordance with the relevant provisions of the Corporation Law, the objection summon exhortation belongs to the prior relief procedure. After the corporate division, the company notifies the creditors of its imminent separation. In the process of corporate division, the creditors appealed to the court of objection summon exhortation. Through the court's judgment, the divided company is required to guarantee or pay off its debts.

#### (1)Time to raise the creditors' objection of summon exhortation

The objection summon exhortation belongs to the prior relief procedure. After the corporate division, the company notifies the creditors of its imminent separation. In the process of corporate division, the creditors appealed to the court of objection summon exhortation. Through the court's judgment, the divided company is required to guarantee or pay off its debts.

#### (2)Procedures and contents of creditors' objection of summon exhortation

The system contents of creditors' objection of summon exhortation includes three aspects. The first one is the divided corporation shall, notice the creditors in accordance with the relevant provisions of the Corporation Law and inform the creditors of the corporate division resolutions and matters. This is the premise of the creditors' objection right. The second one is creditors who have objections to the corporate division and discrete matters may object to the company. It is the objection right manifestation of the creditor's to inform the company to pay off its debts or to guarantee. The third one is the final result of the creditor's objection right is that the divided company pays off its debts or guarantees it against the objections raised by its creditors. (3)CREDITORS' OBJECTION SYSTEM OF SUMMON EXHORTATION IN OTHER COUNTRIES AND REGIONS

#### (a)The mode to raise the creditors' objection of summon Exhortation

Article 125 of the German Corporation Reorganization Law stipulates that creditors must apply to the court for the objection summon exhortation right in writing. He or she can state the cause and amount of the application. The application reasons and the specific amount of the application must be substantiated. The claim amount must be limited to the amount of debt that held by the corporation. In the circumstances, the corporation shall provide guaranty to its creditor's right according to the creditors' objection of summon exhortation.

#### (b)The validity to raise the creditors' objection of summon exhortation

If the creditors raise the objection of summon exhortation on the corporate division, and the corporate does not pay the creditors or provide guarantees on its debts, the objection system of summon exhortation will produce the effectiveness problems. The foreign legislation divides this condition into two types: the first legislation mode is the joint liability system adopted by the European Union, such as EU and other European countries. Because in the European Union, such as EU and other European countries, there has no explicit regulation if the creditors raise the objection of summon exhortation on the corporate division, and the corporate does not pay the creditors or provide guarantees on its debts, they just stipulate the corporate and its shareholders shall be jointly and severally liable in a nutshell. The second legislation mode is discrete invalid system that adopted by the Commercial Code of Japan. In the Commercial Code of Japan, the creditor can claim

for the invalid corporate division. If the creditors raise the objection of summon exhortation on the corporate division, and the corporate does not pay the creditors or provide guarantees on its debts, these procedural flaws result in a fundamental breach of the creditors. On the basis of that, the creditor may submit to the court a lawsuit against the company .

(4) Perfect suggestion on the summon exhortation system of creditor's objection in China

(a) Notification modes on the creditors' objection of summon exhortation

In the Corporate Law, there only regulate the notice of creditor's objection of summon exhortation system and the specific method can be used for the notification without further regulation. Therefore, it is possible to consider the notice way of judicial interpretation in public announcement, letter, E-mail, etc with the legal effect. This will standardize the issue of the notice mode.

(b) Exercise time on the creditors' objection of summon exhortation

In the Corporate Law, the time stipulated in the objection shall be within 30 days from the date of receiving the corporate division notice. The creditors may require the company to pay off its debts or provide corresponding guarantees within 45 days from the announcement date. How to define whether receive the notification has the existence problem of evidence difficult. Therefore, we can immobilize the time to avoid the evidence difficult. It will standardize the notice time, effectively avoid the power abuse of creditors , safeguard the legitimate rights and interests of the divided companies.

(c) Subject range of exercising the creditors' objection of summon exhortation

The creditors have objection right of summon exhortation. But the scope of the creditors is open to question. For the employees who are closely related to the whole process of the company's development, how to exercise the objection right during the corporate division is still a legal blank in the legislative aspects of the Corporation Law. Especially the corporate division separate the high-quality assets and the possibility of insolvency occurs, we need to think deeply about whether give labor union the right as the creditors to join the objection process of summon exhortation. Therefore, we can consider that during the corporate division, especially when the insolvency situation may occur, the scope of creditors in the traditional sense should be extended appropriately. Moreover, we can give labor union the right as the creditors to exercise the objection of summon exhortation.

## 2. INTERVENE INDEPENDENT EXAMINANT

(1) Meaning of independent examinant system

Corporate division is not just the variation of company personnel and organization, but transfer the assets and shares of the original divided company to any other existing company or new company. About the corporate division, no matter whether there exist artificial damage and loss when transferring the assets and shares of the

original divided company to any other existing company or new company, and whether it is fair to evaluate the stock price of the original company as a shareholder of the original company, it will affect the creditors' benefit. The stock price evaluation of the company has strong complexity and professionalism. The market is rapidly changing, the complex and unstable of company operation is existing in companies or new companies during the process of separation and handover with the original company. The stock evaluation of the divided company will inevitably face the influence of external factors such as supply and demand, operation risk and time cost. The price of shares is fluctuated. Moreover, based on the corporate division of the shareholders' benefit of the original company, it is difficult to make a timely and fair assessment of the shares. Therefore, it has significant positive significance seek independent examiner as the third party to evaluate the stock price evaluation of the company in the corporate division . The legislation of many countries and regions stipulates this system, in order to guarantee the fairness and reasonableness exchange of shares during the corporate division. This section takes the evaluation of the stock price during the corporate division as an example, and indicating the unique role of the independent examiner.

(2) System condition of independent examinant in China

Although there has no regulation on the independent examinant system in the Corporation Law, the CPA Law (Law on Certified Public Accountants) has the similar rules. In article 14 of CPA Law: Certified public accountants may undertake the auditing business of capital verification and merger, division and liquidation of enterprise capital. In the process of company separation and merger, the company usually hires accountants to conduct relevant capital verification and audit work. However, the relevant rules are too sketchy. The practice of principle too simple that compare with the more detailed provisions of the independent examinant system in other countries and regions such as Germany.

(3) System regulation of independent examinant in other countries and regions

In order to better protect the benefit of shareholders and creditors, the EU first set up an independent examinant system in the relevant companies' legislation. The German Corporation Reorganization Law accepts this mechanism. Taiwan absorb and learn from it during the legislation of the Enterprises Mergers and Acquisitions Law. In the following, this paper will introduce the examples of the above two laws. In article 6, paragraph 2 of the Enterprises Mergers and Acquisitions Law: during the corporate division and before the board resolution is convened, the express raises the independent expert on the price of the new shares that issued by the newly established company after the division, as well as the rationality of the business value or other property. According to the relevant provisions of the According to the relevant provisions of the German Corporation Reorganization Law: during the corporate division, the independent

examiners enjoy a wide range of right to know as independent third parties. Which means the independent examiner can carefully review the company's assets and accounts of all documents and other relevant written material request, such as accounting books as well as property and debt. As the third party, the independent examiner need to evaluate the price of the new shares that issued by the newly established company after the division, as well as the rationality of the business value or other property. Moreover, the balance sheet, the assets list, the reasons for the scheduled debt performance, and the asset income statement review should be reviewed. These documents are accompanied by opinions from independent third-party experts such as accountants, lawyers or securities dealers which are responsible for the above reasonableness. (in article 320 of the German Corporation Reorganization Law)

(4) Suggestion of building independent examinant system in China

(a) Import independent examinant system

Effective oversight is essential throughout the corporate division. Based on the regulation of the Corporation Law, if the creditors' benefits are damaged during the corporate division, it can only be solved by means of joint and several liability lawsuits against the shareholders. But at this point, the joint and several liability lawsuit increases the cost of the company and the creditor, and the long litigation period wastes a lot of time for the litigant participants. The establishment of the independent examinant system can effectively compensate for the loopholes in the specific operation level of the corporate division process. Therefore, it is possible to draw on and absorb the experience of other countries and regions. We can allow independent examiner to participate in the process of corporate division, review and supervise the property involved in the process. It also makes specific provisions on the qualification of independent examinees, the way of intervention and the consequences.

(b) Election and power of independent examiner

In order to ensure the independence and justice of the independent examiners, it is necessary to avoid the direct appointment to affect the examination results. The selection of an independent examiner can be referred to the EU rules, which are designated by the court. Or based on the German Corporation Reorganization Law, the independent examiner shall submit the application to the court by the company. The court will chose it from the company.

During the corporate division, the company should give independent examiners more extensive information and autonomy. As the main body of the third party, the independent examiner can get all the information related to the company division activities, and shall have the right to make necessary review of the company's assets, accounts of all documents and other related written materials request, such as accounting books, property and debt listing, etc.

This article discuss how to protect the creditors' benefit during the corporate division from summon exhortation of creditor's objection and the independent examinant system. We need to perfect and refine the summon exhortation system of creditors' objection and it is necessary to import independent examinant system during the corporate division.

#### REFERENCES

- [1]Gao Kang. Research on the stakeholder Protection during the Corporate Division [D]. Beijing: China University of Political science and Law, 2006.
- [2]Ma Junju, etc. The Theory of Civil Law (Volume 2) [M]. Beijing: Law Press China, 1998: 368-370.
- [3][Japan] Tamaki Uchida. Creditor's rights and the theory of Civil law II [M]. Tokyo: University of Tokyo Press, 2011: 565.

#### SUMMARY