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The Legal Protection of Creditors' Interests in the Merger of Companies

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Abstract: With the all-round development of socialist market economy, enterprises change more frequently in order to pursue the maximization of interests. The legal protection of creditor's interests in enterprise merger is a problem that we must pay attention to and solve.

Keywords: Company Merger; Creditors' Interests; Legal Protection; Right to Know； Right of Dissent

1. Domestic and foreign comparisons of the protection of the interests of creditors in a corporate merger

1.1 The relevant provisions of China's Company Law

(1) The rights of creditors in the merger of companies

China's Company Law also makes relevant provisions on the rights enjoyed by creditors in the merger, which can be roughly summarized into the following articles:

a. Notification

According to the provisions of China's Company Law, the parties involved in the merger have the obligation to inform their creditors of the merger.

b. Request for liquidation or provision of guarantees

That is, creditors who have objections to the merger after receiving the notice of merger may request their company to pay off or provide security within the statutory time limit from the time of receipt of the notice.

c. Right to claim damages

This is a firewall for the company's creditors to protect their legitimate rights and interests from infringement.

(2) Legal consequences of the company's failure to perform the creditor protection procedure

Article 205 of China's 2005 Company Law stipulates that if a merged company fails to perform its relevant obligations, the registration authority shall request it to supervise its rectification and make a certain amount of fines within the statutory scope[1]. This rule appears to be somewhat mandatory for a company to perform its obligations, but it does not give any compensation to the infringed creditors. First of all, the fine is handed over to the state and is not to compensate the creditors for losses; secondly, whether the merger is completed after the fine does not change the fact that the company has completed the merger, and the rights of the creditors are not guaranteed[2].

1.2 International provisions on the protection of the interests of creditors of a company's merger

(1) Notification

a. Content

As far as the content of the right to know is concerned, many Western countries have made more specific provisions on the details that need to be informed, for example, the German company law stipulates in detail that the local courts of the parties involved in the merger need to announce the merger registration they handle to the public through a gazette, and the content of the announcement includes all the information of the merger registration. The level of detail that France has set out on this issue is also quite high, as are its provisions on consolidation information that need to be clarified to creditors[3].

b. The time of notification

There are two main types of notification time, one is to notify before the merger is established, and the other is to notify after the merger takes effect. One is to inform the creditors of the company of the relevant circumstances of the imminent merger before the merger takes effect, which is one of the conditions for the company to become effective. This also means that the companies involved in the merger will not be able to proceed without fulfilling their obligation to notify their creditors in advance[4]. The legislation of most countries in the world is more recognized in this way, such as France, Italy, Japan and many other countries in China have adopted this

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method of notification before the merger takes effect. The other is to notify the company after the merger takes effect, that is, the parties involved in the merger register and inform the relevant circumstances of the merger after the completion of the merger. Relatively few countries have adopted this approach, typically Germany.

(2) Legal consequences of the company's failure to perform the creditor protection procedure

In Germany, the time for notification of a merger to creditors is actually after the registration of the merger, i.e. after the creditor exercises its right to object is actually effective. It is for this reason that the company's failure to comply with the obligation to inform will not have any impact on the merger, which is of course valid at the time of the merger. However, if the creditor is not informed of the entire merger, the claim for damages may be deemed that the company extinguished by the merger still exists, and the creditor may still claim rights against the original company[5].

In Italy, if the creditors of the company raise objections in the course of the merger, the merger is suspended, that is, the objection raised by the claim has the effect of suspending the company merger.

2. Reflection and Suggestions on the Protection of Creditors' Interests in the Merger of Chinese Companies

2.1 Deficiencies and problems in the protection of creditors' interests in the merger of Chinese companies

(1) The mandatory obligation to inform the company is not strong.

There is a lack of punitive provisions in our laws for companies that refuse to comply with their obligation to inform first. The company pays less for its failure to perform its obligations, which makes the interests of the company's creditors vulnerable.

(2) The provisions on the rights enjoyed by creditors are not detailed enough.

The content of the first company creditor's right to know is not clear enough; the conditions for the second company creditor to raise an objection are not stipulated, and the unconditional enjoyment of the right to object will lead to the abuse of rights, which is not in line with the principle of appropriate protection and ignores the efficiency of the company merger; the application of the third creditor's objection to the repayment of debts and the provision of security is not specified in detail, which is likely to cause confusion in practical operation.

(3) There is no clear remedy for creditors whose rights have been infringed.

It is not possible to determine what remedies a creditor may choose when a company infringes on the interests of creditors in a merger and does not provide for the civil liability that a company should bear if it breaches the creditor's interest protection procedure. This can lead to a lot of controversy when dealing with real-world cases.

2.2 Suggestions on the protection of creditors' interests in corporate mergers in China

(1) Refine the content of the rights enjoyed by creditors in the merger.

Clarify that the creditors of the company have the right to understand the matters of the merger so that the creditors can fully understand the relevant contents of the merger; set the conditions for exercising the right of objection, that is, it can only be exercised if the interests of the creditor have been or will be infringed, so as to guide the creditors to exercise the right of objection correctly, taking into account the efficiency and fairness of the overall design of the company's merger; clarify the legal consequences arising from the establishment of the objection, improve the applicable provisions for the repayment of debts and the provision of security, and solve the problem of confusion in the use of practice.

(2) Establish a truly effective relief system for infringement of creditor rights

Clarify the civil and administrative liability corresponding to illegal acts such as the excessive pursuit of interests by the company and the harm to the interests of creditors; in the form of legislation or judicial interpretation, clarify the application of the corporate personality denial system and clarify the extent of harming the interests of creditors; and introduce foreign "deep stone principle" courts can rely on this principle to determine that the creditors' claims enjoyed by the parent company against the subsidiary are lagging behind other creditors when hearing the case of corporate bankruptcy or company merger of the subsidiary, so as to better protect the rights and interests of the creditors of the subsidiary.

(3) Combine China's actual situation to learn from the favorable experience of foreign countries

Apply the creditor meeting system to corporate consolidation. This can increase the links between creditors to better protect the interests of creditors[6]. For example, Japan's Commercial Code clarifies that with the permission of the court, the creditors of the company may convene a meeting of creditors. subject of derivative litigation rights in some countries internationally also includes creditors, for example, Canadian legislation provides that creditors can bring lawsuits against the company, shareholders or senior management of the company according to their own injury.

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