

Localization Construction of Directors' Liability Insurance System

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Abstract: As an insurance to reduce the company's business risks caused by directors' misconduct, the directors' liability insurance system has not fully demonstrated its function and shows signs of acclimatization. From the perspective of comparative law, the author examines the institutional background and functional evolution of directors' liability insurance in the United States, the former doubts and adaptations in the British law, and the continuation and evolution in the German law, which provides enlightenment for exploring the dilemma of directors' liability insurance system in China and the way to improve it. Directors' liability insurance is not an isolated insurance law adjustment content, and China lacks systematic substantive rules and procedural implementation mechanisms for directors' obligations. The Company law has laid a legal foundation for directors' liability insurance to play its function, supplemented by lower level norms such as regulations at the regulatory level, and gradually expanded the scope of applicable subjects of directors' liability insurance to all types of company directors and executives. Then from the level of insurance law system, the localization of directors' liability insurance clauses is realized, and the unification of the main clauses of the contracts of various insurance companies is promoted, which provides a feasible way to perfect the directors' liability insurance system in our country.

Keywords: Directors' liability insurance, Institutional function, Value conflict.

1. The Origin and Development of Directors' Liability Insurance System

1.1. The origin of directors' liability insurance system

Directors' liability insurance emerged in the United States in the 1930s, and its institutional background was the strictness of directors' legal duties and responsibilities in American corporate governance. The stock market crash of 1929 in the United States, followed by the strengthening of regulations in the field of securities issuance on directors' wrong behavior in company listing and securities trading, led to the United States Securities Act of 1933 and Securities Exchange Act of 1934, which imposed more stringent obligations on directors. Therefore, directors' liability insurance products, which disperse the risk of directors' and officers' liability, have appeared in the insurance industry, and have been sought after by directors and officers. After the Second World War, the legal liability of directors was once relaxed. Under the background of economic recovery, the position of director has become an "easy and honorable" job. Under the background of director liability insurance system, director liability insurance has a prominent incentive role for directors.

1.2. Development of directors' liability insurance system

In the 1980s *Smith v. Van* [488 A.2d 858, 889-90 (Del. 1985)]. Later, the Delaware Supreme Court ruled that the directors were in a state of lack of restraint. On the issue of judging whether the director's behavior is in line with the best interests of the company, the court changed the "business judgment standard" standard of the director's behavior adopted by the trial court and put forward the "due process

standard", which is higher than the "business judgment standard" and has more stringent requirements on the director's behavior. In accordance with the due Process Standard, they make business decisions in good faith, without conflict of interest, and they are also required to make decisions without violating due process. On the issue of due process, it is necessary to judge by judicial review of the court, which increases the responsibility of directors and officers for conduct. As a result, directors and senior managers are unwilling to bear this risk and are unwilling to actively work, so companies have to increase the insurance claim limit of directors' liability insurance to encourage them to actively perform their duties. Insurance companies, meanwhile, have responded by raising premiums. On the one hand, the premium of directors' liability insurance was so high that ordinary companies could not afford it. On the other hand, the increase in the claim limit of directors' liability insurance also increases the risk of commercial insurance companies, making them reluctant to cover such liability risks. It can be seen that the American court's strong intervention in corporate affairs has caused directors' liability insurance to fall into crisis. In order to alleviate the crisis of directors' liability insurance, Delaware took the lead in adding provisions on the exemption or limitation of directors' liability in the amendment of the Company Law in 1986, that is, allowing the articles of association or certificate of incorporation of the company to limit or exempt the acts of directors and officers from liability for their acts. Today, most states in the United States have followed suit, and state corporate laws also allow companies to purchase liability insurance for directors and officers of their own or affiliated companies. Some states explicitly permit it by law, while others, where the law does not, justify it through the company's general right to determine appropriate compensation for directors and officers. Let us take the most representative of the General Companies

Act of Delaware as an example, Article 145 (g) of the Act stipulates that a company has the freedom to purchase and continue to have insurance for its directors, officers, etc. The subject scope of the insured covers not only the directors, senior managers, employees or agents of the Company, but also persons who, at the request of the company, serve as directors, senior managers, employees or agents of other companies, partnerships, joint ventures, trusts or other enterprises. It can be seen that in the United States company law, there are legislative examples to limit directors' liability, which mitigates the negative impact brought by directors' liability insurance and, to a certain extent, encourages directors and officers to perform their duties.

2. Current Situation and Existing Problems of Directors' Liability Insurance System

2.1. Present situation of directors' liability insurance system

At present, there are no explicit provisions on directors' liability insurance in China's current Company Law and Securities Law. In the current Insurance Law, there are only principled provisions on the definition of liability insurance, the basic legal relationship between the insurer, the insured and the third party, the principle of liability insurance claims, the subject matter of insurance and the bearing of the corresponding realization costs of arbitration or litigation. In China's relevant corporate governance regulations, the provisions on directors' liability insurance system began to be seen in China Securities Regulatory Commission (CSRC) in 2001, "Guidance Opinions on the Establishment of Independent Directors System in Listed companies". Subsequently, in the China Securities Regulatory Commission (CSRC) "Code of Governance for Listed Companies" (2002), the People's Bank of China (2002) "Guidance on Corporate Governance of Joint-Stock Commercial Banks" (2002), the (former) China Insurance Regulatory Commission (2004) "Notice on Actively Promoting the Development of Liability Insurance" and other departmental regulations, There is a non-mandatory (only proposed) "director liability insurance" system for listed companies, independent directors and directors of commercial banks. Subsequently, in 2006, the "Several Opinions of The State Council on the Reform and Development of the Insurance Industry" regarded directors' liability insurance as one of the liability insurance, and adopted the "market operation, policy introduction.

Guidance, government promotion, legislative coercion and other methods "strongly advocate development. In 2018, the China Banking and Insurance Regulatory Commission (hereinafter referred to as the "CBIRC") issued the "Notice on the Management Measures for Independent Directors of Insurance Institutions" to authorize insurance institutions to establish the necessary independent director liability insurance system. To sum up, the current director's liability insurance system in China only proposes to introduce director's liability insurance system into the governance mechanism of listed companies, commercial banks and insurance companies at the level of departmental rules. At the legal level, there are no articles directly related to directors' liability insurance system in the current company law, securities law and insurance law. It can be seen that the

directors' liability insurance system still lacks basic legal provisions in our country.

In the practice of insurance industry, the insurance coverage rate of directors' liability insurance of listed companies, commercial banks and insurance companies in China is much lower than that of European and American countries, and the insurance coverage of directors' liability insurance in non-listed companies and closed companies is even less. It is understood that in the policy records of property insurance companies in some provinces, ordinary closed companies have no insurance records of directors' liability insurance. Some scholars believe that although directors' liability insurance plays an important role in dispersing the operational risks of directors and officers, it will produce certain side effects during the system operation. On the one hand, the director's liability insurance system may induce the moral hazard of directors and officers, reduce their sense of responsibility and attention in daily work, and promote the occurrence of negligence and negligent behavior; On the other hand, the director's liability insurance contract may have a certain impact on the punishment and prevention functions of the director's liability, and then weaken the director's liability system itself to condemn the director's wrongful acts, censure and sanction functions. [Sun Hongtao, "Inquiry and Rectification: Censure and Response to the function of Directors' Liability insurance Contract", *Contemporary Economic Management*, No.2, 2009.

Some scholars believe that on the issue of corporate external legal liability in China, the concept of corporate external responsibility is deeply rooted, which is caused by the independent personality of the company, and the company's directors and officers and other managers to assume personal responsibility is not generally accepted by people. [Wang Wei: *Research on Director's Liability Insurance System* (Revised edition), Beijing, Intellectual Property Publishing House, 2016, p. 299] The author believes that China's director's liability insurance does not have the corporate governance mechanism, institutional supporting environment and director's liability concept of the country where its system originated. In China's current laws and regulations, the director's liability insurance system is only promulgated and implemented in the form of departmental rules, and as a guiding norm, the director's liability insurance system is only introduced into a specific corporate governance mechanism, and there is no mandatory normative basis so far. At the same time, in the products registered on the website of China Insurance Industry Association, directors' liability insurance, as a type of insurance under the property insurance business, has no unified industry model clauses to guide its insurance contract terms. Therefore, the contract terms of directors' liability insurance of each insurance company are different, and the policyholder cannot understand one by one. Because directors' liability insurance is transplanted from abroad, Chinese insurance companies have not fully grasped the core concept of this insurance, resulting in contract terms showing the characteristics of "more western, less localized". Due to the different practical experience formed by domestic insurance companies in the formation of insurance contracts and claims, they are subject to the constraints of their own risk identification ability, risk affordability and other conditions, so the main terms of insurance contracts formulated by various insurance companies vary greatly, such as the scope of insurance liability, liability exemption (or exclusion), compensation

limit and deductible. In reality, the legal affairs department of each insurance company often interprets the contract terms in favor of the insurance company, so non-listed companies and closed companies do not have the enthusiasm to take out directors' liability insurance for their directors and officers.

2.2. The existing problems of directors' liability insurance system

Civil liability is the civil law consequence that the party fails to perform the civil obligation. The liability for breach of contract and tort are the main types of civil liability. In essence, civil liability is a kind of compensation responsibility to the parties, which reflects the intervention of the state and is mandatory. On responsibility, the parties can negotiate and have a certain degree of arbitrariness. Modern civil law believes that civil liability is mainly property liability, but not limited to property liability. In section 1384 of the Napoleonic Code of 1804, "Every person shall be liable for compensation not only for damage caused by his own act, but also for damage caused by the act of another person for whom he is responsible or by things under his control." It can be seen that civil liability follows the principle of "self-responsibility".

According to the current law of our country, the civil liability arising from the performance of duties of directors and senior officers is based on the civil liability of different directors to the company. In accordance with the provisions of the Company Law, if a director or his senior management violates laws, administrative regulations or the articles of association in the course of performing their duties and causes damage to the company, the director participating in the resolution shall be liable for compensation to the company. The premise of this liability is that the company's directors and their senior managers have violated fiduciary duties. Does the director's liability insurance of the insurance company cover this kind of civil liability? In theory, we can discuss the violation of laws and regulations and the violation of the articles of association separately: First, the insurance company generally does not compensate the above personnel for the violation of laws and regulations; Secondly, if the violation of the articles of association causes damage to the company, it is still necessary to discuss whether it belongs to the compensation scope of directors' liability insurance. The author examines the scope of liability of directors' liability insurance clauses of different insurance companies, and the situation is roughly as follows: The "Ping An Directors and Officers Liability Insurance Clause" of Ping An Insurance Company makes it clear that the losses, expenses and liabilities caused by intentional acts, fraud, criminal acts or gross negligence are not compensated, but it does not distinguish whether the violations of laws and regulations or the violations of the company's articles of association are exempt from liability. In the "China Directors and Senior Managers Liability Insurance Clauses" of Meiya Property Insurance Co., LTD., "intentional means having the purpose or intention to violate the law, or recklessly ignoring the law", no compensation is paid for the intentional violation of the law, but it can be concluded from the context that the director's violation of the articles of association can be regarded as the compensation agreed in the insurance contract between the applicant and the insurer. Huatai Insurance Company's "Directors (supervisors) and officers liability insurance clause" excludes liability for "any dishonesty, fraud, fraudulent omission or any intentional violation of the law by the insured", and "dishonest behavior" is broadly understood,

and acts violating the articles of association can also be regarded as dishonest behavior. It can be seen that, on the basis of not violating laws and regulations, the coverage of director's liability insurance in commercial insurance can be determined by each insurance company after balancing the cost benefit of insurance premium and insurance compensation by applying the law of large numbers and risk actuarial in insurance industry. However, the current Insurance Law of our country stipulates that "liability insurance" refers to the insurance whose subject matter is the insured's liability to the third party according to law. In combination with the situation that the insured is defined as the insured company and the insured individual in the directors' liability insurance clauses above, it means that the loss of the insured company does not belong to the loss of a third party and should not belong to the compensation scope of liability insurance. Therefore, at present, China's directors' liability insurance does not compensate the directors and officers for the civil liability caused by the infringement of the interests of the company. If there is an insurance product designed by an insurance company to compensate for this, it means that the product design has broken through the relevant regulation of liability insurance in the current Insurance Law. In addition, in theory, the directors and senior management of the company bear the liability for compensation to the company, and then the company compensates the directors and senior management, which may lead to the occurrence of "circular compensation". [In ordinary companies, whether a director's liability for violating the provisions of the company's articles of association is compensated or not needs to be discussed. However, in listed companies, the director's liability insurance is not compensated for the liability caused by the director's violation of laws and regulations and the provisions of the company's articles of association. See Article 24 of the China Securities Regulatory Commission Announcement.

Since 1994, the strengthening of the legal and legislative aspects of directors' liability in Germany has also led to the wider spread of directors' liability insurance in Germany. During the decade from 1995 to 2005, director's liability insurance has almost achieved full coverage in listed joint stock companies, and small and medium-sized limited liability companies have gradually accepted director's liability insurance, which constitutes a new area of rapid growth of this insurance. At the initial stage of the succession of directors' liability insurance, German law scholars are skeptical about the legitimacy of directors' liability insurance, because it conflicts with the behavioral regulation and damage prevention purposes of directors' obligation rules in the German Share Law. In 2009, German lawmakers introduced the "mandatory self-bearing ratio" of insurance premiums in the third sentence of Article 93, paragraph 2, of the German Share Act, thereby indirectly legalizing directors' liability insurance. However, even after the realization of legalization, the conflict between factual force and normative value accompanied the development of directors' liability insurance in Germany, and the phenomenon of functional alienation of directors' liability insurance system also became the focus of German legal scholars. In recent years, a series of corporate governance scandals have demonstrated in an extreme way the defects of the substantive law and procedural law rules of directors' liability in German law. Specifically speaking: First, the subject of premium payment obligations and whether the director should bear part of the premium

obligations. According to the provisions of the German Insurance Contract Law, as liability insurance, the company as the policyholder bears the obligation to pay the premium. In terms of financial treatment, the premium expenditure is not treated as the director's income. Second, the conflict of interest in the conclusion of insurance contracts. In general, the Board of Directors has the right to select an insurance company to purchase directors' liability insurance for the directors and officers of the company on behalf of the company according to its own needs. This means that liability insurance coverage involving board members does not require the consent of the supervisory Board in the form of a resolution; Liability insurance for members of the supervisory Board does not need to be approved by a resolution of the shareholders' meeting. Others call this a "bizarre institutional arrangement." Thirdly, the value conflict between directors' liability insurance and the behavior correction function of directors' obligation rules in Company law. Since the 1990s, the directors' liability rules in German company law (e.g., Article 93 of the German Shares Act and Article 43 of the German Limited Liability Act) have been activated from the "paper tiger" status. The business judgment rule did not substantially alleviate the strict director liability, which objectively led to the popularity of director liability insurance in German business practice. Directors' liability insurance functionally constitutes a regulation of directors' obligations. Impact, weakening the regulatory function of directors' conduct (because the company has purchased liability insurance for directors in the form of its own premiums). However, the special insurance contract arrangement makes the protection function provided by directors' liability insurance "deceptive", and even dissolves into the catalyst of directors' liability.

By summarizing and analyzing the disputes involved in the concentration of business operators in China so far, it can be concluded that: after the above-mentioned disputes are adjudicated or disposed of, whether the regulatory bodies disclose the results of each dispute is not the same, that is, the transparency of the results of dispute settlement is not uniform enough, and even too low. It can be seen that after conditional approval, the regulatory authorities should conduct follow-up observation and supervision and guidance on the subsequent conditional implementation process. In the search of the cases of conditional approval in recent years, except for the cases of lifting additional restrictive conditions, no other disputes have been disclosed on the websites of the Ministry of Commerce or the State Administration for Market Supervision and Administration, the implementation and progress of conditional conditions and whether negative external benefits have been caused to the relevant market, and the regulatory authorities have not made a formal statement on the disclosure of follow-up information for each dispute. In some cases, companies focus on conditional approval, and the regulatory authority will monitor the implementation of the restrictive conditional obligations that accompany the collective collaboration. Anti-monopoly law enforcement agencies shall, after the concentration of enterprises, disclose important information to the public regarding changes in business activities, share selling, asset divestiture, and other major matters contrary to other restrictive conditions. This method can produce a specific restriction and maintenance system in the corresponding category, on the other hand, it can also guide the citizens' spontaneous enthusiasm for supervision.

3. Localization and Reconstruction of Directors' Liability Insurance System

3.1. Law and regulation level optimization

The necessity and feasibility of introducing directors' liability insurance system in Company Law. First of all, based on the consideration of improving corporate governance, it is necessary to directly regulate directors' liability insurance from the basic legal level, supplemented by regulations and other lower levels of norms. Both the British Company Law 2006 as the representative of the common law system and the German Share Law as the representative of the civil law system codify the directors' liability insurance system through basic laws. Article 147 of the Company Law stipulates the legal obligations of directors, supervisors and senior executives in the form of general provisions, but "duty of diligence" was first introduced when the Company Law was amended in 2005. The statutory obligation of directors is the core system for regulating conflicts of interest between (all) shareholders (as principals) and management (as agents). However, this process of institutional transplantation and succession is not yet complete. In addition to the judgment criteria of directors' duty of diligence, the codification of business judgment rules and the procedural implementation mechanism of directors' liability, the introduction of the limitation or exemption system of directors' liability is indispensable. Therefore, our country should also take directors' liability insurance as a limitation or exemption system of directors' liability in the Company law. Secondly, in terms of feasibility, through the "Code of Governance for Listed Companies" and "Independent Directors"

After more than ten years of exploration after the promulgation of the Guiding Opinions, the conditions for introducing directors' liability insurance system in the Company Law have matured. In addition, the Company Law should also extend the application of directors' liability insurance to directors and officers of all types of companies. The justification of expanding the scope of application lies in the fact that conflicts of interest between shareholders and managers exist in the governance of all types of companies, and as a system to ensure the normal performance of directors and promote corporate governance, it should not be

In the legal level of limited liability company directors, supervisors and senior management system discrimination. Specifically, we can learn from the provisions of Article 93 of the German Share Law, and add a clause in Article 149 of the Company Law of China, which can be expressed as follows: "Subject to the provisions of the articles of association or the approval of the shareholders (general) meeting, the company may purchase directors' liability insurance for the directors, supervisors and senior management of the company and its subsidiaries or participating companies."

The legislation technically adopts the "reverse list" mode to guarantee the freedom of insurance to the maximum extent. The "Governance Code of Listed Companies" completely excludes the director's violation of laws and articles of association from the coverage, which strictly limits the scope of application of director's liability insurance in practice. On the contrary, if the director's violation of laws and articles of association due to negligence is included in the coverage, it can not only greatly expand the market demand for director's liability insurance, but also play a positive role in promoting

the construction of internal compliance mechanism in corporate governance. The corporate authority shall establish a corresponding compliance review body within the enterprise according to the scale of the company, the legal risks of the industry in which it operates, the legal development status of the country or region in which it operates, and other factors (which are extremely important for the construction of the compliance mechanism of the company's overseas stock issuance behavior), and ensure that the compliance organization can function normally, rather than a system arrangement. In this way, a good balance can be achieved between protecting the interests of the company and exerting the initiative of directors in business activities. According to the requirements of Article 98 (1) of the Guidelines on Listed Companies' Articles of Association (2019 Amendment) on compliance obligations, directors should "ensure that the company's business conduct complies with the requirements of national laws, administrative regulations and various national economic policies", which has already reflected this idea. Based on the above reasons, the author suggests the "reverse list" legislative model to determine liability in the Company Law

The specific provisions of the scope of liability covered by the insurance can be stated as follows: "The Company shall not take out directors' liability insurance for the liability of directors, supervisors and senior managers of the company, subsidiaries or participating companies due to intentional violation of laws and regulations."

3.2. The authorized level of the articles of association is optimized

When the Company Law of China introduces the provisions on directors' liability insurance, matters such as the authority of directors to enter into contracts and the proportion of directors' self-burden in directors' liability insurance premiums can be determined by the shareholders' (large) meeting through the drafting of the company's articles of association. The German Share Law does not make it mandatory for insurance contracts to be concluded by a general meeting of shareholders, so that in practice the board of directors determines whether, where and how much liability insurance to take out for its members, and the insurance costs are paid by the company acting as the policyholder. Although the proportion of self-commitment is prescribed for joint stock companies, there is no restriction on the directors to reinsure this part of their liability. This approach of German law violates the concept of corporate governance with checks and balances of power, and deserves our vigilance. In practice, the board of directors of listed companies in China requires the general meeting of shareholders to authorize the management of the company to determine the insurance company, determine the insurance amount, insurance premium and other insurance terms, select and appoint insurance brokers or other intermediaries, sign relevant legal documents and deal with other matters related to insurance, etc. And then handle the renewal or re-insurance and other related matters on or before the expiration of the Dong supervision high liability insurance contract. This broad mandate results, in practice, in the Board's de facto ownership of the matter. In this situation, legislation should be adopted to protect the authority of shareholders' meeting at the level of Company Law. In addition, a statutory minimum proportion of the premium payable by the directors themselves may be prescribed and this portion may not be

circumvented by re-insuring. Regarding the authorization optimization of the articles of association, it can be specifically stated as follows: "The articles of association or the resolution of the shareholders' meeting shall specify the proportion of insurance costs borne by the directors, supervisors and senior managers individually, but not less than 10%." Directors, supervisors and senior managers are prohibited from reinsuring the self-borne portion of directors' liability insurance premiums.

3.3. Optimization of insurance contract terms

The different sources of director's liability risk have a direct impact on the specific terms of director's liability insurance. In American practice, directors' liability risks are mainly external risks caused by class action lawsuits. The law generally allows companies to exempt directors from internal liability for negligent acts. On the contrary, in German practice, directors' liability insurance has not played an important role in protecting the external liability of directors or supervisors. The reason is that directors of German companies are subject to external responsibility only in very exceptional circumstances. Moreover, the German Share Law expressly prohibits the exemption of directors' internal liability. The subsequent experience of this system shows that the localization of the terms arrangement of directors' liability insurance contract and the coordination of the impact of directors' liability insurance contract arrangement on corporate governance are the key issues to determine whether this system can take root in the practice of China's insurance industry. The current terms of directors' liability insurance contract in China are too "take over", and have not yet been able to formulate contract terms according to the factors such as the industry in which the insured company is located and the historical illegal situation, and have not fully considered the particularity of directors' liability in China, which attaches equal importance to internal responsibility as well as external civil and administrative responsibility (Article 193 of the Securities Law). Even did not notice that our company law does not exist to the damage of the company part of the system basis. Of course, for independent directors, being the subject of information disclosure liability and being claimed by investors is also their main professional liability risk. Therefore, it is necessary to sum up the practical experience of the Guiding Opinions on Independent Directors and set up independent director liability insurance as a separate insurance. In addition, in common director's liability insurance, the policyholder and the insured have extensive notification obligations to the insurer. In the case of major changes of insured companies, mergers or divisions, changes in shareholders, securities issuance and transactions, and other matters, the insurance company has strict obligations to notify and submit transaction-related materials, which makes the insurance company have a direct influence on corporate governance.

In order to give full play to the normative function of directors' liability insurance, we should realize the localization of insurance contract terms on the basis of learning from the experience and lessons of America and Germany. Among them, the most core is the scope of the insurance company's exemption clause. Although the present shareholder representative litigation is not smooth in our country, the strengthening of directors' internal responsibility is the only way to strengthen corporate self-discipline and perfect corporate governance. We believe that the negligent

violation of the articles of association should be appropriately included in the coverage, and the damage caused by the administrative penalty such as "fine" or "other punitive compensation" should be included in the compensation scope of the director's liability insurance contract. To sum up, directors' liability insurance exists as a system to limit or exempt directors' liability. As a form of Regulatory Strategy, directors' obligation rule [According to the different modes of action, comparative corporate law scholars divide the legislative mode to reduce the agency cost between shareholders and management into two types: "regulatory mode" and "governance mode". The former constrains the agent's behavior directly in the form of mandatory norms. The latter is to solve the agency problem by giving the principal control; Its actual function depends on the effectiveness of the corresponding implementation mechanism (such as judicial organs, administrative supervision departments). For example, the popularity of director's liability insurance in US law is largely due to the shareholder representative litigation system and the financial incentives that class actions provide to (small) shareholders and their lawyers. On the contrary, the role of shareholder representative action in German law is very limited, but dominated by the supervisory board of the company against the board members or the current board of directors against the former board members for breach of duty action damages. Therefore, the development of directors' liability insurance system needs the systematization of directors' liability entity rules and procedural enforcement rules.

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