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A Case Study of Subject Identification and Immunity in the Pre-Litigation Procedure of Shareholder Representative in China

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Abstract

Whether the pre-litigation procedure of shareholder representative is effective is one of the important issues about the functioning of shareholder representative litigation. In judicial practice in China, the identification of the subject of shareholder representative and the necessity of the pre-litigation procedure are the most common and controversial points. In this paper we will analyze the subject identification and the exemption situation in the pre-litigation procedure of shareholder representative from the perspective of interpretation and legislative theory, based on the cases obtained from sources such as China Judgments Online and Jufa.com. Through the empirical analysis of the above two aspects, it is found that there are problems and loopholes in the connection between legal texts and judicial practice, and finally suggestions are proposed to improve the pre-litigation procedure of shareholder representative, in order to improve the adaptability of the legal text specification of the shareholder representative litigation system and the review of judicial practice.

Keywords: shareholder litigation procedure, pre-procedure, subject identification, exception exemption

1. Introduction

Shareholder representative litigation refers to a litigation system in which shareholders sue in their own name and the compensation obtained is attributed to the company when the legitimate rights and interests of the company are illegally infringed upon, but the company is negligent in pursuing responsibilities through litigation. However, in the case study of judicial practice, we found that there are structural defects and procedural loopholes in the shareholder representative litigation system. In the middle, there may be procedural normative issues such as vague scope of defendants, unclear neutrality of accepting organs, and lack of written notification obligations. All of this will be explained below. First, we start with the structural defects of shareholder representative litigation.

1.1 Structural Defects of Shareholder Representative Litigation

As a "just umbrella company" for the interests of shareholders, the shareholder representative litigation system was first introduced into Chinese law when the Company Law of the People's Republic of China was revised in 2005. Shareholder representative litigation, as a special institutional design, has a prominent feature in that it gives small and medium shareholders the right to sue the company's operators and control shareholders on behalf of the company through statutory means, so that the company's operation is restrained by small and medium shareholders, which is of great significance for establishing a good corporate governance structure. However, it is worth noting that this system pushes shareholders to the opposite of controlling shareholders, company operators and even companies, creating an inherent structural conflict in the institutional structure. Specifically, the right to sue controlling shareholders and company operators should originally belong to the company, but they actually have the control of the company. Therefore, the shareholder who brings a lawsuit on behalf of the company sues the controlling shareholder or the operator who controls the company. This litigation structure makes the shareholder and the company, as well as the controlling shareholder, operator and other subjects, in a state of obvious opposition in appearance, which affects the shareholder representative. The legal basis of the lawsuit may also raise questions and concerns about the function of shareholder representative litigation.

1.2 Characteristics of the Pre-procedure for Shareholder Representative Litigation

Shareholder representative litigation pre-procedure means that relevant requests should be made to the board of directors, board of supervisors and other institutions before prosecution. There is a board of supervisors, and after

the board of directors receives the request, there is no representation or refusal to sue for the shareholder's request. Only when there are statutory circumstances, shareholders can file a lawsuit. In the institutional design of shareholder representative litigation, the setting of pre-procedures is of great significance for resolving the structural conflicts mentioned above. On the one hand, from the perspective of the attributes of the system, the right to file a lawsuit on behalf of shareholders should belong to the category of common benefit rights, both representative and subrogation. Among them, the representativeness of shareholder representative lawsuits means that from the perspective of group law, shareholders, as members of a group, when the interests of the company are damaged but cannot be sued, shareholders should investigate the responsibility of the perpetrators on behalf of all shareholders, thereby protecting the interests of the company. The so-called subrogation of shareholder representative litigation is mainly from the perspective of company organs. It is believed that shareholders, as the organs of the company, should file a lawsuit when the company cannot file a lawsuit, so as to protect the interests of the company.

2. Analysis of the Subject in the Pre-Litigation Procedure

The implementation of various legal systems in procedural law is premised on the eligibility of the parties. The same is true for shareholder representative litigation procedures. When the shareholder representative exercises the right to sue in his own name and the compensation obtained is attributed to the company, the court first examines whether the subject is qualified.

2.1 Disputes over Shareholder Qualification Determination

Theoretically speaking, when the company suffers damage, if the company does not exercise its powers in accordance with the regulations, the shareholders can exercise their own supervisory rights, and can hold the directors and other management personnel who improperly exercise their rights accountable for the purpose of protecting the interests of the company. In the process of shareholder representative litigation, the subject exercising rights must be the company's shareholders. At this time, the defendant parties often defend that the plaintiff does not have the identity of a shareholder. The following is a selection of some court verdicts to comment on the court's reasoning for this part.

A. Dispute over the Right to be Informed between the Appellant Fushun Yumin Trading Co., Ltd. and the Appellee Meng Xiangfu and Other Shareholders

The defendant company claimed that the five appellants were only minority shareholders of the company, with a small shareholding ratio and no formal appearance of identity. At the same time, according to the company's articles of association, "minority shareholders do not have the shareholder's right to know." Therefore, the court of first instance held that the appellants were not shareholders of the company. 2Nd-round Moderation The court held that the shareholders registered on the register of shareholders are shareholders who have the right to be informed the shareholders, and the Supreme People's Court's Provisions on Several Issues Concerning the Application of the Company Law of the People's Republic of China (4) (hereinafter referred to as Interpretation 4) stipulates that this right is an identity right, which is an inherent right, and the articles of association of the company cannot be substantially deprived of it. Therefore, it adopts the formal appearance doctrine to confirm its identity and determine that the subject of the appellant is qualified.

B. Dispute over the Right to be Informed of Appellant Ninghai County Road Transport Co., Ltd. and Appellant Guan Huijuan Shareholders

The defendant company believed that although the plaintiff was a shareholder registered in the industrial and commercial registration, he was not elected as the representative of the invested employees. Due to the large number of companies, the unelected employees did not participate in the actual operation and management of the company. The court of first instance reviewed it according to the form., finding that it has the shareholder's right to know that it meets the subject eligibility requirements. After trial, the 2nd-round Moderation Court held that this case is an internal dispute between the shareholder and the company. Whether a shareholder has shareholder qualifications should be reviewed in combination with the company's actual operation and management and the internal resolutions made. It should be comprehensively considered and determined that it does not have shareholder qualifications and can only support the inspection rights during the period when it is a shareholder.

C. The Appellant Xi'an Dongrun Property Management Co., Ltd. and the Appellant Wang Qinsheng Shareholders' Right to be Informed Dispute Case

The defendant company believed that the plaintiff's capital contribution was suspected of being forged, and it had reported the case, and at the same time cancelled its identity through the resolution of the shareholders' meeting. The court held that: First, formally, the plaintiff was a shareholder in the company's register of shareholders and

industrial and commercial registration records, and second, the evidence submitted by the company could only prove that the public security organs had accepted it, and could not prove that it had committed a criminal act. Even if there was a criminal act, it would not affect its shareholder identity. At the same time, the shareholder's capital verification report also showed that it had made a full capital contribution, so whether it was a formal examination or a substantive official examination, it could be determined that it had shareholder status.

By analyzing the above three cases, it can be found that the dispute over shareholder identity mainly includes three types of review methods in the actual judicial application process. First, some courts adopt the current commercial appearance doctrine and pass the formal review of shareholder identity. According to the evidence submitted by both parties, as long as the shareholder register, articles of association or the industrial and commercial registration are recorded. Second, the court found that although it has a formal appearance, it has substantially lost its identity and no longer holds equity because the company has not changed the information in time. If it is still identified as a shareholder, it will infringe the rights and interests of the company. Third, the court determined that the identity of shareholders should be comprehensive, not only to review the appearance of the form, but also to conduct a substantive trial on whether they contributed capital, and to verify the defense reasons of the defendant company, so as to determine the identity of shareholders. This paper believes that the above three types of rights and interests protected in different ways. The first focuses on protecting the interests of shareholders, as long as the registration records are sufficient. The second focuses on protecting the interests of the company. Even if the company does not timely update shareholder information, it cannot punish the company and make a judgment against the company. The third is to balance the interests of the company and shareholders, and at the same time review the formal and substantive elements of shareholder identity, so as to make a determination on a fairer basis, so that the interests of both parties can be guaranteed.

2.2 Disputes over the Expansion of Shareholder Qualifications

Due to the complexity of commercial activities, that is, it is not simply based on whether they contribute capital or whether they have registered for the record to identify shareholder representatives, there are also shareholders and third parties who sign a proxy holding agreement, fail to pay capital in the process of company establishment, or have no shareholder status for other reasons. Such information can be reflected in the defense reasons of the defendant company in the court verdict. At the same time, because there are different theories on such issues in the academic circles, by analyzing the court verdict, this paper selects some cases to illustrate the judicial practice. Judgment thinking of judges, including the following five categories.

2.2.1 Former Shareholders

During the case search process, it was found that most of the shareholders who initiated the shareholder representative proceedings were investors who were holding equity, but there were still some shareholders who no longer held equity for other reasons, but they met the "Interpretation IV" that they were not shareholders at the time of prosecution. Exceptions. Select the case of the dispute over the right to be informed of the shareholders of the appellant Yi Ziqiang and the appellant Yichun Tengda Real Estate Co., Ltd.0. For analysis, the defendant company in this case claimed that the equity held by Yi Ziqiang has been ruled in other cases to be executed in the name of the buyer company, and the industrial and commercial registration has been synchronized. The plaintiff shareholder believed that his rights and interests had been infringed during the shareholding period. The court of first instance held that according to the provisions of Article 7 of Interpretation 4, if there was preliminary evidence to prove that his rights had been infringed during the shareholding period during the prosecution, he could also file a case for trial to protect his rights. Even if the preliminary evidence submitted was wrong, the 2nd-round Moderation court agreed.

2.2.2 Dormant Shareholders

In commercial activities, there are often dormant shareholders due to various reasons such as financing, agency, and risk avoidance. Therefore, dormant shareholders are also more common in shareholder representative lawsuits. This article selects two cases for further explanation.

A. Dispute over the Right to be informed of the Appellant Yimen Yezhifeng Mining Co., Ltd. and the Appellant Yang Wansheng Shareholders

Because Yang Wansheng was not a shareholder recorded in the industrial and commercial register, the two parties sued the court because of whether the capital contribution was a loan or an investment. In the end, the Supreme Court ruled that Yang Wansheng was a dormant shareholder of the company, whose shares were held on behalf of another shareholder of the company. The court of first instance found out that Yang Wansheng wanted to become a prominent shareholder, but the other shareholders did not agree. The court of first instance finally

determined that it had the identity of a shareholder. The 2nd-round Moderation court passed the shareholder's participation in the company's operation and management, whether the anonymous identity could be recognized by other shareholders of the company, and whether becoming an obvious shareholder would destroy the stability and agreement between shareholders. Factors such as nature, believe that the "Company Law" requires shareholders to register for the record, but it does not make it clear that those who are not registered are not shareholders of the company; at the same time, after exhausting all the remedies that can be converted into obvious shareholders, it still fails to become obvious shareholders, and it can be determined that they have substantial identity.

B. The Appellant Mr Zhang's Dispute over the Shareholder's Right to be informed with the Appellant Fujixian Guangjin Hesha Co., Ltd., and the Third Person in the Original Trial, Huang Moumou

The defendant company believed that Mr Zhang was a dormant shareholder, and his father was the actual investor. During the trial, both parties recognized this. The first instance determined that the shareholder was a shareholder according to the requirements of formal appearance. The 2nd-round Moderation court held that although both parties recognized the act of holding shares on behalf of the parties, the court held that the apparent shareholder of the shares on behalf of the dormant shareholder exercised his rights on behalf of the dormant shareholder, and it was also one of the ways to protect the rights of the dormant shareholder. Therefore, the nominal shareholder of the shares on behalf of the nominee shareholder is the qualified shareholder.

From these two cases, it can be seen that in practice, whether the dormant shareholder of proxy shares can exercise the rights of shareholders, one is because it is an actual investor. The Company Law stipulates that shareholders should be registered and recorded, and does not deny that unregistered dormant shareholders are not shareholders. Second, if a dormant shareholder wants to exercise the rights of a shareholder, it should be exercised on behalf of an obvious shareholder, otherwise it must first become an obvious shareholder. This paper believes that the above two situations are consistent with the theory, and its essence is to affirm that the dormant shareholder is the actual shareholder of the company, so the defendant company uses the reason that it is obvious that the shareholder is a proxy shareholder. The defense is invalid. The court prefers the registered obvious shareholders to call-over on their behalf. In a few cases, it can be seen from these two cases: in practice, whether the dormant shareholders of proxy shares can exercise the rights of shareholders, one is because they are actual investors. The Company Law stipulates that shareholders should be registered and recorded, and does not deny that unregistered dormant shareholders are not shareholders. Third, if dormant shareholders want to exercise shareholder rights, they should exercise them on their behalf through obvious shareholders, otherwise they must first become obvious shareholders. This paper argues that the above two situations are consistent with the theory. The essence is to affirm that the dormant shareholder is the actual shareholder of the company. Therefore, the defendant company defends on the grounds that it is obvious that the shareholder is a proxy shareholder, which is invalid. The court prefers the registered obvious shareholder to be a call-over. A few cases, such as Supreme Court Minzai No. 218 (2016), failed to claim rights as a dormant shareholder after exhausting the method of becoming an explicit shareholder. It should be supported. Therefore, regarding the protection of the exercise of rights by dormant shareholders, in judicial application, it is not a "one-size-fits-all" denial of shareholder qualifications, but a trial to find out the facts of the case, maximize the protection of shareholders' rights, and balance the interests of shareholders and the company.

2.2.3 Defective Shareholders of Capital Contribution

Regarding the issue of whether shareholders who have not contributed capital, have not contributed capital in full, or have withdrawn capital should restrict their shareholders' right to know in the identification, after reading the court verdict, it was found that this issue was not restricted in the process of judicial application. Typical cases such as the dispute between the appellant Wuxi Construction Machinery Factory and the appellee Xue Changfei, Lin Nanfa, Chen Haoxing, and Yu Yongliang shareholders' right to know. In this case, the court of first instance held that although the defendant company claimed that the plaintiff did not contribute capital and did not participate in the daily operation and management of the company, it was a shareholder who was recorded and had a formal appearance. If it believed that its investment was defective, it should be claimed in another case.

Considering the reasons for the problematic restrictions on shareholders' capital contribution in the "Company Law", it is because the company, as an independent legal person, when encouraging shareholders to invest in the market, bears the responsibility externally as the company's legal person, not for shareholders to bear the responsibility. When the shareholder's capital contribution is false or defective, limit the rights it enjoys, and bear joint and several liability to the outside world within the scope of its uninvested capital. At the same time, it restricts property rights. This is based on the protection of the company's development and the protection of third

parties dealing with it., which is conducive to building a harmonious and benign market economy. However, disputes over shareholders' right to know occur within companies, so capital contribution only determines whether shareholders can fully enjoy shareholders' rights, and should not be used to resist the exercise of the right to be informed.

2.2.4 Successor Shareholders

Sorting out the relevant cases of the sample relay shareholder, it was found that the judge's determination of this issue was the same. For example, in the case of a dispute over the right to be informed between the appellant Jiangyin Zhengbang Management Co., Ltd. and the appellant Liu Linhai shareholder, the defendant company claimed that Liu Linhai was the transferee of the original shareholder's equity. The original shareholder signed a letter of commitment with the company during the shareholding period, so Liu Linhai, as a successor shareholder, should also limit his rights. The court of first instance held that the letter of commitment substantially restricted the rights of shareholders, and did not support its defense. The 2nd-round Moderation court held that the successor shareholder did not make a promise to give up the right to be informed when joining the company, even if the original shareholder promised to give up the right to be informed, not to mention that the original shareholder's promise did not give up the right to be informed.

This paper believes that the newly added shareholders' right to know should be based on the moment they transfer and acquire equity, and they will enjoy their own right to know, and will not be attached to the transfer method and the restrictions on the original shareholders. The transfer method is only different. For example, the equity transfer issue in this case, the succession and transfer issue in the 2nd-round Moderation civil case of the dispute between Shanghai Yadong Wood Industry Co., Ltd. and Pan Jian's female shareholder's right to know. As long as the act of transferring equity is legitimate and legal, its basic rights should not be substantially deprived, and the time and scope of the exercise of the rights of the successor shareholders should be guaranteed according to the type of company and the scope stipulated by the law.

2.2.5 The Impact of Shareholding Status on Shareholder Identity

A. Dispute over the right to be informed between the appellant Changsha Integrated Real Estate Co., Ltd. and the appellant Wang Jinzhang and Ye Wende shareholders

It is understood that Wang Jinzhang's equity was frozen by the People's Court of Quanzhou City, Fujian Province. The freezing period began on June 1, 2017 and ended on May 31, 2020. Therefore, the defendant company claimed that its equity freezing period could not exercise its right to know. The first-instance and 2nd-round Moderation courts stated in the adjudication case that the shareholder's equity freezing does not affect his shareholder identity.

B. Dispute over the Right to be Informed of Shareholders of Appellant Guangdong Yiteda Technology Development Co., Ltd. and Appellant Liao Bingbing and Defendant Lao Xiaoyu in the Original Trial

In this case, Liao Bingbing transferred Lao Xiaoyu's equity without paying the corresponding consideration, and the payment was in the process of enforcement in another case. The court of first instance held that the shareholder registered in the transfer had the appearance of rights and was a qualified shareholder in this case, so it supported his exercise of the right to be informed the stock market. The 2nd-round Moderation court held that according to the principle of good faith and the existing evidence could not prove that he had the ability to enforce the transfer payment, and the judgment was revised to believe that it should be restricted and not support him as a shareholder of the company.

The above two cases are selected to illustrate the two judicial thinking on the determination of shareholder identity in the state of enforcement, auction, freezing, and seizure of equity in judicial application. This paper argues that under normal circumstances, the state of shareholder auction and freezing does not automatically disqualify shareholders, so it cannot deny their relevant shareholder rights. Judging from the results of reviewing the judgment, the vast majority of courts believe that the exercise of shareholders' right to know is not necessarily related to the status of their equity. However, it should not be determined in a "one-size-fits-all" manner, and can be comprehensively considered in combination with the actual situation between the company and shareholders and various aspects of evidence.

3. Analysis of Exemptions in Pre-procedures

After determining the eligibility of the subject, whether the shareholder representative litigation pre-procedure is a necessary element is also a common point of dispute in judicial trials. The pre-procedure for shareholder representative litigation is set up because the shareholder representative litigation is the right of action of the company exercised by the subrogation of shareholders, and the will of the company should be respected first, and it is also to avoid gratuitous lawsuits that affect the normal operation of the company. However, the pre-procedure

is not absolute. If it is stuck to this, it may give the other party the opportunity to conceal evidence, transfer property, or cause irreparable damage to the interests of the company. Therefore, the exemption from the pre-procedure for shareholder representative litigation should be allowed under certain circumstances. Exemption from the pre-litigation procedure for shareholders' representatives under certain circumstances. Paragraph 2 of Article 151 of the Company Law stipulates that "if the situation is urgent and failure to file a lawsuit immediately will cause irreparable damage to the interests of the company, the shareholders stipulated in the preceding paragraph have the right to file a lawsuit directly with the people's court in their own name for the interests of the company." Article 25 of the Jiumin meeting notes stipulates: "According to the provisions of Article 151 of the Company Law, one of the pre-procedures for shareholders to file a representative lawsuit is that shareholders must first request the relevant organs of the company to file a lawsuit in the people's court. Under normal circumstances, if the shareholder fails to perform the pre-procedure, the lawsuit should be dismissed. However, this pre-procedure is aimed at the general situation of corporate governance, that is, when the shareholder submits a written application to the relevant company authorities, there is a possibility that the relevant company authorities will file a lawsuit. If the relevant facts found show that such a possibility does not exist at all, the people's court shall not reject the lawsuit on the grounds that the plaintiff has not performed the pre-procedure. "

The substantive rights protected by shareholder representative litigation belong to the company. However, the legislation of various countries and regions in the world requires shareholders to first file a lawsuit against the perpetrator in the name of the company with the company's board of directors or supervisors (committees) before suing. There are certain differences on the issue that shareholders can file a shareholder representative lawsuit in court. In British judicial practice, there is no need for shareholders to perform pre-procedures when the defendant is all the current directors of the company. The United States not only stipulates the pre-procedure of the shareholder's written application obligation, but also specifies that the object of performance is the special litigation committee (composed of board members who have no interest in the infringement). The plaintiff shareholder should strictly want the organization to perform the pre-procedure. Japanese pre-procedures also stipulate the obligation to perform a written application to the company, but there are certain differences: Japanese law accepts shareholder applicants as company supervisors. This shows that Japanese company law attaches great importance to the status of supervisors, trying to strengthen the status of company supervisors to further respect the company's independence and autonomy, and avoid the goal of abusive lawsuits. However, Japanese scholar professor Masaki Kitazawa believes that Japan's full power to judge whether a company can sue cannot actually hinder the effect of shareholder representative lawsuits, nor can it prevent abuse of lawsuits.

In Article 151 of the Company Law of the People's Republic of China, from the literal understanding of the provisions of this article, the "pre-procedure" is only an explanatory and guiding provision that the court has when accepting a case, based on the consideration of rationalizing the internal governance of the company and strengthening the sense of responsibility of the company's decision-making organs. It is not a mandatory normative procedure. It also stipulates an exception for "emergency", that is, if it believes that "not immediately filing a lawsuit will cause irreparable damage to the interests of the company," the court should directly accept the shareholder. The representative lawsuit is not bound by the "pre-procedure". The meaning of this "explanatory" and "guiding" regulation is to guide shareholders to maintain effective communication with the company, and to urge shareholders to form a consistent interest identification with the company's decision-making body as much as possible when safeguarding the company's interests, so as to avoid differences. When regulating the relationship between directors, senior managers and debtors and the company, the company is required to proceed from its own independent personality and interests to safeguard its legitimate rights and interests, so as to achieve the goal of maximizing the protection of shareholders' interests.

3.1 General Information on the Pre-procedures for Shareholder Litigation Proceedings

Paragraphs 1 and 2 of Article 151 of The Company Law in China clearly stipulate the pre-procedure in shareholder representative lawsuits. According to this article, if a shareholder wants to file a shareholder representative lawsuit against a director or senior manager, as a principle, he must first submit a written request to the board of supervisors (or a supervisor without a board of supervisors) requesting the company to sue the directors and senior managers. If a shareholder wants to file a shareholder representative lawsuit against a supervisor, he must first file a request in writing with the board of directors (or an executive director without a board of directors) requesting the company to sue the supervisor. Shareholders can file a representative action only if the company rejects the plaintiff shareholder's request, or if there is no response after 30 days.

3.2 Exceptional Exemptions from Shareholder Pre-litigation Procedures

Shareholders who file a subrogation lawsuit should generally perform the pre-procedure, but in some cases, shareholders who file a subrogation lawsuit may not need to perform the pre-procedure. Shareholders have the right to file a lawsuit directly with the people's court in their own name for the benefit of the company, mainly including the following Circumstances: (a) The situation is urgent and failure to file a lawsuit immediately will cause irreparable damage to the interests of the company; (b) Objectively, there is no possibility of performing the pre-procedure. Among them, in practice, "objectively there is no possibility of performing the pre-procedure" mainly includes directors and supervisors as co-defendants; directors and supervisors are at the mercy of the defendant; supervisors or boards of directors are not registered; additional claims in lawsuits do not need to re-perform the pre-procedure, etc. Below, the analysis of exceptional exemptions in the pre-procedure of shareholder representative litigation is demonstrated one by one.

3.2.1 The Situation Is Urgent and Failure to File a Lawsuit Immediately Will Cause Irreparable Damage to the Company's Interests

According to the provisions of Article 151, paragraph 2, the "comma" in the middle of the situation is urgent and the failure to file a lawsuit immediately will cause irreparable damage to the company's interests means that the situation is urgent and does not necessarily have to meet the requirements of "Failure to file a lawsuit immediately will cause irreparable damage to the company's interests" is an emergency. Moreover, in combination with the provisions of Paragraphs 1 and 2 of Article 151 of the Company Law, "emergency" means that from the perspective of conditions, the company's internal organs have also lost or cannot take the initiative to file a lawsuit on behalf of the company; from the perspective of time, shareholders are no longer allowed to file a lawsuit on behalf of the company through the company's internal organs in writing; from the perspective of the results, the company's existing interests are about to be damaged or are being damaged, which can be considered "emergency". For example, Article 10 of the "Guidelines for the Trial of Shareholder Representative Proceedings by the Intermediate People's Court of Shenzhen Municipality" stipulates that if a shareholder directly files a lawsuit with the people's court on the grounds that Article 151, paragraph 2, of the Company Law "the situation is urgent and failure to file a lawsuit immediately will cause the company's interests to suffer irreparable damage", the people's court shall determine whether the reasons are valid based on the following factors: (1) The infringement against the company is in progress, and the pre-existing internal remedy procedure will result in irreparable damage to the company. result; (2) waiting for a reply will expire the period of the company's rights; (3) the infringer is transferring the company's property or the company's property may be lost (4) Other situations where waiting for a reply may cause the company's losses to expand or be irreparable.

However, from the perspective of judicial adjudication cases in practice, it is extremely difficult for shareholders to prove that "the situation is urgent" from the perspective of proof. The following can be seen through two cases. The court's reasons for adopting the emergency situation.

A. Guangxi Jinwuyue Energy Group Co., Ltd. Contract Dispute Retrial Review and Trial Supervision Civil Case

Regarding whether the shareholder representative in the case of Jinwuyue Company filing a shareholder representative lawsuit in this case meets the statutory conditions, the Supreme Court held that: According to the facts found in this case, Yuan Jianwei issued an "authorization engagement letter" to Ding Haishun on December 23, 2016; Ding Haishun obtained the official seal of the material reserve company on December 27, 2016; on January 18, 2017, Ding Haishun held the official seal of the material reserve company and signed the "Debt Transfer Contract" with the material group company; April 8, 2017 Today, the material group company initiated arbitration according to the contract and claimed the creditor's rights transferred by Xinyue Coal Company according to the "Debt Assignment Contract". This court believes that the above situation should belong to the "urgent situation and failure to file a lawsuit immediately will cause irreparable damage to the interests of the company" stipulated in the above-mentioned provisions of the Company Law of the People's Republic of China. As a shareholder of the material reserve company, Jinwuyue Company has the right to file a lawsuit in this case in its own name for the benefit of the material reserve company.

B. The 2nd-round Moderation Civil Case of the Dispute between Anhui Chiyu Instrument and Cable Group Co., Ltd. and Jiangsu Jinniu Cable Technology Development Co., Ltd. over Installment Sales Contract

In this case, the court held that although the capital base of Chiyu Company came from Surun trust funds, the registered company shareholder form it took was a natural person shareholder. Accordingly, the court of first instance determined that Bao Xiaoming, Jin Fuhu, and Tao Xudong brought the lawsuit in this case as a shareholder representative. The lawsuit and found that it met the circumstances of urgency. In this regard, this court believes that the following facts in this case are in line with the provisions of the Company Law on shareholder

representative litigation and the urgency of the situation, that is, the plaintiff's claim is to confirm that Chiyu Company and Surun Investment Company signed on November 5, 2012. The equity transfer contract for the transfer of the equity of Guodian Company held by Surun Investment Company is invalid. Combined with the claims of the investors of Surun Trust Fund reflected in point (2) above, that is, the majority of employees of Skylight Company, so even from the perspective of company law, it is urgent for the acting shareholders Bao Xiaoming, Jin Fuhu, and Tao Xudong to file a lawsuit in this case, which is in line with the "Chinese People's The Company Law of the Republic stipulates that "shareholders have the right to file a lawsuit directly with the people's court in their own name for the benefit of the company."

It can be seen that if there is no full certainty in judicial practice, it is not recommended that shareholders directly file a lawsuit on behalf of the company in their own name. This kind of thinking is risky. It is recommended to take the second best course to see if not filing a lawsuit immediately will make the company's interests suffer. In the case of irreparable damage, of course, the safest thing is to follow the general procedures. It is more appropriate to request the company's internal organs to file a lawsuit on behalf of the company in writing. Of course, if there is evidence that the company's internal organs have completely failed, a shareholder representative lawsuit can also be directly filed., without the need to be restrained by the pre-procedure.

3.2.2 Objectively, There Is no Possibility of Performing the Pre-procedure

- Directors and Supervisors as Co-defendants

As co-defendants, board members and supervisors cannot represent both the defendant and the company, so it is no longer necessary to perform the pre-procedure. In order to protect the interests of the company in a timely manner, the performance of the pre-procedure should be exempted. In the dispute over liability for damages to the interests of the company between Li, Mr Zhou and Mr Liu, the court held that the three directors of ZTE were the plaintiff and the defendant respectively, and one of the defendants also served as the supervisor of ZTE. Objectively, ZTE's supervisors and other board members other than the plaintiff are all defendants in this case. They have a conflict of interest with the company and cannot represent both their own interests and the interests of the company. Therefore, in this case, in order to protect the interests of the company in a timely manner, the plaintiff should be exempted from the obligation to perform the pre-procedure.

- Directors and supervisors are at the disposal of the defendant.

If other shareholders other than directors, supervisors, and senior executives infringe on the interests of the company, and the executive directors and supervisors of the company are objectively unable to exercise their powers independently under the control of the shareholder, they may directly file a shareholder subrogation lawsuit without the need to perform the pre-procedure. If the executive directors and supervisors of the company are appointed by the defendant shareholder, they converge with the interests of the defendant shareholder, and do not have independence, they are objectively unable to exercise their powers independently. Therefore, insisting on performing the pre-procedure is not conducive to the exercise of shareholders' litigation rights. It is also not conducive to the protection of the company's interests. If there is no need to perform the pre-procedure, a subrogation lawsuit can be directly filed. Reference cases can be seen in Jiangxi energy group company, Fujian Shuanglin Agricultural Development Co., Ltd. 2nd-round Moderation civil case of dispute over liability for damage to company interests, Du Jiake, Luo Sheng and Shanghai Chengjia Industrial Development Co., Ltd. and Huizhong and Xi'an Guangyuan Real Estate Co., Ltd. damage to the company's interests 2nd-round Moderation civil case.

- Unregistered Supervisor or Board of Directors

If there is no clearly registered supervisor or board of supervisors in the industrial and commercial registration, the pre-procedure for filing a subrogation lawsuit against the board of directors cannot be completed objectively. Supreme Court Gazette Case Yang Yongxing, Li Quan and other civil 2nd-round Moderation civil case for disputes over liability for damages to the interests of the company, the court held that Hunan Hanye Company did not have a supervisor and board of supervisors registered for industry and commerce. Although Zhou Moumou claimed that Zhou Moumou was a supervisor of Hunan Hanye Company, Hunan Hanye Company clearly denied that Zhou Moumou was a company supervisor, and this fact has been rejected by the effective civil judgment of the people's court in another case. The evidence submitted in Zhou Moumou's 2nd-round Moderation is not enough to deny the determination of the effective civil judgment in another case from the above facts, it cannot be proved that Hunan Hanye Company has established a board of supervisors or supervisors. The pre-procedures for Zhou Moumou to file a shareholder representative lawsuit against the company's directors Li Moumou and Peng Moumou cannot be objectively completed, so there is no need to perform the pre-procedures. At present, the

registration of industrial and commercial information still needs to be filled in with clear directors or executive directors or supervisors. Such situations rarely occur in reality.

- There is no need to re-perform the pre-procedure for adding claims in the lawsuit.

During the litigation process, there is a situation where the pre-procedure needs to be re-performed, and the re-performance of the pre-procedure will still have the same result as before, so there is no need to perform the pre-procedure again. In the process of case trial, if there are situations such as increasing claims and the need to perform the pre-procedure again, even if the pre-procedure is re-performed, the company's executive director or supervisor will still not file a lawsuit, which is no different from the current litigation effect. There is no need to increase the cumbersome procedures and cause unnecessary litigation. Therefore, there is no need to perform the pre-procedure again. Otherwise, it will be inconsistent with the legislative purpose of the Company Law to protect the rights and interests of companies. Typical cases can be seen in Lin Sunzhong, Xi'an Saige Trading Co., Ltd. 2nd-round Moderation Civil Case of Liability Dispute for Damage to Company Interests.

To sum up, when a shareholder files a subrogation lawsuit, it generally needs to perform the pre-procedure. However, in some special circumstances, if it is no longer meaningful to perform the pre-procedure, the pre-procedure may no longer be performed, and the shareholder may directly file a lawsuit with the people's court.

4. The Loopholes and Deficiencies in the Pre-litigation Procedure System of Shareholder Representative Litigation

Judging from the existing judicial and legal precedents, the court tends to lighten the review of the pre-procedure for exempting shareholders. For example, in some cases, such as Sino-foreign joint ventures and wholly foreign-owned enterprises, as mentioned above, since there is no board of supervisors, shareholders can file a lawsuit without going through the pre-procedure of filing a written application with the board of supervisors. In addition, in the liquidation stage of the company, the company's powers are specifically exercised by the liquidation team, and there is no need to file a written application with the board of supervisors. For example, the 2nd-round Moderation civil case of Li Lu, Zhou Yufeng and Liu Guizhi's dispute over liability for damages to the interests of the company is a typical case. However, in the process of case study and reading the court verdict, it is not difficult to find that there are also major loopholes in the pre-litigation system of shareholder representatives. Mainly include the following points.

4.1 Lack of Norms on Written Requests from Shareholders

According to Article 151 of the Company Law of the People's Republic of China, before filing a representative lawsuit, shareholders should, in principle, request the company's board of directors or board of supervisors to file a corresponding lawsuit in "written form". In addition, there is no more regulation on "shareholders' requests" in the pre-litigation procedures for shareholders' representative litigation in the "Company Law". Therefore, due to the specific operation of "shareholders' requests", such as "shareholders' requests as written documents, what specific content should be included" and other issues are not clear in the "Company Law". Therefore, from the perspective of the design of the legal system, it is still necessary to regulate the "written request of shareholders" in more detail.

4.2 Problems Existing in the Institutional Arrangements of the Requesting Authority

According to Article 151 of the Company Law of the People's Republic of China, in a shareholder representative lawsuit, when the defendant's object is a director or senior management, the shareholder's "request for prosecution" shall be submitted to the board of supervisors. On the contrary, when the defendant's object is a supervisor, the shareholder's "request for prosecution" shall be submitted to the board of directors. In this structural arrangement, there are the following problems.

First, with regard to the institutional arrangements of the requesting authority, Chinese regulations on the scope of defendants in shareholder representative lawsuits are quite broad and vague. In addition to directors, senior managers, and supervisors, "others" are also included. At the same time, it should also be pointed out that among the current examples of shareholder representative lawsuits in China, the number of cases that are called "others" accounts for a considerable proportion. According to Article 151 (3) of the Company Law, the scope of defendants in shareholder representative lawsuits includes "others" who harm the interests of the company. As for whether the scope of "others" includes all third parties that damage the interests of the company, should there be more explicit restrictions? This is not clearly stipulated in the "Company Law", and there are disputes in academia. Some scholars advocate that "others" should be restricted accordingly from the purpose of the norm. There are also scholars who advocate that "others" should be restricted from the perspective of responsibility. However, if the "other person" has already assumed the corresponding legal liability through other means, in order to avoid the

"other person" bearing excessive legal compensation liability, it should be excluded from the scope of the defendant. This paper argues that the scope of "others" should not be restricted. The main reason is that according to the actual situation of shareholder representative litigation in China, it is far from the level of worrying about overflow. At least the current direction of improvement of representative litigation should not be to restrict "others"., but should consider efforts to promote the realization of the function of representative litigation. At least the current direction of improvement of representative litigation should not be to restrict "others", but should consider efforts to promote the realization of the function of representative litigation. However, in the system design of pre-procedure, when the defendant is "others", who should the shareholder's "request for prosecution" be made to? The Company Law is not clear.

Second, the requesting authority should be neutral. Only if the requesting authority meets the neutrality requirements and can reasonably arrange the company authority that accepts the shareholder's request, can it effectively decide whether to sue according to the best interests of the company. This will form a more powerful restraint on the company's operators, which is conducive to giving full play to the important role that shareholder representative litigation plays in improving the corporate governance structure. One is to restore the company's interests, and the other is to supervise the company's operators. In Chinese pre-litigation procedures for shareholder representatives, according to the different defendants, the accepting authority for accepting "shareholder requests" is the board of directors or the board of supervisors. How to ensure the neutrality of the "corporate organ that accepts the request of shareholders" is another question worth considering.

Finally, in the system design of the pre-procedure for shareholder representative litigation in China, should the company (whether the board of directors or the board of supervisors) reply to the shareholder's claim after receiving the shareholder's request? There is no clear regulation on this issue in the Company Law. Also because there is no mandatory requirement in the "Company Law", it is the best choice for the company not to reply to the shareholder's request. In fact, the question of whether the company should reply to the shareholder's request is by no means a simple procedural issue, it affects the function of the entire pre-procedure, and may even affect the realization of the function of the shareholder's representative lawsuit.

As for the above issue, due to the lack of clear provisions in the Company Law, if the plaintiff shareholder can predict before making a request that the company will not respond to their request or can only provide a very simple response that does not meet their expectations, then the shareholder may not invest more energy in making written requests to the company (of course, the Company Law does not provide detailed regulations on written requests from shareholders). As a result, the fulfillment of the preliminary procedure may become a mere formality to satisfy legal requirements. Such a mechanism obviously has a significant impact on the effectiveness of the preliminary procedure system.

5. Related Recommendations

To sum up, it can be seen that the problem of subject identification and immunity in the pre-litigation procedure of shareholder representative litigation needs to be improved from the two dimensions of legislative theory and interpretation theory. This paper points out that the specific suggestions include the following points.

5.1 Further Explanation of the Scope of the Defendant

In judicial practice, the common lawsuits of shareholder representative lawsuits mainly include company directors and senior managers violating their obligations of loyalty and diligence to the company, embezzling company assets, seizing company business opportunities, unfair related-party transactions, and neglecting to claim rights from third parties. Controlling shareholders' participation in unfair related-party transactions damages the company's interests, other shareholders withdraw their capital contributions or fail to pay their capital contributions as agreed. Article 151 of the Company Law of the People's Republic of China stipulates that shareholders may, under statutory circumstances, request in writing the board of supervisors or the supervisors of a limited liability company without a board of supervisors to file a lawsuit with the people's court. Although the obligation of shareholders to request in writing is regulated to some extent, as mentioned above, the current company law still has a certain boundary ambiguity about the scope of the defendant, which needs to be further explained. Based on the analysis, this paper suggests that the current legislation should focus on further explaining the scope of the defendant. Although there is no need to limit the situation that the defendant is "other" in the practical case of the company's shareholder representative litigation, when the defendant is "other", the legal provisions on who the legislature should file the shareholder's litigation claims should be further explained in detail.

5.2 Institutional Normative Arrangements for Further Accepting Institutions

Since other members of the board of directors may have more interests implicated or even private feelings with

the directors or controlling shareholders who are the defendants, it is difficult for the board of directors to act as the requesting authority of shareholders to decide on behalf of the company whether to file a lawsuit. It is expected that the decision of the board of directors will be completely neutral. In this case, the supervisory board with fewer interests is obviously more neutral than the board of directors, so it is more likely to make a reply representing the true meaning of the company. In addition, as a statutory supervisory body in Chinese corporate governance, the basic function of the supervisory board is to supervise the company's operation and management behavior. Therefore, it seems more reasonable to use the board of supervisors as the organ that accepts shareholders' requests, but since the board of supervisors is a meeting body, in order to avoid confusion in the application of the system caused by unclear powers and responsibilities, the chairperson of the board of supervisors should be regarded as the statutory organ that accepts shareholders' requests. Although the final decision still requires a resolution of the board of supervisors, this will effectively push the board of supervisors to exercise the decision.

5.3 Further Standardizing the Obligation of Receiving Agencies to Notify in Writing

In the pre-procedure of shareholder representative litigation in China, the company should be clearly required to fulfill the obligation of notification. The normative measures and standards for the notification obligation of the accepting agency are mainly reflected in the process and content. In terms of process, first, when the board of supervisors or the board of directors rejects the shareholder's request for litigation, a statement of reasons for not suing should be prepared. Secondly, the content of the non-prosecution statement should include the company's investigation and the reasons for the company's decision not to prosecute. The record establishment of the non-prosecution statement, no matter how long it is, should be sufficient to explain the above two points. In addition, the company is clearly required to produce a statement of reasons for non-prosecution, and the content of the statement of reasons for non-prosecution should also be regulated, such as a clear record of the proportion of shareholders' approval and opposition to the decision of non-prosecution; whether shareholders are aware of the content of the written notification from the accepting agency, or It is through the formulation of shareholders' articles of association to clarify the specific application of shareholder representative litigation. The above suggestions may make it easier and clearer for shareholders who receive a statement of non-prosecution reasons to understand the company's decision, which is obviously positive for the trial of shareholder representative litigation.

6. Conclusion

As one of the important systems of the Company Law of the People's Republic of China, although the pre-procedure is clearly stipulated in the design of the shareholder representative litigation system, this paper analyzes the two most critical aspects: the subject identification and the exemption of the pre-procedure, and finds that the current Chinese civil procedure law There are still normative issues such as vague scope of defendants, neutrality of accepting organs, and lack of written notification obligations. This not only brings obstacles to the specific implementation of the pre-procedure, but also leads to the fact that the pre-procedure system may be a mere formality, making it difficult to exert the corresponding institutional functions, but also affects the realization of the functions of the shareholder representative litigation system. Therefore, the article puts forward three suggestions to deal with the problems pointed out above at the end, from the three aspects of improving and explaining the scope of the defendant, the institutional normative arrangement of the accepting agency, and the written consideration of the accepting agency, from the procedure to the entity's pre-procedure system for shareholder representative litigation. It is expected to activate the pre-procedure system and further promote the shareholder representative litigation system to play the role of supervising company operators, standardizing and controlling shareholder behavior, and establishing a good corporate governance structure.

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It states that "I promise that I will not participate in the operation and management of Zhengbang Company, and Zhou Jianhui will be solely responsible for the operation and management. Due to limited economic conditions, I cannot participate in the company's capital increase and share expansion. The original share principal will remain unchanged. No matter how big the company develops in the future, how big the share principal is, and I will not participate in the gain of the share principal. As long as the company exists, regardless of losses and profits, I will only receive 10,000 yuan in dividends every year. As a shareholder, I am obliged to cooperate with the company's decision-making but do not bear any risks of the company. Hereby promise."

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