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Research on the Determination of the Validity of Equity Division in Divorce under Valuation Adjustment Mechanism Agreements

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Abstract. Valuation Adjustment Mechanism (VAM) agreements are widely used in China's capital market. In the current domestic capital market, it is quite common for spouses to contribute marital joint property to invest in limited liability companies, while only one spouse signs the VAM agreement. When a couple gets divorced, a series of tough issues crossing family law and commercial law have emerged: whether equity attached with VAM agreements can be divided, how to conduct such division, and whether the non-shareholding spouse shall bear the obligations under the VAM agreement. This paper focuses on the validity of equity division in the scenario of litigated divorce where only one spouse holds company equity and the other is not registered as a shareholder. It first reviews the current normative systems of family law and commercial law, and then discusses the validity determination under two division modes, namely direct equity division and equity division by discount compensation respectively. Under the direct division mode, the non-shareholding spouse shall not be bound by the VAM agreement in principle. Meanwhile, restrictive clauses that are not included in the company's articles of association cannot oppose the spouse's acquisition of shareholder qualification. Under the discount compensation mode, the order of claim repayment depends on whether the debts arising from the VAM agreement are recognized as marital joint debts. If such debts are personal debts, the survival-related claims of the non-shareholding spouse shall be granted priority protection.

Keywords: Divorce Equity Division, Valuation Adjustment Mechanism (VAM) Agreements, Marital Joint Property, Equity Transfer

1. Introduction

In recent years, VAM agreements have been widely applied in China's capital market. In practice, many spouses invest their marital joint property in limited liability companies, with only one party acting as the signatory of the VAM agreement. Upon divorce, questions including whether equity attached with VAM agreements is divisible, how to divide such equity, and whether the non-shareholding spouse needs to assume VAM obligations have become difficult problems involving the intersection of family law and commercial law. However, relevant legal norms still have

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ambiguities and gaps. Academic researches on divorce equity division mostly focus on the legal nature of jointly-owned marital equity, division methods and the protection of other shareholders' interests [1]. Researches on VAM agreements mainly concentrate on their validity and performance [2]. Few academic papers combine the above two fields to systematically discuss the validity determination of dividing equity with attached VAM agreements in divorce proceedings. Taking the division validity of equity in limited liability companies with VAM agreements as the research object, this paper targets the situation where one spouse holds equity and the other is not a registered shareholder in litigated divorce cases. It firstly sorts out the current legal norms and points out their deficiencies, then analyzes practical dilemmas under direct equity division and discount compensation division modes, and finally puts forward suggestions on rule reconstruction.

2. Normative investigation on the validity determination of divorce equity division under VAM agreements

This section first sorts out the division approaches stipulated in *Judicial Interpretation (I) on the Marriage and Family Part of the Civil Code* based on the property right nature of equity.

First of all, equity has the attribute of property right and can be identified as marital joint property in the internal relationship between spouses. Article 125 of the *Civil Code* lists equity as an independent right enjoyed by civil subjects, side by side with real right, creditor's right and intellectual property right, which proves that equity possesses the nature of property right. Neither the *Company Law* nor its supporting judicial interpretations specify whether equity can be jointly owned and how to realize joint ownership. Article 1062 of the *Civil Code* does not explicitly list equity as marital joint property, and only stipulates that "income from investment" belongs to marital joint property. Then whether equity falls into the category of "income from investment"? Some scholars hold that investment income can be divided into realized income and unrealized income. Realized income such as annual dividends distributed to shareholders, remaining assets allocated after company liquidation and equity transfer proceeds are all marital joint property, while unrealized asset income is still incorporated into equity [3]. The author agrees with this viewpoint: when spouses make investment with marital joint property, equity is the alternative form of the invested property. The appreciation of equity value also comes from joint investment, so the joint ownership nature of equity shall not be denied merely for the reason that profits have not been distributed. Furthermore, Article 72 of *Judicial Interpretation (I) on the Marriage and Family Part of the Civil Code* further confirms that equity can be divided as marital joint property: "Where the husband and wife divide negotiable securities such as stocks and bonds, investment fund shares and shares of unlisted joint-stock limited companies among their joint property, if they fail to reach an agreement or it is difficult to conduct distribution according to market price, the people's court may make distribution proportionally by quantity." To sum up, equity has the attribute of property right and is an object of rights within the scope of marital joint property.

Secondly, current judicial interpretations prescribe two ways for equity division in divorce: direct division and division by discount compensation. Article 73 of *Judicial Interpretation (I) on the Marriage and Family Part of the Civil Code* stipulates: "Where a people's court hears a divorce case involving the division of capital contributions made by one spouse in a limited liability company with the joint property of the husband and wife, and the other spouse is not a shareholder of the company, the case shall be handled respectively in accordance with the following circumstances: (1) If both spouses unanimously agree to transfer part or all of the capital contributions to the shareholder's spouse, more than half of the other shareholders consent to the transfer and all other shareholders clearly waive the preemptive right, the shareholder's spouse may become a shareholder

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of the company; (2) If both spouses reach a consensus on matters such as the transferred share of capital contributions and the transfer price, while more than half of the other shareholders disagree with the transfer but are willing to purchase the capital contributions under the same conditions, the people's court may divide the proceeds obtained from the transfer of capital contributions....."

While recognizing the property attribute of equity and protecting the joint rights and interests of the non-shareholding spouse, Article 73 balances the personality-based nature of limited liability companies by setting the consent right and preemptive right of other shareholders. Nevertheless, this provision only regulates ordinary equity and does not cover equity attached with VAM obligations. Once equity is burdened with VAM obligations, current laws and regulations fail to clarify whether the equity obtained by the non-shareholding spouse is complete equity or equity attached with VAM obligations. Such normative blank creates room for the discussion of this paper.

3. Validity determination of direct equity division

In divorce litigation, when dividing the capital contributions made by one spouse in a limited liability company with marital joint property and the other spouse is not a company shareholder, two solutions including direct division and division by discount compensation are available on the premise of mutual consent of both spouses in accordance with Article 73 of *Judicial Interpretation (I) on the Marriage and Family Part of the Civil Code*. Under the direct equity division mode, the non-shareholding spouse may obtain shareholder qualification. At this time, it needs to be discussed whether the VAM agreement attached to equity is binding on the new shareholder and whether restrictive clauses in the agreement constitute obstacles for the spouse to acquire equity. This section sorts out divergent judicial opinions in current judicial practice and carries out further discussion.

3.1. Review of existing judicial opinions on the succession of rights and obligations under VAM agreements in equity transfer

Judicial courts hold obviously different attitudes on whether the rights and obligations under VAM agreements are transferred along with equity transfer in judicial practice. One viewpoint is the Succession Theory, which holds that if the equity transferee has full knowledge of the VAM agreement and generally succeeds to the original shareholder's rights and obligations, the transferee shall assume the repurchase obligation [4]. The other viewpoint is the Non-succession Theory, which argues that the equity transferee is not a party to the agreement. In accordance with the principle of privity of contract, the transferee shall not automatically bear VAM obligations without his consent or ratification [5].

The above judicial divergences indicate that it has not been settled whether the binding force of VAM agreements is automatically transferred along with equity circulation in pure commercial transactions. Accordingly, it is worthy of discussion whether the non-shareholding spouse shall be bound by the VAM agreement after obtaining equity when equity is transferred due to changes in personal status in divorce equity division cases. Different from equity transferees in commercial transactions, the non-shareholding spouse in divorce scenarios usually does not participate in the negotiation and signing of VAM agreements. The basis for the spouse to obtain equity is the joint ownership of property under family law, rather than the transaction consensus under commercial law. Whether such difference leads to different conclusions on validity determination will be analyzed from two aspects below: the binding force of VAM agreements on the non-shareholding spouse after equity acquisition, and the opposing effect of restrictive clauses on equity transfer stipulated in the agreement.

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3.2. Determination of the binding force of VAM agreements on the non-shareholding spouse after acquiring equity

The *Minutes of the National Court Work Conference on Civil and Commercial Trials* stipulates that courts shall apply both the Contract Law and the Company Law when hearing disputes over VAM agreements. This rule clarifies the contractual nature of VAM agreements: they belong to innominate contracts which are not explicitly regulated by the *Civil Code*, and shall be governed by the General Provisions of the Contract Part. Paragraph 2 of Article 465 of the General Provisions of the Contract Part of the *Civil Code* prescribes: "A legally established contract is binding only on the parties thereto, unless otherwise provided by law." This means that as a kind of contract, a VAM agreement only binds its signatories. Without the consent of a third party, the agreement cannot impose obligations on the third party, and the third party has no obligation to take the responsibilities stipulated in the agreement on his own initiative. In practice, the signatories of VAM agreements are mainly divided into three categories: first, the investor and the shareholders or actual controllers of the target company; second, the investor and the target company; third, the investor, the target company, and the shareholders (or actual controllers) of the target company sign the agreement together. If the signatory is a natural person, the scope of parties can be directly determined according to the signatories. What needs to be discussed is whether the original non-shareholding spouse is a third party to the VAM agreement and thus exempted from relevant obligations when the target company acts as one party to the agreement.

From the perspective of internal marital relationship, as mentioned above, equity has the attribute of property right and can be recognized as marital joint property. Based on the fact of joint investment, both spouses enjoy the joint ownership of property rights and interests attached to equity. However, such joint ownership only exists internally between spouses and cannot oppose external commercial subjects. In light of the commercial appearance doctrine, the *Company Law* stipulates that shareholder status is determined by records in the shareholder register and industrial and commercial registration. Moreover, current Chinese laws do not recognize the registration mode of jointly-owned equity. For this reason, equity acquired through joint investment by spouses is usually registered under the name of only one spouse in practice. In view of the above facts, the original non-shareholding spouse is not a party to the VAM agreement from the perspective of commercial appearance. As a capital transaction agreement in the commercial field, the signing and performance of VAM agreements mainly follow the commercial appearance doctrine, whose core purposes are to safeguard transaction security and efficiency and protect the investor's reasonable reliance on commercial appearance. Therefore, the non-shareholding spouse shall be deemed as a third party to the VAM agreement. In accordance with the principle of privity of contract, a third party shall not be arbitrarily imposed with obligations or held liable for compensation, repurchase and other liabilities stipulated in the VAM agreement, unless the third party clearly expresses the intention to assume VAM obligations or joins the VAM agreement.

3.3. Validity determination of restrictive clauses on equity transfer in VAM agreements

Even if the non-shareholding spouse is not automatically bound by VAM obligations in principle, creditors often add restrictive clauses on equity transfer into VAM agreements to protect their interests in practice. A typical clause is as follows: "During the VAM period stipulated in this agreement, Party B shall not directly or indirectly transfer, gift, pledge, create any encumbrance or dispose of any equity of the target company held by Party B without the written consent of Party A." Such restrictive clauses on equity transfer aim to protect the interests of investors, stabilize the

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equity structure and corporate control of the company, and prevent shareholders from cashing out and leaving so as to avoid failure to perform VAM obligations. It is necessary to discuss whether investors can claim breach of the VAM agreement based on such clauses under the background of direct equity division in divorce. Essentially, these restrictive clauses limit the procedures for external equity transfer and grant investors the right of consent over equity transfer. Both the *Company Law* and *Judicial Interpretation (I) on the Marriage and Family Part of the Civil Code* have provisions on the procedures for equity transfer, resulting in overlapping provisions. The priority of application of relevant laws shall be clarified first as the foundation for further research.

3.3.1. Priority application when the Company Law conflicts with the Judicial Interpretation (I) on the marriage and family part of the Civil Code

Both the *Company Law* and *Judicial Interpretation (I) on the Marriage and Family Part of the Civil Code* contain provisions on the procedures for external equity transfer of limited liability companies, so it is essential to clarify which law shall be applied preferentially when provisions overlap. Article 84 of the revised 2023 *Company Law* on external equity transfer of limited liability companies deletes the requirement that "the transfer shall be consented to by more than half of the other shareholders". In contrast, Article 73 of *Judicial Interpretation (I) on the Marriage and Family Part of the Civil Code* stipulates that the non-shareholding spouse can obtain equity only when more than half of the other shareholders consent to the transfer and clearly waive the preemptive right. From the perspective of legal hierarchy, the *Company Law* is a law enacted by the Standing Committee of the National People's Congress, while *Judicial Interpretation (I) on the Marriage and Family Part of the Civil Code* is a judicial interpretation issued by the Supreme People's Court. Laws have higher legal force than judicial interpretations. Therefore, when conflicts arise over the requirement of "consent from more than half of the other shareholders", Article 84 of the *Company Law* shall be applied preferentially.

3.3.2. Discussion on the nature of the right of consent for equity transfer

It is necessary to clarify whether the right of consent for equity transfer is a creditor's right based on contracts or a shareholder's right derived from the shareholder's identity. Although the revised new *Company Law* has removed provisions on the right of consent for equity transfer, Paragraph 2 of Article 71 of the 2018 version of the *Company Law* (now invalid) stipulates: "Where a shareholder intends to transfer his equity to a person other than the company's shareholders, the transfer shall be consented to by more than half of the other shareholders." The legislative basis for this rule is as follows. First, limited liability companies are closed organizations featuring the personality-based nature among internal shareholders. Accordingly, restrictions can be imposed on external transferees entering the company through equity transfer; otherwise, external personnel will enter the company along with equity circulation. Second, the close bond between shareholders of limited liability companies leads to a carefully designed allocation of equity proportion, equity structure and corporate power. The system of shareholder's right of consent for external equity transfer is formulated in consideration of the characteristics of limited liability companies. Third, based on the principle of party autonomy in private law, the internal governance structure of limited liability companies is established to protect the interests of shareholders and the company, ensure that equity changes conform to the fundamental interests of the company and all shareholders, and prevent structural changes caused by equity transfer [6]. The legal right of other shareholders to consent to external equity transfer is exclusively enjoyed by shareholders based on their shareholder identity,

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which proves that this right is a type of shareholder's right attached to shareholder status. Shareholder's rights can be divided into self-benefiting rights and common-benefiting rights according to their purposes of exercise. Self-benefiting rights are exercised by shareholders for personal interests, while common-benefiting rights enable shareholders to participate in internal corporate governance. The requirement that external equity transfer must obtain consent from more than half of the other shareholders aims to maintain the personality-based nature of limited liability companies, stabilize the equity structure and protect the interests of the company and all shareholders, so it falls into the category of common-benefiting rights among shareholder's rights. To sum up, the investor's claimed right of consent for equity transfer is a shareholder's right based on shareholder identity.

3.3.3. The investor's claim to the right of consent for equity transfer shall be based on the company's articles of association

Shareholder's rights are established on the basis of the *Company Law* and the company's articles of association. Any shareholder's right not stipulated by law can only be effectively protected by law if it is included in the articles of association [7]. Agreements between the company and its shareholders cannot create new shareholder's rights, and may only stipulate detailed rules for the realization and protection of existing rights [8]. Paragraph 2 of Article 84 of the *Company Law* prescribes the preemptive right of shareholders in external equity transfer, while the proviso of Paragraph 3 reserves room for autonomy of the company's articles of association: "If the company's articles of association have separate provisions on equity transfer, such provisions shall prevail." Since the right of consent for equity transfer has no legal basis in the *Company Law*, and VAM agreements cannot create shareholder's rights attached to shareholder identity, whether an investor can claim the right of consent for equity transfer depends on whether the contents of the VAM agreement are incorporated into the company's articles of association. If the right of consent for equity transfer is only stipulated in the VAM agreement, the investor cannot claim breach of contract on the ground that the other party transfers equity without consent. The reason is that special shareholder's rights can only be created by the *Company Law* and the company's articles of association, and VAM agreements, as contractual creditor's rights instruments, have no power to set up such shareholder's rights for investors. On the contrary, if the relevant clauses on the right of consent for equity transfer are incorporated into the company's articles of association, such clauses will be converted into valid shareholder's rights, and the investor may claim breach of contract for equity disposal without prior consent.

4. Validity determination of equity division by discount compensation

In practice, the personality-based nature of limited liability companies often makes direct equity division unachievable. When other shareholders exercise the preemptive right, the to-be-divided equity will be converted into discount compensation funds for division in accordance with Article 73 of *Judicial Interpretation (I) on the Marriage and Family Part of the Civil Code*. Under such circumstances, the property claims arising from marital status and the equity repurchase claims of investors under VAM agreements may conflict with each other. It needs to be clarified which type of claim shall be repaid preferentially. This section first sorts out existing judicial positions, then defines the subjects of creditor's rights and liabilities under the discount compensation mode, and finally determines the order of claim repayment combined with the nature of VAM-related debts.

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4.1. Existing judicial opinions on conflicts between claims arising from personal relationship and ordinary monetary claims

Judicial courts hold inconsistent attitudes when handling conflicts between claims formed by divorce property division and monetary claims of external creditors. One judicial position prioritizes the protection of property claims arising from personal relationship. Courts holding this view believe that rights obtained under divorce agreements involve the overall arrangement of marital and family relations, which enjoy priority over ordinary monetary claims. The other position gives priority to the protection of external creditors. If the divorce equity disposal is recognized as an act intended to evade debts maliciously, the court will rule to revoke the equity disposal clauses in the divorce agreement [9].

When dealing with conflicts involving ordinary monetary claims, courts have taken the fairness and reasonableness of property division consideration and the existence of malicious debt evasion through divorce into consideration. Similarly, cases under the context of VAM agreements shall be discussed separately. The subjects of creditor's rights and liabilities under the discount compensation mode shall be defined first, and further analysis shall be conducted combined with the nature of VAM-related debts.

4.2. Definition of subjects of creditor's rights and liabilities under the mode of equity division by discount compensation

Due to the core characteristic of personality-based nature of limited liability companies, in most divorce equity division disputes, more than half of the company's other shareholders refuse to allow the non-shareholding spouse to become a registered shareholder through equity transfer for the sake of maintaining stable company operation and closed equity structure. Under such circumstances, other shareholders may purchase the marital joint equity held by one spouse to be divided under equivalent transaction conditions. In accordance with Article 73 of *Judicial Interpretation (I) on the Marriage and Family Part of the Civil Code*, people's courts will no longer conduct direct equity transfer and division, but divide the equity transfer proceeds obtained from the transaction to settle the disposal of marital joint property between the divorced spouses.

From the perspective of external commercial legal relationship, such equity circulation is essentially an internal equity transfer among shareholders of the limited liability company. The non-shareholding spouse has no shareholder qualification and is not a participant in this commercial equity transfer act. In this legal relationship, the parties with rights and obligations are the other company shareholders exercising the preemptive right and the shareholding spouse in the divorce case. From the perspective of internal family legal relationship, the equity transfer proceeds originate from marital joint property. The shareholding spouse is obligated to pay the corresponding share of equity discount compensation to the non-shareholding spouse. To conclude, the parties with rights and obligations are the two divorced spouses. The non-shareholding spouse, as a legitimate creditor entitled to equity discount compensation, has the right to claim corresponding compensation in accordance with divorce property division rules, while the shareholding spouse shall perform the payment obligation of discount compensation in accordance with the law.

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4.3. Rules for the order of claim repayment when the equity repurchase obligation under VAM agreements arises

VAM agreements generally stipulate that when repurchase conditions are triggered, the investor has the right to request the target company, its shareholders or actual controllers to repurchase the agreed equity from the investor. The repurchase right stipulated in VAM agreements is not a right of formation, but a claim right of creditor's rights [10]. If the repurchase conditions of the VAM agreement attached to the equity are triggered during the process of divorce equity division by discount compensation, the shareholding spouse will bear both the commercial equity repurchase debt under the VAM agreement and the equity discount compensation debt arising from divorce. It is necessary to decide which debt shall be repaid first by judging whether the VAM-related repurchase debt is recognized as marital joint debt.

4.3.1. Criteria for determining marital joint debts arising from VAM agreements

The following criteria shall be adopted to determine marital joint debts arising from VAM repurchase transactions in judicial practice. First, in the absence of joint signature of both spouses or subsequent ratification by the non-borrowing spouse, a debt can be recognized as marital joint debt only if it is incurred for the couple's common life or joint production and operation. Second, courts shall focus on examining whether the non-borrowing spouse obtains direct benefits or expected benefits from the investment. Third, the distribution of burden of proof shall follow the principle of judging whether the debt falls within the scope of household affairs [11].

4.3.2. Vam-related debts recognized as personal debts of the shareholding spouse

If the equity discount compensation involved in the case is the only core source of income for the non-shareholding spouse to maintain basic living needs and guarantee survival, such compensation constitutes a survival-related claim. The author holds that the right to survival is the foundation of all other rights and prevails over ordinary property rights. Therefore, survival-related claims are a type of priority claims, whose holders have the right to receive repayment prior to other creditors from the debtor's property [12].

If the equity discount compensation involved is only an ordinary consideration for marital property division and does not have the exclusive attribute of guaranteeing the non-shareholding spouse's basic survival, the repayment shall be conducted in accordance with the provisions on the order of debt offset and repayment stipulated in Article 560 of the *Civil Code*.

4.3.3. Vam-related debts recognized as marital joint debts

Article 1089 of the *Civil Code* stipulates that marital joint debts shall be repaid jointly upon divorce. If the VAM-related debts are recognized as marital joint debts, marital joint property shall be used to repay such joint debts preferentially. After all joint debts are fully repaid, the remaining property, if any, shall be divided between the spouses.

5. Conclusion

The determination of the validity of divorce equity division under VAM agreements is essentially a collision between the normative systems of family law and commercial law. This paper draws the following conclusions through analysis:

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First, equity attached with VAM agreements has the attribute of property right and belongs to marital joint property, so the non-shareholding spouse has the right to claim division of such equity. Second, under the direct equity division mode, the non-shareholding spouse shall not be bound by the VAM agreement in principle in accordance with the principle of privity of contract. Restrictive clauses not included in the company's articles of association cannot oppose the spouse's acquisition of shareholder qualification. Third, under the equity division mode by discount compensation, the order of repayment between discount compensation claims and VAM-related debts depends on whether the VAM-related debts are marital joint debts. If the VAM-related debts are personal debts of the shareholding spouse, the survival-related claims of the non-shareholding spouse shall be protected with priority.

This paper still has deficiencies. Firstly, this paper only discusses the scenarios where both spouses reach a consensus as stipulated in *Judicial Interpretation (I) on the Marriage and Family Part of the Civil Code*, and does not involve adjudication rules and interest measurement when the court makes a ruling directly if the two spouses fail to reach an agreement. Secondly, the discussion on the order of repayment under discount compensation is mainly based on the analysis of substantive law provisions, while procedural issues in enforcement procedures such as equity value appraisal are not fully discussed. Thirdly, there are various types of VAM agreements, which are not discussed separately in this paper, so the universality of the conclusions needs further verification.

In the future, the intersection between the capital market and the field of marriage and family will become increasingly close, and disputes over the division of equity attached with VAM agreements will become more prominent. Further efforts can be made to strengthen the connection between family law and commercial law. For example, revise *Judicial Interpretation (I) on the Marriage and Family Part of the Civil Code* to make it consistent with the new *Company Law*, or issue guiding cases to unify judicial criteria for determining the validity of divorce equity division under VAM agreements and bridge the divergent positions between family trials and commercial trials.

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