

学校编码: 10384

分类号\_\_\_\_\_密级\_\_\_\_\_

学号: K0508002

UDC\_\_\_\_\_

厦门大学

硕士学位论文

公司非破产清算法律问题研究

On the Legal Issues about Corporation

Non-bankruptcy Liquidation

陈菲

指导教师姓名: 夏雅丽 教授

专业名称: 民商法学

论文提交日期: 2010 年 3 月

论文答辩时间: 2010 年 月

学位授予日期: 2010 年 月

答辩委员会主席: \_\_\_\_\_

评阅人: \_\_\_\_\_

公司非破产清算法律问题研究

陈菲

指导教师 夏雅丽 教授

厦门大学

厦门大学博硕士学位论文摘要库

2010年3月

厦门大学博硕士学位论文摘要库

## 厦门大学学位论文原创性声明

本人呈交的学位论文是本人在导师指导下,独立完成的研究成果。本人在论文写作中参考其他个人或集体已经发表的研究成果,均在文中以适当方式明确标明,并符合法律规范和《厦门大学研究生学术活动规范(试行)》。

另外,该学位论文为( )课题(组)的研究成果,获得( )课题(组)经费或实验室的资助,在( )实验室完成。(请在以上括号内填写课题或课题组负责人或实验室名称,未有此项声明内容的,可以不作特别声明。)

声明人(签名):

年 月 日

## 厦门大学学位论文著作权使用声明

本人同意厦门大学根据《中华人民共和国学位条例暂行实施办法》等规定保留和使用此学位论文，并向主管部门或其指定机构送交学位论文（包括纸质版和电子版），允许学位论文进入厦门大学图书馆及其数据库被查阅、借阅。本人同意厦门大学将学位论文加入全国博士、硕士学位论文共建单位数据库进行检索，将学位论文的标题和摘要汇编出版，采用影印、缩印或者其它方式合理复制学位论文。

本学位论文属于：

1. 经厦门大学保密委员会审查核定的保密学位论文，  
于 年 月 日解密，解密后适用上述授权。

2. 不保密，适用上述授权。

（请在以上相应括号内打“√”或填上相应内容。保密学位论文应是已经厦门大学保密委员会审定过的学位论文，未经厦门大学保密委员会审定的学位论文均为公开学位论文。此声明栏不填写的，默认为公开学位论文，均适用上述授权。）

声明人：

年 月 日



## 内 容 摘 要

公司非破产清算制度是公司法律制度中的重要组成部分。公司非破产清算作为公司法人人格存续的最后阶段，能否使得清算活动安全有序、公平有效的进行，对于有效保护股东、债权人和利益相关人的权益，对于公司能否顺利退出市场竞争，对于维持市场经济秩序的顺畅都有着重要意义。然而遗憾的是，公司非破产清算法律制度的不足，使得我国公司在退出市场时存在混乱状况，股东、债权人和相关利益人的权益处于不确定的风险之中；另一方面，公司非破产清算导致的纠纷因为没有完善的法律规定进行指引，而成为长期困扰我国司法实践的普遍性问题。本文以公司非破产清算法律制度为研究对象，并将“公司清算”界定为公司的非破产清算。本文通过与其他国家和地区有关非破产清算的法律规定进行比较，寻求非破产清算法律制度背后的共性及其合理内核，并发掘其中对于我国公司非破产清算法律制度完善的可借鉴之处，在此基础上，针对我国实践中凸显出来的公司非破产清算问题，提出完善建议，寻求可能的解决途径。

除前言与结语外，全文共分四章：

第一章 阐述公司非破产清算的历史渊源、概念与制度价值。第二节中通过公司非破产清算概念的分析与辨析，将公司清算界定为是依据《公司法》而进行清算，将破产清算界定为依据《破产法》而进行清算，从而将公司清算做狭义解释为公司的非破产清算。同时，通过对公司清算的科学分类，明确我国公司清算只有法定清算，以及自行清算和强制清算，为下文论述做了铺垫。第三节对清算法律制度的制度价值的阐述，目的是为下文具体法律制度的设计起到一定的指导作用。

第二章 通过我国非破产清算法律制度与其他国家、地区法律制度之间进行比较研究，凸显我国的公司非破产清算法律制度不够完善的同时，也为完善公司非破产清算法律制度提供借鉴之处。

第三章 指出我国公司非破产清算法律中存在的问题，从非破产清算程序、清算人制度以及法律责任方面分析目前我国非破产清算法律制度中存在的缺

陷。

第四章 完善我国公司非破产清算法律制度的建议，这一章是全文的重点。本文主要从完善我国非破产清算程序、清算人制度、强制清算制度、法律责任和法律监督五个方面进行论述，意在引起各界对于公司非破产清算法律制度的关注。

**关键词：**公司；非破产清算；制度完善

厦门大学博硕士

## ABSTRACT

As one of the most important components of the corporate legal system and the last stage of the corporation, non-bankruptcy liquidation, whether to make liquidation affairs in order, justice and efficiency, is of great significance to protecting the interests of shareholders, creditors and other relevant people, leading companies out of the market competition smoothly and keeping the economic order in the society. However, the inadequate law system in this field inevitably witnesses a confusion when the corporation quits the market, rendering at stake the interests of the shareholders, creditors and other beneficiaries; on the other hand, it makes the dispute in liquidation a long-term prevalent problem in our judicial practice. This dissertation, treating the corporate liquidation legal system as the object of study and defining the “corporate liquidation” as non-bankruptcy liquidation, seeks for the commonness and rationality in the liquidation law system through the comparison of non-bankruptcy liquidation laws in several other countries, which will provide a reference to improving the counterpart system in our country. Suggestions will also be offered to settle afore said problems.

The dissertation is composed of four chapters including an introduction and a conclusion.

In the first chapter, the historical origin, the concept and the system value of the corporate non-bankruptcy liquidation are illustrated. In the second section, with the analysis and discrimination of the concept of corporate non-bankruptcy liquidation, corporate liquidation is defined as “the liquidation according to the company law” and bankruptcy liquidation as “the liquidation according to the bankruptcy law”, so that corporate liquidation, in the narrow sense, can be interpreted as corporate non-bankruptcy liquidation. At the same time, corporate liquidation is scientifically classified as legal liquidation, initiative liquidation and compulsory liquidation to prepare for the following expatiation. In the third section, the value of the liquidation law system is illuminated, serving as guidance to the proposition of the specific law



system in the following part.

In the second chapter, the comparison of non-bankruptcy liquidation law system between our country and other nations reflects the inadequacy of the law system in our country, and provides a reference to improving it.

The third chapter highlights the problems of the corporate non-bankruptcy liquidation law in our country, analyzing the inadequacy of our present law system in non-bankruptcy liquidation procedure, liquidator system and the legal liability.

To be taken attention by the society, the fourth chapter lies the proposition to improving the corporate non-bankruptcy liquidation law system in the non-bankruptcy liquidation procedure, liquidator system, compulsory liquidation system, legal liability and supervision in our country, which serves as the most important part in this dissertation.

**Key words:** Corporate; Non-bankruptcy liquidation; System improvement

厦门大学博硕

<b>目 录</b>	
<b>前 言</b> .....	<b>1</b>
<b>第一章 公司非破产清算概述：渊源·概念·价值</b> .....	<b>2</b>
<b>第一节 公司非破产清算的历史渊源</b> .....	<b>2</b>
一、公司非破产清算的萌芽.....	2
二、现代公司非破产清算的发展.....	2
<b>第二节 公司非破产清算的概念</b> .....	<b>3</b>
一、公司非破产清算的概念.....	3
二、公司非破产清算与相关概念的辨析.....	4
三、公司非破产清算的分类.....	6
<b>第三节 公司非破产清算的制度价值</b> .....	<b>8</b>
一、程序正义和结果公平的体现.....	9
二、利益平衡的需要.....	9
三、社会信用和交易安全的保证.....	9
<b>第二章 中外公司非破产清算制度之比较</b> .....	<b>10</b>
<b>第一节 清算程序之比较</b> .....	<b>10</b>
一、非破产清算程序相关规定之比较.....	10
二、特别清算程序相关规定之比较.....	11
三、非破产清算终结后相关规定之比较.....	13
<b>第二节 清算主体之比较</b> .....	<b>14</b>
一、清算人的选任.....	14
二、清算人的任职资格.....	15
三、清算人的解任.....	16
<b>第三节 非破产清算监督之比较</b> .....	<b>17</b>
一、债权人会议及监理人.....	17
二、法院的监督及检查人.....	18

<b>第三章 我国新《公司法》中非破产清算法律问题之评价</b> .....	<b>20</b>
<b>第一节 我国非破产清算程序存在纰漏</b> .....	<b>20</b>
一、普通清算程序中的纰漏.....	20
二、我国强制清算案件审判实践中存在问题.....	21
三、我国清算终结规定中的纰漏.....	22
四、我国非破产清算监督机制不健全.....	23
<b>第二节 我国非破产清算中清算人制度存在的问题</b> .....	<b>24</b>
一、我国各部门法对非破产清算机构的称谓规定混乱.....	24
二、我国清算人选任规定上的不足.....	25
三、我国清算人任职资格不明确.....	26
四、我国清算人解任制度的缺失.....	26
<b>第三节 我国非破产清算法律责任规定不完备</b> .....	<b>27</b>
一、非破产清算的民事责任存在纰漏.....	27
二、行政责任与刑事责任不明晰.....	28
<b>第四章 完善我国公司非破产清算法律制度之建议</b> .....	<b>30</b>
<b>第一节 完善我国非破产清算程序相关规定</b> .....	<b>30</b>
一、明确规定普通清算期限.....	30
二、规范和完善清算人通知、公告.....	30
三、确立非破产清算终结后的相关规定.....	31
<b>第二节 完善我国非破产清算中的清算人制度</b> .....	<b>32</b>
一、统一清算人称谓.....	32
二、完善清算人选任制度.....	33
三、明确清算人任职资格.....	35
四、建立清算人解任制度.....	36
<b>第三节 健全我国非破产清算的法律责任</b> .....	<b>36</b>
一、完善非破产清算的民事责任.....	37
二、增加恶意不进行清算行为的行政责任.....	37
三、增加恶意不进行清算行为的刑事责任.....	38
<b>第四节 完善我国强制清算制度</b> .....	<b>39</b>

一、扩大强制清算的申请主体范围.....	39
二、赋予法院依职权启动清算程序的权力.....	39
三、健全债权申报和财产分配的制度.....	40
<b>第五节 健全我国公司非破产清算监督制度 .....</b>	<b>41</b>
一、加大人民法院的监督权力.....	42
二、建立债权人会议制度.....	42
三、强化公司非破产清算的登记制度.....	43
<b>结 语.....</b>	<b>45</b>
<b>参考文献.....</b>	<b>46</b>

厦门大学博硕士



## CONTENTS

<b>Introduction</b> .....	<b>1</b>
<b>Chapter 1 The Summary of corporation non-bankruptcy liquidation: origin, concept and value</b> .....	<b>2</b>
<b>Subchapter 1 The historical origins of corporation non-bankruptcy liquidation</b> .....	<b>2</b>
Section 1 The rudiment of the corporate non-bankruptcy liquidation .....	2
Section 2 The development of the modern corporate non-bankruptcy liquidation .....	2
<b>Subchapter 2 The concept of corporation non-bankruptcy liquidation</b> .....	<b>3</b>
Section 1 The concept of the corporate non-bankruptcy liquidation .....	3
Section 2 The discrimination between the corporate non-bankruptcy liquidation and relevant concept .....	4
Section 3 The sorts of the corporate non-bankruptcy liquidation .....	6
<b>Subchapter 3 The system value of corporation non-bankruptcy liquidation</b> .....	<b>8</b>
Section 1 The embodiment of the procedural justice and resulting fairness .....	9
Section 2 The need of the balance of interests .....	9
Section 3 The warranty of the social credit and transaction security .....	9
<b>Chapter 2 Comparison of corporation non-bankruptcy liquidation system between china and other countries</b> .....	<b>10</b>
<b>Subchapter 1 Comparison of the non-bankruptcy liquidation procedure</b> .....	<b>10</b>
Section 1 Comparison of the relevant provisions of the non-bankruptcy liquidation procedure .....	10
Section 2 Comparison of the relevant provisions of the special liquidation Procedure .....	11
Section 3 Comparison of the relevant provisions after the non-bankruptcy liquidation .....	13
<b>Subchapter 2 Comparison of the non-bankruptcy liquidation subject</b> .....	<b>14</b>
Section 1 Election of the liquidators .....	14

Section 2	Qualification of the liquidators .....	15
Section 3	Dismissal of the liquidators .....	16
<b>Subchapter 3</b>	<b>Comparison of the non-bankruptcy liquidation supervision .....</b>	<b>17</b>
Section 1	Meeting of creditors and supervisors .....	17
Section 2	Supervision of court and Inspectors.....	18
<b>Chapter 3</b>	<b>Evaluation of the non-bankruptcy liquidation legislation in the current corporation law in our country .....</b>	<b>20</b>
<b>Subchapter 1</b>	<b>Loopholes of the non-bankruptcy liquidation system in our country.....</b>	<b>20</b>
Section 1	Loopholes of the normal liquidation procedure .....	20
Section 2	Questions of the judicial practice of the compulsory liquidation cases in our country .....	21
Section 3	Loopholes of the provisions after liquidation in our country .....	22
Section 4	Inadequate supervisory mechanism of the non-bankruptcy liquidation in our country.....	23
<b>Subchapter 2</b>	<b>Loopholes of the liquidator system in the non-bankruptcy liquidation in our country .....</b>	<b>24</b>
Section 1	The provisions of chaos with the name of the non-bankruptcy liquidation organization in the department laws in our country .....	24
Section 2	Inadequacy of the provisions in the liquidators' election in our country.....	25
Section 3	Ambiguity of the liquidators' Qualification in our country .....	26
Section 4	Shortage of the provisions to dismiss liquidators in our country.....	26
<b>Subchapter 3</b>	<b>Inadequate provisions of the legal liability in non-bankruptcy liquidation in our country .....</b>	<b>27</b>
Section 1	Loopholes of the civil liability of non-bankruptcy liquidation .....	27
Section 2	Confusion between the administrative responsibility and criminal responsibility.....	28
<b>Chapter 4</b>	<b>Proposition to improving the law system of the corporation non-bankruptcy liquidation .....</b>	<b>30</b>

<b>Subchapter 1</b>	<b>Improvement of the provisions of the non-bankruptcy liquidation procedure in our country</b> .....	<b>30</b>
Section 1	Clarification of the term of normal liquidation procedure .....	30
Section 2	Improvement of liquidator advice and pronouncement model .....	30
Section 3	Establishment of the relative rules on the closed liquidation .....	31
<b>Subchapter 2</b>	<b>Improvement of the liquidator system of non-bankruptcy liquidation in our country</b> .....	<b>32</b>
Section1	Unification of the appellation of liquidator .....	32
Section2	Improvement of the electoral system of liquidator .....	33
Section3	Clarification of the competency of liquidator .....	35
Section4	Establishment of the dismissal system of liquidator .....	36
<b>Subchapter 3</b>	<b>Improvement of legal liability of non-bankruptcy liquidation in our country</b> .....	<b>36</b>
Section1	Improvement of the civil liability of non-bankruptcy liquidation .....	37
Section2	Augmentation of the administrative liability of malicious refusal of liquidation .....	37
Section3	Augmentation of the criminal liability of malicious refusal of liquidation .....	38
<b>Subchapter4</b>	<b>Improvement of the compulsory liquidation system in our country</b> .....	<b>39</b>
Section 1	Expansion of the proposer body of the compulsory liquidation .....	39
Section 2	Authorization of the court to start liquidation procedure legally .....	39
Section 3	Improvement of the system of creditor's rights claims and property distribution .....	40
<b>Subchapter 5</b>	<b>Improvement of the supervision system of corporation non-bankruptcy liquidation in our country</b> .....	<b>41</b>
Section 1	Reinforcement of the supervision power of court .....	42
Section 2	Establishment of the liquidator conference system .....	42
Section 3	Reinforcement of the corporation liquidation registration system .....	43
<b>Conclusion</b> .....		<b>45</b>
<b>Bibliography</b> .....		<b>46</b>



Degree papers are in the "[Xiamen University Electronic Theses and Dissertations Database](#)". Full texts are available in the following ways:

1. If your library is a CALIS member libraries, please log on <http://etd.calis.edu.cn/> and submit requests online, or consult the interlibrary loan department in your library.
2. For users of non-CALIS member libraries, please mail to [etd@xmu.edu.cn](mailto:etd@xmu.edu.cn) for delivery details.

廈門大學博碩