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Abstract
So far as Asia is concerned, corporate governance is an import. The concept itself was virtually unknown in China ¬a decade ago. Yet corporate governance has now been enthusiastically embraced in China, to the point that the year 2005 was declared the Year of Corporate Governance and extensive amendments have been made to several laws and regulations with an emphasis on corporate governance. This essay will consider the effectiveness of China's corporate governance law on paper and in practice with the OECD's Principles of Corporate Governance acting as a general guide.

Keywords
corporate governance, framework, china, supervisory

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CORPORATE GOVERNANCE IN CHINA

Mabel Tsui*

So far as Asia is concerned, corporate governance is an import. The concept itself was virtually unknown in China a decade ago.[1] Yet corporate governance has now been enthusiastically embraced in China, to the point that the year 2005 was declared the Year of Corporate Governance and extensive amendments have been made to several laws and regulations with an emphasis on corporate governance. This essay will consider the effectiveness of China's corporate governance law on paper and in practice with the OECD's *Principles of Corporate Governance* acting as a general guide.

In September 2001, the China Securities Regulatory Commission (CSRC) of the People's Republic of China (PRC) investigated Ying Guang Xia, a blue chip company, after the media voiced suspicions about its profit increase from 178 million yuan in 1999, to 567 million yuan in 2000.[2] In May 2002, the CSRC reported that from 1998 to 2001, the company had 'fabricated sales receipts and disclosed false information about various production facilities that actually never existed',[3] leading investors to believe they were investing in blue chip stock, and then encouraging investors to purchase follow-up stock issuances.[4]

It was this case – known as China's Enron[5] – which highlighted the importance of corporate governance and its then failed state in China.[6] From there and throughout the next decade the concept of corporate governance moved from being a 'virtual unknown' to 'centre stage'[7] in China's economic

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* LLB (Hons), LLM.

1 Julian Roche, *Corporate Governance in Asia* (Routledge 2005) 36.

2 Li Yan, *CSCR:* 'Yinguangxia Fabricated 745M Yuan Profit' *People's Daily* (Online), (6 September 2001) <http://english.people.com.cn/200109/06/eng20010906_79497.html>.

3 Jianyu Wang, 'Dancing With Wolves: Regulation and Deregulation of Foreign Investment in China's Stock Market' (2004) 5 *Asia-Pacific Law and Policy Journal* 1, 41.

4 Christopher Zoella, 'Corporate Scandals: Global Recognition of Securities Regulation – How is China Faring?' (2009) 41 *University of Toledo Law Review* 213, 228.

5 Warren Wong, *Standard and Poor's Country Governance Study – Corporate Governance in China* (March 2009) Standard and Poor's <http://www2.standardandpoors.com/spf/pdf/equity/ChinaCorpGovjhEng.pdf>.

6 Wang, above n 3, 40.

7 James Feinerman, 'New Hope for Corporate Governance in China' (2007) 191 *The China Quarterly* 590, 593.

reform. In light of that, 2005 was named the Year of Corporate Governance[8] as significant amendments were made to the *Company Law of the People's Republic of China*[9] and the *Securities Law of the People's Republic of China*.[10] Both came into effect on 1 January 2006.

This article will examine the regulation of listed companies in China, with a focus on the supervision measures and disclosure obligations imposed on companies. Part I sets out the Organisation for Economic Co-operation and Development's (OECD) basic principles of corporate governance, revised in 2004.[11] It provides one definition of 'corporate governance' and will lay the foundation for this article's discussion of China's corporate governance framework. Part II will consider the legal framework as it currently stands with regard to those involved in the supervisory process – the board of directors, the board of supervisors and the independent director. Part III will consider the company's disclosure obligations. The remainder of the article will discuss the regulatory framework's success in light of China's economic and social conditions. This article will conclude that in theory, the system provides a corporate governance system comparable to developed nations, but a number of factors affect the system in practice.

PART I – A CORPORATE GOVERNANCE FRAMEWORK

The OECD defines corporate governance as a set of 'procedures and processes according to which an organisation is directed and controlled ... [specifying] the distribution of rights and responsibilities among different participants in the organisation ... and [laying] down the rules and procedures for decision

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8 Wong, above n 5, 1.

9 *The Company Law of the People's Republic of China* Fifth Session of the Standing Committee of the Eighth National People's Congress on 29 December 1993, revised at Tenth Session of the Tenth National People's Congress of the People's Republic of China on 27 October 2005 [State Administration for Industry and Commerce (PRC) trans, *The Company Law of the People's Republic of China* (2005) <http://wzj.saic.gov.cn/pub/ShowContent.asp?CH=ZCFG&ID=213&myRandom=.174839104>].

10 *The Securities Law of the People's Republic of China* Eighteenth Meeting of the Standing Committee of the Tenth National People's Congress on 17 October 2005 [Ministry of Commerce (PRC) trans, *The Securities Law of the People's Republic of China* (2005) <http://www.fdi.gov.cn/pub/FDI_EN/Laws/law_en_info.jsp?docid=50896>].

11 Organisation for Economic Co-operation and Development, *OECD Principles of Corporate Governance* (2004) Organisation for Economic Co-operation and Development <http://www.oecd.org/document/49/0,3343,en_2649_34813_31530865_1_1_1_37439,00.html>.

making.'[12] Participants include the board, managers, shareholders and other stakeholders.

In support of this concept, the OECD came up with six principles in 1999 (and revised them in 2004) which stated the minimum goals of a corporate governance framework and 'represent[ed] a common basis that OECD member countries consider essential for the development of good governance practices.'[13] The OECD expressly invited both member and non-member countries to utilise the principles in the improvement of their legal, institutional and regulatory frameworks for corporate governance. The six principles of a domestic corporate governance framework were to:

- promote transparent and efficient markets, while being consistent with the rule of law and a clear articulation of the responsibilities of all participants;[14]
- protect and facilitate the exercise of shareholder rights;[15]
- ensure equitable treatment of all shareholders, including minority and foreign parties and their rights and methods of redress for any violations;[16]
- recognise the rights of stakeholders and encourage co-operation between the company and the stakeholders;[17]
- ensure that accurate and timely disclosure is made in a transparent way – all material matters, including the financial situation, performance, ownership and governance of the company must be disclosed;[18] and
- ensure strategic guidance and effective monitoring of management by the board and the board's accountability to the company and its shareholders.[19]

These principles will lay the basis for this article's discussion on China's corporate governance framework, both in theory and in practice.

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12 Organisation for Economic Co-operation and Development, *Glossary of Statistical Terms* (13 July 2005) Organisation for Economic Co-operation and Development <http://stats.oecd.org/glossary/detail.asp?ID=6778>.

13 Organisation for Economic Co-operation and Development, above n 11, 11.

14 Organisation for Economic Co-operation and Development, above n 11, 17.

15 Ibid 18.

16 Ibid 20.

17 Ibid 21.

18 Ibid 22.

19 Ibid 24.

PART II – THE SUPERVISORY ROLES

The focus here will be on the three parties involved in effective monitoring of the company – the board of directors ('BOD'), the board of supervisors ('BOS') and the independent director.

The two-tier system

The *Company Law* adopted a board system comparable to that of the German system.[20] It is a two-tier control system comprised of the BOD and the BOS. Regardless of what type of company the boards are acting for,[21] the same powers and obligations apply to each.

The BOD is responsible to the shareholders' and exercises its power in various matters set out in article 47, which mainly relate to the company's financial and economic arrangements. These include determining operation and investment plans (art 47(3)); working out annual financial budget plans and final account plans (art 47(4)); and working the company's basic management system (art 47(10)).

The BOS, on the other hand, is responsible for supervising the company's affairs as well as the exercise of powers by directors and senior managers. Article 54 sets out its powers which include having the power to demand that directors and senior managers correct any actions which have injured the company's interests (art 54(3)). When managers violate any laws, administrative regulations or the company's articles of association, articles 54(6) and 152 allow the BOS to initiate lawsuits against the offenders. Article 55 BOS deals with investigative powers. Where the company is being run abnormally, they may make investigations or hire an accounting firm to assist with investigations, with expenses being born by the company. Article 151 requires directors and senior managers to provide relevant information and materials to the BOS and cannot obstruct it from exercising its powers.

Article 148 provides that both directors and supervisors must comply with laws, administrative regulations and the company's articles of association, as well as bear 'obligations of fidelity and diligence' to the company. They cannot obtain unlawful gains by taking advantage of their position or encroaching upon company property. Article 149 sets out a list of prohibited actions which would essentially translate into breaches of their fiduciary duties, including misappropriation of company funds (art 149(1)); seeking business opportunities for themselves or others through their position (art 149(5)); or disclosing company secrets without permission (art 149(7)).

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[20] Discussed in more detail in Part IV.

[21] The *Company Law* establishes two kinds of companies – Limited Liability Companies and Joint Stock Limited Companies.

If the director or supervisor violates any laws thus causing loss or injury to the company, they shall make compensation – according to article 150.

The independent director

While article 123 of the *Company Law* expressly mandates the independent director institute for listed companies, the 2001 'Guidelines for Introducing Independent Directors to the Boards of Directors for Listed Companies'[22] formally established the institution of the independent director in China and provides the relevant details of this office.

Article 1.1 of the Guidelines defines 'independent director' as one holding no other post in a company, as well as maintaining no relations with the company or its major shareholders which could prevent the independent director from making objective and independent judgments.

The term of office is the same as other directors, but cannot consecutively exceed six years.[23] The BOD, BOS and shareholders who independently or jointly hold more than 1% of shares can nominate an independent director.[24] Meanwhile, article 5.5 provides that dismissal before expiry of the term shall not occur without 'proper reason'. However, if the director fails to attend a board meeting three consecutive times, the BOD may request a replacement.

Article 1.3 requires at least one of the directors to be an accounting professional. Chapter 2 lists additional requirements including the need to have a basic knowledge of the operation of listed companies and familiarity with the legal framework;[25] and having over five years of work experience in law, economics or related fields.[26]

Chapter 3 expressly provides for circumstances where a person cannot be appointed as independent director. As well as being unable to be appointed in a situation where there is a conflict of interest (actual or potential),[27] a person cannot be appointed where they have provided professional services to the

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22 *Guidelines for Introducing Independent Directors to the Board of Directors of Listed Companies* (People's Republic of China) No 102 of 2001 [China Securities Regulatory Commission trans, *Notice on Issuing the Guidelines for Introducing Independent Directors to the Board of Directors of Listed Companies* (2001) <http://www.csrc.gov.cn/n575458/n4001948/n4002030/4064492.html>].

23 Ibid, Article 4.4.

24 Ibid, Article 4.1.

25 Ibid, Article 2.3.

26 Ibid, Article 2.4.

27 Ibid, Articles 3.1-3.4.

company or its subsidiaries;[28] been excluded by the company's articles of association;[29] or excluded by the CSRC.[30]

Article 1.2 requires the independent director to bear duties of a fiduciary nature, including 'good faith and due diligence' as well as care towards the company and shareholders. Along with protecting the company's interests, they are also especially required to protect the interests of minority shareholders and cannot be influenced by major shareholders, controllers and other interested parties.

Article 5.1 requires the independent directors to 'play an active role' and states circumstances where they have special powers, additional to their powers under other laws. However, the consent of over half of all independent directors must be obtained in order to exercise these powers.[31]

Article 6.1 provides for circumstances where the independent opinion of the director is required, including appointment and dismissals of directors[32] and senior managers;[33] loans or funds transfers which exceed RMB3 million or 5% of the company's net assets[34] and events which may be detrimental to minority shareholders.[35]

Article 7.3 expressly provides that other members of the company shall 'cooperate actively' and not reject proper requests from the independent director, nor hinder their work or conceal information.

PART III – DISCLOSURE OBLIGATIONS

Disclosure obligations of listed companies were progressively developed throughout various laws and regulations.

2002 'Code of Corporate Governance for Listed Companies' (the 'Code')[36]

Article 87 provides that disclosure is an ongoing duty where the company must 'truthfully, accurately, completely and timely' disclose information required by law, including information which may have a 'material effect on

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[28] Ibid, Article 3.5

[29] Ibid, Article 3.6

[30] Ibid, Article 3.7

[31] Ibid, Article 5.2

[32] Ibid, Article 6.1(a).

[33] Ibid, Article 6.1(b).

[34] Ibid, Article 6.1(d).

[35] Ibid, Article 6.1(e).

[36] *Code of Corporate Governance for Listed Companies* (People's Republic of China) No 1 of 2002 [China Securities Regulatory Commission trans, *Code of Corporate Governance for Listed Companies* (2002) <http://www.ecgi.org/codes/documents/code_en.pdf>].

the decisions of shareholders and stakeholders'.[37] Article 90 requires disclosure of information regarding corporate governance including independent directors, BOS and BOD structures, evaluation and performance; the state of corporate governance of the company and plans and measures designed to improve this area. Articles 92 to 94 require disclosure of matters or events which may affect the control of shares or changes in shareholdings.

The Securities Law

In a similar tone to the Code and the Measures (discussed below), the Securities Law requires ongoing, authentic and accurate disclosure.[38] Article 65 requires a listed company to provide a midterm report to the CSRC stating the financial and business situation of the company; any major litigation; particulars of any changes made to the shares or bonds issued and other matters. Article 67 requires the company to disclose a temporary report regarding a 'major event that may considerably affect the trading price' of the company shares. 'Major event' includes where a major change occurs in the business guidelines or scope of the company;[39] company's decision on a major investment or asset purchase;[40] incurrence of a major debt[41] or deficit;[42] major litigation involving the company[43] or where the company is involved in a criminal matter which has been filed and is investigated by a judicial organ.[44]

Article 193 provides where a company fails to disclose the information as required, the CSRC shall order it to correct that error, give it a warning or impose a monetary fine of between 300,000 yuan and 600,000 yuan. Persons-in-charge will be warned and fined between 30,000 yuan and 300,000 yuan.

Measures for Administrating the Information Disclosure of Listed Companies

A relatively new instrument in this area is the 2007 decree of the CSRC – *Measures for Administrating the Information Disclosure of Listed Companies* ('Measures') which apply the current statutory disclosure obligations with an aim of 'intensifying the administration of information disclosure as well as safeguarding the lawful rights and interests of investors.'[45] There is certainly an 'intensifying' element: the Measures provide in great detail *what*

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37 Ibid, Article 89.

38 Ibid, Article 63.

39 Ibid, Article 67(1).

40 Ibid, Article 67(2).

41 Ibid, Article 67(4).

42 Ibid, Article 67(5).

43 Ibid, Article 67(10).

44 Ibid, Article 67(11).

45 Ibid, Article 1.

information must be disclosed, *when* disclosure must occur and whether they are factual occurrences or potential future events. Listed companies are required to disclose information in a truthful, precise, complete and timely manner, openly and simultaneously.[46]

Article 3 obliges the directors, supervisors and senior managers to perform their duties in a faithful and diligent manner and to guarantee the authenticity, accuracy, completeness, timeliness and fairness of the information. Article 9 requires the CSRC to supervise the information disclosure documents and announcements. Chapter 3 provides for periodic reports which must disclose any information which may 'grossly affect the investors' investment decisions.'[47] Article 21 requires the *annual* periodic report to contain information including accounting and financial information;[48] appointment of directors, supervisors and senior managers and their entitlements[49] and major events occurring during the reporting period and their effect on the company.[50] Article 24 requires directors and senior managers to confirm the reports while the BOS decide whether the reports accurately reflect the current situation of the company.

In cases where a major event may grossly impact the trading price of the company's shares but is not known by investors, the company is required to disclose the information as well as explain its cause and possible legal effects.[51] There is a list of factors in determining what a 'major event' is. These include the company's decision regarding any significant investment or purchase of asset;[52] any significant deficit or loss suffered;[53] or where the company is being investigated or penalised due to a violation of law or regulation.[54] In a similar vein, article 31 requires the company to disclose information about a 'significant event' where a resolution about the event is made;[55] or there is an agreement made about the event;[56] or the directors, supervisors or senior managers report the event.[57] Where there is a risk that the event cannot be kept confidential or will be disclosed or divulged to the

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46 Ibid, Article 2.

47 Ibid, Article 19.

48 Ibid, Article 21(2).

49 Ibid, Article 21(5).

50 Ibid, Article 21(8).

51 Ibid, Article 30.

52 Ibid, Article 30(2).

53 Ibid, Article 30(5).

54 Ibid, Article 30(11).

55 Ibid, Article 31(1).

56 Ibid, Article 31(2).

57 Ibid, Article 31(3).

market or there is evidence of any abnormal dealing, then the event and its progress must be disclosed immediately.

Chapter 5 requires the company to constitute rules on managing information disclosure affairs, a topic that has not been mentioned in prior information disclosure regulations.[58] Matters include details on procedures for checking and disclosing information;[59] duties of reporting deliberation and disclosure as applicable to the BOD, BOS and senior managers;[60] measures for keeping confidential information;[61] and mechanisms concerning failure to disclose information as required and the parties who violated the laws.[62] The duties of the BOD to be diligent and duteous in preparing disclosure information[63] and the BOS's supervisory role over disclosure duties[64] are continually emphasised.

PART IV – EVALUATION OF THE FRAMEWORK

Initial observations

The framework satisfies the minimum goals for a domestic corporate governance framework as set by the OECD and arguably goes beyond them. There is in place what would appear to be an effective management and monitoring system over the company and its employees by two reliable boards. The BOS and BOD responsibilities, obligations and powers are clearly articulated by the respective laws. The importance of the independent director institution in the framework is acknowledged and appropriate qualifications and knowledge is expected of the office-holder. Disclosure obligations are addressed in a number of laws and regulations, with the common focus on disclosure of significant matters regarding the company. Shareholders, with the support of the BOS, are given express avenues to approach the judicial system where directors and senior managers act inappropriately and minority shareholders are specially protected. All these institutions are formalised by legislative reforms and act as checks and balances as against other branches of the company as well as the company overall.

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58 Grant Chen and Zhengyi Zhang, *New Disclosure Standards for PRC Listed Companies* (May 2007) LLinks < http://www.llinkslaw.com.cn/doc/New-Disclosure-Standards-for-PRC-Listed-Companies-en.pdf>.

59 *Code of Corporate Governance for Listed Companies* (People's Republic of China), above n 36, Article 37(2).

60 Ibid, Article 37(4).

61 Ibid, Article 37(6).

62 Ibid, Article 37(11).

63 Ibid, Article 38.

64 Ibid, Article 43.

However, practical factors significantly hinder the effectiveness of the system, stemming from China's history, economic and cultural conditions. These are discussed below.

Political interference by the State

In 2001, the then CSRC vice-chairperson Laura Cha acknowledged State interference when she attributed the ineffectiveness of corporate governance in China as being partly due to China's economic transition and 'partly to the entanglement of ownership rights with management responsibilities'.[65]

Listed companies in China usually have three groups of shareholders: the State, the legal persons and individual investors; however, only shares held by the latter can be traded.[66] Further, Wei also notes that the State is absolute owner of most of the second category of shareholders – the legal persons.[67] Add to this China's economic history where all companies were once state-owned enterprises and State interference becomes an unfortunate and unavoidable fact. Shen and Jia quote one study where the largest shareholding state in listed corporations averaged close to 50%, compared to the second largest shareholder who owned less than 10%.[68]

In addition to ownership woes, enforcement is adversely affected by the State. As the main enforcement agency of the State Council, the CSRC is 'susceptible to political influence, local protectionism and other forms of corruption'.[69] As the main shareholder of most companies (again, a consequence of history), the government is reluctant to enforce laws and impose punishment for fear of negatively impacting on a company's performance.[70] If all fraudulent and unlawful behaviours were publicly revealed, it could result in a stock market crash and the potential loss of a large amount of State assets,[71] as well as a

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65 Laura Cha, 'The Future of China's Capital Markets and the Role of Corporate Governance' (Speech delivered at the China Business Summit, 18 April 2001) <http://www.csrc.gov.cn/n575458/n4001948/n4002030/4064448.html>.

66 Gang Wei, 'Ownership Structure, Corporate Governance and Company Performance in China' (2007) 13(4) *Asia Pacific Business Review* 519, 520.

67 Ibid, 523.

68 Sibao Shen and Jing Jia, 'Will the Independent Director Institution Work in China?' (2005) 27 *Loyola Los Angeles International and Comparative Law Review* 223, 232.

69 Craig Anderson and Bingna Guo, 'Corporate Governance Under the New Company Law (Part 2): Shareholder Lawsuits and Enforcement (May 2006) *China Law and Practice*, 15.

70 Xiao Huang, 'Modernising the Chinese Capital Market: Old Problems and New Legal Responses' (2010) 21 *International Company and Commercial Law Review* 26, 34.

71 Noelle Trifiro, 'China's Financial Reporting Standards: Will Corporate Governance Induce Compliance in Listed Companies?' (2007) 16 *Tulane Journal of International and Comparative Law* 271, 288.

general loss of trust in security investments.[72] There is therefore a misalignment of interests – in fact, there is a direct conflict of interest between the State's position as dominant shareholder with the minority shareholder, as the former's interest lies in maintaining social stability as well as self-interest[73] while the latter is concerned about their economic welfare. This would breach the element of the third OECD principle (*equitable treatment of shareholders*) as minority shareholders should be protected from abusive actions by, or in the interest of the controlling shareholders.[74]

The realities of China's 'two-tier'

Although its powers are supervisory and independent in principle, the BOS institution in China is often criticised as having a 'symbolic rather than practical function'.[75] The two-tier system is derived from Germany, however, unlike Germany, the Chinese BOS have no powers to take action against managers. The *German Stock Corporation Act* of 2009[76] provides the BOS with powers to appoint members of the management board.[77] In cases where members are shown to have breached their duties, or were unable to manage the company or where there has been a vote of no confidence by the shareholders, the BOS has power to revoke their appointment.[78] Contrast these powers to those of the BOS in China under the *Company Law*, which effectively make the board *just* supervisory, both in name and nature. Although the BOS has investigative powers and can demand the correction of any faults, there is no mention of the consequences where the BOS discovers serious abnormalities of the company operation or where a director or senior manager refuses to cooperate or correct the wrongful act. The BOS does not have the power to dismiss or revoke the wrongdoer. Although parties are required to cooperate with the BOS when it exercises its power, it seems that only after the refusal to cooperate emerges would the wrongful acts be discovered. It is possible that the company would have suffered some extent

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72 Sonja Opper and Sylvia Schwaag-Serger, 'Institutional Analysis of Legal Change: The Case of Corporate Governance in China' (2008) 26 *Washington University Journal of Law and Policy* 245, 259.

73 Trifiro, above n 71, 286.

74 Organisation for Economic Co-operation and Development, above n 11, 20.

75 Angus Young, 'Conceptualising a Chinese Corporate Governance Framework: Tensions Between Tradition, Ideologies and Modernity' (2009) 20 *International Company and Commercial Law Review* 235, 239.

76 Obtained from *Stock Corporation Act – Translation as at 16 October 2009* (16 October 2009) Norton Rose <http://www.nortonrose.com/knowledge/publications/pdf/file25596.pdf?lang=en-gb>.

77 Ibid, Article 84(1).

78 Ibid, Article 84(3).

of injury before a correction occurs or new appointments are made. Overall, this would defeat the purpose of the board the OECD prescribes, as a Chinese BOS is unable to *effectively monitor* and 'ensure the integrity' of the corporation's accounting and financial reporting systems.[79] Also, contrary to OECD principle 1, the BOS is not provided with the *resources* to fulfil their duties in a professional and objective manner.[80]

Although legally it is a positive outcome that BOS are democratically elected by shareholders, in reality the election is dominated by management and, in cases of SOEs, supervisors and enterprise employees are subordinate to the enterprise chief.[81] Young also highlights the problem of appointing inexperienced supervisors who lack expertise so that, effectively, the BOD controls the company.[82] BOS are also generally 'incapable or unwilling' to identify and address managerial corruption.[83] Consequently, the BOS can be seen as merely rubber-stamping decisions of the BOD.[84]

The inter-dependent director

China's drive behind the independent director institution 'has been the hope that they will play the monitoring role' that the BOS has failed to fulfil.[85] This role is seen effectively as a 'protector of small shareholders against both management and dominant shareholders',[86] reflecting the spirit of its United States' origins.[87] However, one only need to refer to real-life experiences to discover that legal reform may not equate to nor guarantee social or personality reforms.

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79 Organisation for Economic Co-operation and Development, above n 11, 25.

80 Ibid, 17.

81 Donald Clarke, 'The Role of Non-Legal Institutions in Chinese Corporate Governance' in Curtis Milhapult, Kon-Sik Kim and Hideki Kanada (eds), *Transforming Corporate Governance in East Asia* (Routledge 2008) 168, 179.

82 Young, above n 75.

83 Jie Yuan, 'Formal Convergence or Substantial Divergence? Evidence from Adoption of the Independent Director System in China' (2007) 9 *Asia-Pacific Law and Policy Journal* 71, 79.

84 Task Force Report, *Corporate Governance in China – An Investor Perspective* (March 2006) Institute of International Finance Inc <http://www.taglaw.com/files/TAGLaw%20Announcements/China_Corp_Governance.pdf>.

85 Clarke, above n 81.

86 Donald Clarke, 'The Independent Director in Chinese Corporate Governance' (2006) 31 *Delaware Journal of Corporate Law* 125, 191.

87 Shen and Jia, above n 68, 224-5.

In 2001, 12 members of the Zhenzhou Baiwen Co Ltd were fined for malpractice.[88] One of the fined board members was Professor Lu Jiahao, who was an independent director of the company. Professor Lu protested that although he was an independent director, he should not be punished as he 'always regarded the independent director as an *honorary title*.'[89] He 'knew nothing about the operation of the company' and 'didn't have the ability to understand the accounting sheets.'[90] He therefore saw the position as a *name* only.

This sentiment is so widely held that independent directors are nicknamed 'vase directors' as they are only seen to be decorative.[91] Appointers seek appointees who are scholars,[92] with no corporate experience, and thus are unlikely to interfere.[93] In turn, the appointees see the position as an easy job and do not attempt to diligently fulfil their duties.[94] Finally, as the institution is a relatively recent establishment in China, there is a lack of experienced professionals qualified to serve in this role.[95]

The independent director institution was introduced for the purpose of monitoring the BOD, but as the BOS and the independent director enjoy simultaneous supervision rights, 'functional criss-cross and repetition is inevitable in execution'.[96] Ironically, the existence of a BOS may therefore result in the independent director expecting the BOS to be responsible for the monitoring and supervision duties.[97]

With regard to the voting of an independent director, article 4.1 of the Code allows shareholders who independently or jointly hold more than 1% of shares to nominate an independent director. Under article 106 of the *Company Law*, cumulative voting is not mandatory. In that sense, where companies have *not* implemented the cumulative voting system, minority shareholders, whom the institution is supposed to protect, would most likely be outvoted by the majority shareholders.

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88 Jie Yuan, 'Formal Convergence or Substantial Divergence? Evidence from Adoption of the Independent Director System in China' (2007) 9 *Asia-Pacific Law and Policy Journal* 71, 93.

89 Quoted from Yuan, ibid 88 (emphasis added).

90 Ibid.

91 Ibid 90.

92 Ibid 88.

93 Ibid.

94 Ibid.

95 Ibid 101.

96 Organisation for Economic and Co-operation Development, *Overview of Governance of State-Owned Listed Companies in China* (2005) <http://www.oecd.org/dataoecd/14/6/34974067.pdf>.

97 Ibid.

Lack of legislative detail or clarity

As China leans more towards a civil law system, the courts would require detailed legislative guidance in order to apply the statute in question. Yet a consistent theme in many legislative instruments is the use of broad terms which lack further detail or legal definitions.

Article 20 of the *Company Law* provides that in order to pierce the corporate veil, the creditor's interests be 'seriously' damaged. However, unlike penalty provisions where bracket amounts are provided, no monetary sum or other guidance is given to distinguish 'serious' damage from other damage. Legislative ambiguity continues throughout other legislative instruments. For example, there is an emphasis on the relevant parties as well as the company to act truthfully and diligently when carrying out their duties. Yet no guidance is provided as to what is in compliance with or in breach of these requirements, nor are exceptions provided for special circumstances. Articulation of the *division* of responsibilities (OECD principle 1) is of no use without further articulation of the *nature* of those responsibilities.[98]

Even where some form of judicial guidance or interpretation can be provided, there are problems. Court rulings on pending false disclosure matters are delayed as lower courts await further clarification and instructions from the country's highest court of the land – the Supreme People's Court[99] - including matters regarding the calculation of damages and other particulars.[100] Credit however must be given to the Supreme People's Court for clarifying the applicable laws upon the Company Law coming into effect in 2006. Article 1 of the *Provisions about Several Issues on the Application of the Company Law of the PRC (I)* confirmed that where an undecided or new case was based on facts or events which occurred prior to the *Company Law* coming into effect, that the laws, regulations and judicial interpretations effective at the time of occurrence would continue to apply.

PART V – CONCLUSION

The theoretical framework addresses many pressing issues with a balanced approach. Unfortunately, problems hindering practical enforcement result in even the first OECD principle underpinning good corporate governance – *promoting transparent and efficient markets* – being unachievable.

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98 Organisation for Economic Co-operation and Development, above n 11, 17.

99 Zhiwu Chen, 'Capital Markets and Legal Development: The China Case' (2003) 14 *China Economic Review* 451, 3.5.

100 Chenxia Shi, 'Protecting Investors in China Through Multiple Regulatory Mechanisms and Effective Enforcement' (2007) 24 *Arizona Journal of International and Comparative Law* 451, 495.

Working on achieving *compliance* with the laws is always the necessary next step, and this is recognised. For example, the CSRC, in conjunction with various universities, now requires potential applicants for the independent director office to undergo a compulsory training course.[101] The objective of the training is to 'equip directors with a broad knowledge and understanding of rules and regulations' as well as update them on the latest changes in the industry.[102] The aim of such courses is to reinforce the concept of this office as being much more than a name or a decorative vase.

The task of reforming legislative provisions and regulations must not be seen as completed. Identification of the fact that some enforcement difficulties arise due to legislative vagueness is one area that can be assisted by legislative reform. Legislative instruments, which suffer from ambiguity, could adopt a similar approach to the 2007 Measures by providing guidance to certain terms or phrases in the form of details, examples or circumstances. Bracket amounts could be applied to indicate the range of monetary penalties under article 158 of the *Criminal Law*. The qualifications for an independent director as prescribed by the 2001 Guidelines could also include a requirement that the applicant have either a business or law degree obtained from a western educational institution, or a minimum number of years of board member or executive experience in a western or developed (or comparable) corporate environment.

Recognition that the problem lies in enforcement and application rather than the law that is (or is not) on paper can be seen as a glass half-full. The success of further legislative reform in this (or any other area) must always be considered in the overall context of how well the law on paper will be enforced in practice. Unfortunately, this is something that is beyond the scope of this article, as issues regarding law enforcement and compliance in China lie beyond its current corporate or economic situation and extends into the country's culture and history.

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[101] Roche, above n 1, 93; Shen and Jia, above n 68, 243.

[102] Roche, ibid.