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Competing Legal Transplants of the Independent Directors and Board of Supervisors in the Chinese Law

Diplomová práce

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Václav Svoboda

Rád bych na tomto místě poděkoval panu profesorovi Tomáškovi za cenné rady a pomoc při vedení této práce.

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Introduction

China has drawn attention of many contemporary scholars. Economical boom of recent thirty years poses a lot of questions about the essence of Chinese success. China itself has sought international attention focusing on developing a system of *soft power* which would help China spread its international power. In view of this fact PRC has tried to develop its own system called *socialism with Chinese characteristics*.

An interesting situation emerged during the process of Chinese search for its own economic and ideological independency, institutions of independent directors and board of directors found use in the corporate governance scheme of publicly listed companies in China. This phenomena is rare perhaps unique.

This work helps us understand the fundamental features of supervision in Chinese corporate governance system. Besides that it brings valuable thoughts on corporate governance as whole.

The first two chapters will introduce the situation of Chinese socio-legal development and general idea of need of supervision in relation to the corporate governance. The third chapter will focus on the board of supervisors in German law together with the description of Chinese board of supervisors concept will follow. In the same pattern we will follow the US institution of independent directors, and that of its Chinese counterparts. The analysis of Chinese institution is the core of this thesis. Final part is the conclusion drawn from previous facts in chapter 5.

Development of the Internet and low copyright protection in China makes the most part of sources either primary or secondary easily accessible. Much of work on Chinese corporate governance was done by Donald Clarke who focused mainly on the role of the independent directors in the Chinese system. Chinese scholars put forth developing ideas on the independent directors too, the topic of the board of directors uses to be put aside. This leads to that the role of board of supervisors has been disregarded in the literature, thereby a lack of complex view on the internal company supervision was to be observed.

This thesis should answer questions such as: What role should each of the two-layer supervision body institution assume? Did China adopt these institutions properly i.e. in accordance with its own needs? Which adjustments should be done?

1 The first phases of the reform

The evolution of the relationship between the state and business companies can be divided into three stages. The first stage is signified by absolute hegemony of the Chinese state in the economy strictly performed until 1978. It was slightly reformed within 1978 – 1984. The second stage fully evolved between 1984 and 1993, its significance was gradual separation of enterprises from the state. The third stage denounces the period since 1993 (when the Company Law emerged) till today. During that time the state left its total ownership position and became a mere stakeholder in the state-owned enterprises.

1.4.1 The First Stage

The Maoist era adhered to a strict centrally planned economy, thus the enterprises were not independent entities. The whole state could have been regarded as a huge company composed of many branches, which had neither their own legal personality nor right to perform their administration.[1].

However, there was some diversity in the classification of various forms of state-run enterprises, for our purposes using a common term, which covers all state-run entities - the State Owned Enterprise ('SOE') is sufficient.

Above the whole structure stood the central economic plan of the central government. The government transferred principles of the plan to the local bodies, which were enforcing them in the state enterprises. State governed all economic activity: supplies, production as well as demand. The profit from the economic transactions was then turned over back to the state.[2] The system was highly ineffective and burdened by heavy bureaucratization and imbalances between supply and demand.

After the death of Mao Zedong (1893 – 1976) the reformers initiated a step-by-step reform of the socialist system. What should be borne in mind is that even the reformers never decided to leave the principles of the socialism. Their

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[1] Hu Xiaojing. Rechtsfragen der chinesischen Corporate Governance. Frankfurt am Main: Peter Lang, 2006, p. 41

[2] Hsu, Steven. Understanding China's Legal System. New York: New York University Press, (2003).

[2] Hsu, Steven. Understanding China's Legal System. New York: New York University Press, (2003). http://www.zfwlxt.com/html/2010-3/2010371508411.htm
http://www.zfwlxt.com/html/2010-3/2010371508411.htm
http://www.zfwlxt.com/html/2010-3/2010371508411.htm, p. 275

reforms were intended to make the current system more efficient in order to help China take its position among the world leading powers.

1.4.2 The Second Stage

The reforming steps of the second stage begun already in 1979, when the Administration of Industry and Commerce started to issue first business licenses. The new 1982 constitution implemented in Article 16 that: '*State enterprises have decision-making power in operation and management within the limits prescribed by law*.'

On 12 April 1986 the General Principles of the Civil Law were adopted. This document provided the first definition of legal person in Article 36.

Apart from the emerging legal background of the legal personality of enterprises, the relationships between enterprise on the one side and managers, employees, state and society on the other side shifted considerably.[3] China, as one of the first transition economies, launched performance contracts. This system introduced leasing of smaller enterprises, contract management responsibility system and the asset responsibility system. Variable contracts were to be concluded between directors and supervising agency. Later on, the contracts system further extended directors' rights to operate the company assets and surplus. At the very end of this first stage (1992) the managers were given the power to decide freely about production, supplies, prices, investments, hiring workers and their rewards and so on.[4]

It influenced the relationships as follows: it increased managers' responsibility towards enterprise, but gave the directors a relatively free hand in the field of managing SOE and loosened the strict government control over them. Within the framework of the reduction of direct state power over the SOEs, a gradual, but still weak, raise of workers' influence in the SOEs could have been observed. These changes opened the SOEs toward the society, directors were no more responsible only to the supervising organs, but they had to begin to

[3] Hsu, Steven. Understanding China's Legal System. New York: New York University Press, 2003
http://www.zfwlxt.com/html/2010-3/2010371508411.htm, p. 275

[4] Tenev, Stoyan; Zhang Chulin. Corporate Governance and Enterprise Reform in China. Washington: World Bank and International Finance Corporation, 2002, p. 13

interact with the society, civil responsibility and market incentives, instead of government orders. [5]These were the first efforts to rationalize the corporate governance.

1.4.3 The Third Stage

The decline of the first stage of economic reforms was signified by the *Tian'anmen* incident and following economic depression, ended by Deng Xiaoping's (1904-1997) Journey to South that launched second stage of the reforms mainly influenced by Company Law adopted on 29 December 1993[6] and other laws such as Labour Law (1 January 1995), Securities Law (1 January 1999) and Code of Corporate Governance for Listed Companies in China (issued by China Securities Regulatory Commission on 7 January 2001).

The Company Law prepared ground for the reform of SOE, because there had not been stipulated any clearly defined general conditions for the establishment of a Chinese company of Private Law before Company Law promulgation. The Company Law did not only aim to the newly established companies, but it rather served as a guideline for the SOEs, which should have been transformed into independent enterprises. The government expected higher business performance from the privatization of the SOEs, which ought to have been attained by modern Western capitalist tools, especially by improved corporate governance. It further wanted to cut off smaller badly performing enterprises connected to the local governments. [7]

Privatization forced the managers to bear responsibility and operate the enterprises more efficiently with the modern tools, at the same time the government gained two advantages. Firstly, it got rid of the burden presented by the direct governance over the enterprises and reduced related bureaucracy, and secondly, it gained broad control over economy using smaller capital than before

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[5] Nakamura, Masao. Changing Corporate Governance in China and Japan. Basingstoke: Palgrave Macmillan, 2008, p. 24

[6] Tenev, Stoyan; Zhang Chulin. Corporate Governance and Enterprise Reform in China. Washington: World Bank and International Finance Corporation, 2002, p.16

[7] Hu Xiaojing. Rechtsfragen der chinesischen Corporate Governance. Frakfurt am Main: Peter Lang, 2006, p. 80

by means of partial privatization, during which it kept majority in every privatized company.

In the 1990s the government focused on providing strong institutional background for the privatization, therefore as late as 1998 triggered a policy of decentralization and started to withdraw party members, who supervised enterprises.

Since then, the government has tried to gradually reduce direct control and shifted towards both developing institutional background (external corporate governance) and mainly the internal corporate governance, which secures execution of the majority stakeholder rights. Besides this effort, China has sought for new investments from broader public. In order to attract smaller and middle investors minority shareholder rights have undergone certain evolution.

2 Need for Good Corporate Governance

2.4 Controlling organs

The necessity to establish controlling organs inside companies originated as more efficient and less expensive mechanism than individual shareholder control. Controlling organs are surely not necessary in companies with very small number of shareholders, who can alone in their own interest investigate company's operation. With growing number of company shareholders some general shareholders' representation had to be introduced, if it were not, two options would occur: on one hand, shareholders (particularly the small, who are not enough financially motivated) would not be interested in company matters and would refuse to supervise the directors. This would allow the directors to harm company's interests; on the other hand, it can occur that the shareholders would be interested in company issues in great number, which is not only highly expensive, but it can block company's work, if each of them was personally investigating company's documents or its managers.[8]

[8] Hu Xiaojing. Rechtsfragen der chinesischen Corporate Governance. Frakfurt am Main: Peter Lang, 2006, p. 41

Establishment of controlling organs allows shareholders to '*vote by hand*' – choose their representative instead of '*voting with their feet*' – leaving the company when things have gone wrong.[9]

Chinese corporate governance has been regarded as one of the worst corporate governance countries in the world. In survey from 2006 it was ranked 44 out of 49 countries.[10]

Officially 16 percent (192) of 1,200 companies listed in China were subject to disclosed corporate scandal. Most of the scandals have been false statements, balance sheets and annual reports. Other cases represent corruptive actions of directors and executive managers. This trend has been declining since 2007, but has remained very significant.[11] China thus sought for better corporate governance system.

2.5 The Chinese Legal Environment

In PRC only 134 laws were promulgated since 1949 till 1978, but neither civil, penal nor business code were among them. In fact, we can say, there was no positive law at all. The turning point of the year 1978 started among other things a legal reform.

The beginning of postmodern Chinese law was rather chaotic. The legal system jumped from non-existence of formal legal sources to necessity of clearly defined legal structures. Originally there was no need for formal legislature at dawn of the economic reform and only secret internal guidelines were issued by the State council, this was especially popular in case of foreign invested joint-ventures. Government agencies so disposed by wide range possibilities how to deal with individual application of the norm in terms of the secret guideline.[12]

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[9] Lu Tong. Development of System of Independent Directors and the Chinese Experience. Institute of World Economics and Politics. (2009): http://hdl.handle.net/123456789/21923, p. 2

[10] Yong, Kang and Brown, Elizabeth. Chinese Corporate Governance: History and Institutional Framework. RAND Corporation, (2008): http://www.rand.org/pubs/technical_reports/TR618.html, p. 3-4

[11] Jingu, Takeshi; Corporate Governance for Listed Companies in China - Recent Moves to Improve the Quality of Listed Companies. Nomura Capital Market Review, Vol. 10, No. 2. 2007, p. 44-45

[12] Kryomann, Benjamin. Das Kapital Recht der VR China. Tübingen: Mohr Siebeck, 2009, p. 23-30

Since that time great progress has been made, but ambiguity of laws is still a burning issue.

Nuisance of the Chinese legal system is that laws and regulations are formulated very vaguely and with high level of ambiguity which often seems as if the legislator wanted to formally comply with some standards, but in the material sense has not met them.

Besides the extensively interpretable laws a great diversity of varying regulations governs China. Even though the National People's Congress and its Standing Committee should be the only legislative bodies in China, the State Council, Supreme People's Court and Local People's Governments all have the power to issue provisions with force of law without any special authorization. Meanwhile, there is no strictly given hierarchy of provisions and many governmental and local bodies issue variously called regulations, such as: opinion, guidelines, recommendation, principles and many others which make this system very confusing.[13]

If a collision of laws occurs, not the judicial court, but issuing institutions settle an agreement how to enforce the provision. This procedure applies also in case that a provision of a higher institution contradicts a provision of lower body. Likewise the issuing institution is responsible for the interpretation of its regulation, courts have no or only consultative word in this. The academic interpretation is taken in account only when interpretation of an institution leaves some blank space. [14]

2.6 Chinese Judicial Power

We cannot speak about independent judicial power in China. Chinese courts are rather to be considered as a special governmental body with its own agenda – mainly solving disputes. The courts have to discuss their awards with higher-level courts and other administrative bodies of their level which causes interconnection of court officials with the local agencies.[15]

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[13] *Ibid.*
[14] *Ibid*.
[15] Clarke, Donald C.; Murrell, Peter; Whiting Susan H. The Role of Law in China's Economic Development. SSRN. (2006): http://dx.doi.org/10.2139/ssrn.878672 p. 5-35

With respect to the corporate governance it has to be noted that courts are reluctant to help shareholders in their applications. The Supreme Court issued a notice prohibiting courts from accepting cases claiming damage caused by insider trading, market manipulation and misleading financial statements [16] i.e. the most common issues of listed companies.

Current situation corresponds to Chinese tradition of distrust in the courts, because it is too much authoritative way of dispute resolution.[17] The system of mediation has become highly popular and it is also promoted by the government[18], but not very likely to help the shareholders who are in a weak position for mediation. Weak courts should force the government to make the utmost effort to enhance corporate governance in order to prevent damage. ▫

Weak judicial system harms not only individuals but, in terms of corporate governance, it seriously damages markets and the national economy. Investors lose courage to invest being afraid of the low judicial guarantee. The companies are more likely to be subject to money stripping and other momentous misdeeds are observed.

2.7 Chinese State and Business Companies

2.7.1 State participation

The share rights of the citizens of the PRC have not been equal in the territory of the People's Republic.

The A-shares (shares traded in the mainland China, i.e. not in Hong Kong, Taiwan etc.) were divided to the fully tradable and non-tradable shares. Non-tradable shares were meant to be an obstacle protecting privatization of SOEs. Tradable shares were fully circulating on the stock markets in Shenzhen and Shanghai. The tradable and non-tradable shares could have coexisted together within one company. Company issuing just a small portion of tradable shares (commonly 1/3) to the market and withholding a dominant non-tradable state

[16] Clarke, Donald C.; Murrell, Peter; Whiting Susan H. The Role of Law in China's Economic Development. SSRN. (2006): http://dx.doi.org/10.2139/ssrn.878672, p. 50

[17] Hsu, Steven. Understanding China's Legal System. New York: New York University Press, 2003 http://www.zfwlxt.com/html/2010-3/2010371508411.htm, p. 18

[18] *Ibid. 16,* p. 38

owned part of the shares (2/3) was a common phenomenon which caused many market and corporate governance issues.[19]

The reform of the company internal structure was supposed to achieve better performance, but not privatization. It also sought to raise capital in the companies in other way than bank loans.[20] Collected data have shown that the SOEs could be divided according their capacity to small, medium and large. Medium and small firms, which were mainly managed by local governments, became very unprofitable in the 1990s while the large companies achieved relatively good results.[21]

In view of this fact a decision was made to privatize middle and smaller enterprises. Only the biggest key companies remained under the full state control. Official roots of this policy can be traced to the year 1999. On 6 June 2001 The Interim Measures on Reduction of State Owned Securities to Raise the Social Security Fond Management were adopted to dissolve the concentrated state ownership. The aim of the measures was rather low, it struggled for 10% reduction of the state ownership in the wholly state owned companies limited on shares[22], but ultimately failed to achieve more fundamental goals, because of the deficient rules for share issue (especially that related to the issue price) it caused huge market misbalances. The measures were subsequently suspended and just one year later definitely cancelled.

Since January 2004 the Chinese government started to openly support the shift to the capitalization of stock markets, this stance was confirmed by a document Some Opinions of the State Council on Promoting of Progress and Stable Development of the Market Reform. In 2006 nearly all the companies listed on the Shanghai and Shenzhen stock exchanges converted all their shares

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[19] Hu Xiaojing. Rechtsfragen der chinesischen Corporate Governance. Frankfurt am Main: Peter Lang, 2006, p. 78-80

[20] Clarke, Donald C. The Role of Non-Legal Institutions in Chinese Corporate Governance. George Washington University Law School. (2008): http://scholarship.law.gwu.edu/faculty_publications/47/, p. : 171

[21] Chun Liao. The Governance Structures of Chinese Firms. New York: Springer, 2009,p. 34

[22] Article 5 of the Interim Measures on Reduction of State Owned Securities to Raise the Social Security Fond Management

to fully tradable[23] and on 16 November 2010 the last non-tradable share of the China Petrol was changed to tradable.[24]

All these moves has influenced primarily the markets, but has much less affected the corporate structure. Even though the state owns fully tradable share, it does not mean it would sell them. The division of the share types thus marked deeply the current shareholder structure of the SOEs.

Current trend of government policy toward large companies could be called 'state capitalism'. The state builds strong *keiretsu* groups system. Established on one core enterprise fully owned by State-Owned Assets Supervision and Administration Commission (SASAC) and many smaller firms attached to the company. Traditionally in Japan, the companies create a web of relations based on loyalty, supplier contracts, loans, cross-shareholding and so on, in China only hierarchical (from top down) shareholder system constitutes the group. Each group usually consist of the core company, publicly traded subsidiaries, finance company taking care of financial needs of the group and research institute responsible for the group development.[25] This system effectively transmits governmental bureaucracy on the companies; the government still withholds its decisive position through the central company.

2.7.2 Institutional External Corporate Governance

State is seeking to release the market forces which could improve corporate governance in the basic aspects like minority shareholder protection, better management or higher effectiveness etc. Market surely is not a free force driving the corporate governance in China to better results. State wants to retain some

[23] Jingu, Takeshi; Corporate Governance for Listed Companies in China - Recent Moves to Improve the Quality of Listed Companies. Nomura Capital Market Review, Vol. 10, No. 2. 2007, p. 47-48

[24] Forchielli, Alberto . "China Stock Market Enters "All Tradable Era"." AlbertoForchielli.com. 18 Nov 2010. Web. http://www.albertoforchielli.com/2010/11/18/china-stock-market-enters-all-tradable-era/

[25] Lin, Li-Wen and Milhaupt, Curtis J., We are the (National) Champions: Understanding the Mechanisms of State Capitalism in China. Columbia Law and Economics Working Paper No. 409. (2011): http://dx.doi.org/10.2139/ssrn.1952623, p. 1-12

(rather high) degree of control over the market forces; it is establishing a number of bodies restraining them.

In terms of corporate governance the most important supervisor is the China Securities Regulatory Commission ('CSRC'), which obtained a status of a government agency directly under the State Council in 1998.[26] Importance of the body lies not only in levying penalties and market supervision, but also in research. The CSRC is an organ pioneering in many branches related to capital markets and corporate governance introducing modern institutions to the Chinese law.

CSRC is considered to be a highly professional body, although it is being criticized for not being big enough to be able to effectively control the market. This reproach could be found as very substantial, when taking in regard that PRC mostly prefers to rely on direct governmental control to other individual means of self-control.

It is commonly accepted that the banks are able to improve corporate governance in broader range than small shareholders being able and willing to exercise its rights and powers.[27] Chinese banks fail to achieve this market function. In the early days of marketization of the Chinese economy the banks served as cashier for the SOEs, they did not decided economically, but on basis of a political order[28] subsequently now, when restriction is lower the banks lack the 'monitoring culture'.[29] Thus they have not performed their function well until today.

Important role in corporate governance should play the media, but the Chinese media are under strict state supervision through system of state licenses, thus they cannot freely report on politically delicate matters.

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[26] Huang Chi-wei. (2008). Worldwide Corporate Convergence Within A Pluralistic Business Legal Order: Company Law and the Independent Director System in Contemporary China. Hastings International and Comparative Law Review. Vol. 31, p. 410-411

[27] Clarke, Donald C. The Role of Non-Legal Institutions in Chinese Corporate Governance. George Washington University Law School. (2008): http://scholarship.law.gwu.edu/faculty_publications/47/, p. 175

[28] Wei, Yuwa. Seeking for a Practicable Chinese Model of Corporate Governance. Michigan: DCL Journal of International Law, Vol. 10, p. 393, 2001, p. 411

[29] *Ibid. 27*, p. 175

2.7.3 Market or Social Democratic system

Two major cultures of market economy and corporate governance are commonly accepted that originated in the US called market system and that of Western Europe particularly of Germany called social democratic.

There are two opinions how to categorize Chinese economy. One opinion says China is closer to the German system according to many markers: one big shareholder, dependence on bank loans rather than capital investments, stable work market and relatively loosened inner company structure.[30] Other opinion divides Chinese enterprises into two branches. First are the SOEs and former SOEs for which applies the theory mentioned before, other branch are smaller, newly established enterprises. These are closer to the British model similar to the US one. Smaller family companies depending on self-investment represent this system with instable work markets and loosened centralized company structure.[31] But despite this fact current trend tends to converge the main market cultures.

The US and German model can be also divided according to whose interest does the company management serve. The US model is called shareholder-orientated, which means that the company seeks highest profits on behalf of the shareholders. The German model supports stakeholder-orientated approach, for which it is significant that the company should bear society-wide responsibility.

The Chinese model tries to formally follow the shareholder model, but in reality it supports the majority shareholder (i.e. state) interests, and the state then enforce the stakeholder policy. However, it is not from the position of the company, but from position of the state policy.

[30] Hu Xiaojing. Rechtsfragen der chinesischen Corporate Governance. Frankfurt am Main: Peter Lang, 2006, p. 34

[31] Chun Liao. The Governance Structures of Chinese Firms. New York: Springer, 2009, p. 34-170

3 Body of Supervisors

3.4 German Concept

German Body of Supervisors ('BOS') is the highest body of the two-trier company system. But it has not always been so. Germany was the first country to introduce the conception of the BOS in 1870. Until a reform of the Stock Corporation Act in 1937 the BOS and Body of Directors ('BOD') were both elected by the SHM. So they were nominally on the same level, but in reality BOS did not have any powers over BOD and was therefore inferior to it. The company structure changed in the 1937.[32] BOS was to be appointed by SHM and according to §83 of the Stock Corporation Act in 1937 got the powers to appoint and dismiss BOD.

This shift changed the relationship between these two bodies profoundly. Not the executive but the supervision body is the head of the hierarchy.

The main task of the BOS is to appoint the BOD and to continuously supervise it,[33] so that it has no right to intervene to the managing sphere of the BOD (exempt for special occasions). BOS has the right to decide on general strategies of the company, which is BOD bound to follow as well as submit for the BOS approve businesses, which were requested by the BOS to pass its approval. [34]

This system weaves a web of subtle relationships between executive and supervision power, but it clearly determines, that the reason of BOS is the defence of the interests of the biggest shareholder, because the structure of German companies is based on a model where normally one big shareholder owns a majority share and controls the company. This role is usually played by a bank, family or institutionalized investor. [35] Shareholder's intention is to supervise the BOD effectively to force him to follow his interests. It is then unlikely that one tier system would have developed in Germany, because it

[32] Kropff, Bruno. Münchener Kommentar zum Aktiengesetz. Bd. 3 §§ 76-117, München: Beck, 2004, p. 530
[33] Schultz, Dietrich; Schultz, Reihardt. Geseschaftsrecht: ein Lehrbuch. Tübingen: Mohr Siebeck, 1981, p. 208
[34] § 111 of the Stock Corporation Act
[35] Bake, Kent; Anderson, Ronald; Kolb, Robert. Corporate Governance: A Synthesis of Theory, Research and Practice. Hoboken: Wiley. 2009, p. 37-57

would not enable the shareholder to exert so much influence on the board. Some scholars assume that the Corporate Governance system is predetermined by the shareholder structure.[36]

The BOS consist of a chairman and vice chairman. The chairman organizes work and represents the board to the public. In order to fulfil its mission the BOS is endowed with the right to create committees which can decide on partial matters.

In the reform of the Stock Corporation Act from 1965 a new[37] element was introduced to the BOS in compliance with Common Decision-Making Act and Mining Common Decision-Making Act[38]. So the novelization on the employees prescribed they had to be represented in the body when more than 500 employees (or 2000 employees) are employed. The proportion differs according to the amount of employees in a company and in dependence to which of the two acts the company corresponds. This reform was enactment based on a social democratic idea of the unity of capital and work. It provides two general advantages – improvement of democratic decision making in the company and access of the board to on-spot information.[39] Ambivalent feature of this approach is that the employees defend only their own interests i.e. they can hinder a speculation or extreme risk operations, in that way it can discourage possible investors.

The law stipulates that the BOS is elected for 4 years and it has to meet on session at least 2 times in half a year, which assures proper execution of its duties.[40] A member of the BOS could be dismissed by decision of the SHM. It must pass ¾ majority of votes.[41]

A tool allowing the BOS execute its powers is the right to check company documents and choose independent auditing company to verify the annual

[36] Chun Liao. The Governance Structures of Chinese Firms. New York: Springer, 2009, p. 10-24
[37] It is new to the Stock Corporation Act, but older in the German law culture. This institution entered the law in early 1950s.
[38] §96 of the Stock Corporation Act
[39] Hu Xiaojing. Rechtsfragen der chinesischen Corporate Governance. Frankfurt am Main: Peter Lang, 2006, p. 182
[40] Schnorr, Tanja. Historie des Aufsichtsrats. Würzburg: Bayerische Julius-Maxmilian Universität, 2006, p. 95
[41] §102-103 of the Stock Corporation Act

report, define general strategies and approve important contracts.[42] Board can represent company before court, when it is a conflict of interest for BOD.

The members of the BOS are strictly forbidden to engage in the managing functions especially concurrently occupy posts in the BOD or proxy. Measures are also set up to guarantee independence within concern or other entities – a BOS member cannot serve as a BOD member in another company where a member of the affected BOD works as BOS member as well as cannot be a legal representative of a subsidiary. The BOS member is allowed to participate in only 10 BOS of companies which are prescribed to create them.[43] The meaning of these measures is to ensure the independency of BOS members from BOD influence and give sufficient time for execution of the function.

The §101 of the Stock Corporation Act provides that not more than one third of the BOS can consist of so-called delegated members. SHM does not elect these members; they step into the office by decision of the shareholder defined in Articles of Association. State broadly uses this right to supervise the companies where it takes part. It also does not need to oppress other shareholders to effectively control its assets.[44]

The BOS is reliable for all damages caused to the company by unlawful operation without limitation.[45]

3.4.1 Non-legal enhancement

The Federal Committee for Corporate Governance was convened in 2001 and it published the German Corporate Governance Codex ('DCGC')in the same year which has been regularly updated since then. It combines three layers: first layer repeats in more comprehensive way what the law stipulates, second layer called 'shall' layer stipulates supra legal recommendation for good corporate governance according to rule 'comply or explain' – the company should explain why it did not had applied such recommendation and third 'should' layer which does not prescribe any duty, only gives recommendation for having an advanced

[42] §111 of the Stock Corporation Act
[43] §100 of the Stock Corporation Act
[44] Hu Xiaojing. Rechtsfragen der chinesischen Corporate Governance. Frankfurt am Main: Peter Lang, 2006, p. 74
[45] §116 of the Stock Corporation Act

corporate governance company.[46] The Corporate Governance Code is a more flexible tool then law, so it can show us possible trends of BOS institution.

One of the first legal duties of the both boards is to communicate and coordinate policies[47] which is the base of good corporate governance in this system of mutual interdependencies. Both organs should make annual report on corporate governance to the SHM.[48]

The GCGC converge with some features of one tier system. It proposes to the BOS to create at least two committees, i.e. the audit and nomination committees, and it recommends engaging appropriate number of independent members.

Audit committee shall supervise accounting of a company and ensure that the audit company chosen for the control of the annual report of the company is independent from both the company and BOD. Chairman of the committee shall be experienced in accounting and auditing procedures and shall not have been member of the BOD in two preceding years.[49] The chairman of the BOS shall not concurrently preside the audit committee.[50]

The nominations committee shall be composed of only shareholders` representatives and its occupation is to propose candidates to the BOS.[51]

The number of independent BOS members is specified as *appropriate*. Definition of independency is very broad: *'[A BOS member] is regarded as not independent, when he is in a personal and business relationship to the company, its bodies, majority shareholder or related enterprise, which can constitute an essential not merely temporary conflict of interest*.'[52] Furthermore only two members of BOS can be former members of BOD (but not in the two preceding years).

The trends show that cooperation between BOS and BOD will be stressed up. Professionalization imitating the US pattern of special committees focused on

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[46] Kropff, Bruno. Münchener Kommentar zum Aktiengesetz. Bd. 3 §§ 76-117, München: Beck, 2004, p. 42
[47] 3.1. of the German Corporate Governance Codex
[48] 3.10. of the German Corporate Governance Codex
[49] 5.3.2. of the German Corporate Governance Codex
[50] 5.2. of the German Corporate Governance Codex
[51] 5.3.3 of the German Corporate Governance Codex
[52] 5.4.2. of the German Corporate Governance Codex

special key matters will be followed. One of the anticipated novelties should be the introduction of independency in the board which has not been much requested in the past.

3.4.2 Critics of the two tier model

BOS has its indisputable advantages for the majority shareholders, but the first very important flaw is the lack of minority shareholder protection. The majority shareholder can easily enforce his intentions in the highest bodies but the minority shareholder has no representative to protect his interests. This leads to little willingness of small investors to invest, because they have only a little possibility to influence the company policies. Generally when they feel dissatisfied with a company policy, he has two possibilities - raise a claim before court or sell its shares, none of these is very efficient. The upcoming concept of the independent BOS could lead to improvement in this field. Nonetheless, a sole independency does not provide guarantee for better approach to the minority shareholders, because according to the agency theory the managers will foremost follow their own interests and only subsequently struggle for the company best interests. For instance, it is more convenient for an independent director to obey instructions of a majority shareholder, who will elect him for the next session.

The conception of fully independent BOS is unlikely to be provided in Germany in the near future. Since the shareholder structure is not much dispersed (there is commonly one big shareholder controlling the whole company) it would not be desirable for corporate governance if the conditions changed.

German BOS is commonly very large body around 20 people representing broad stakeholder interests, which is why it is often criticized as a slow corporate governance mechanism. The companies are less profit-driven than their US counterparts thus their corporate scandals are to be caused by personal interests such as personal benefits, bribes or money striping[53] rather then by focusing on shareholder support.

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[53] Shirreff, David. Boards Behaving Badly. The Economist. (2009): http://www.economist.com/node/14183029/

3.5 Chinese concept

3.5.1 Composition and independency

The history of Chinese BOS is considerably short. There was no space for such institution during the Maoist era. System of the centrally planned economy only allowed a governmental control over the enterprises. The supervision carried out the superior state bodies and the BOS functions were entrusted to external bodies.[54] This system granted thoroughgoing execution of the plan of the central government.

The changes performed by the government since 1979 led to implementation of independent supervision body which was firstly introduced in the 1993 Company Law. Then it passed partial novelization in 2005 (effective since 1 January 2006) which moved the position of the BOS provisions within the code and extended liability of the body and slightly amended other provisions. Other regulations such as Principles of Corporate Governance for Chinese Listed Companies issued by the SCRS on 11 September 2001 have not changed much in the legislation.

According to the Company Law the body shall consist of the following: '*The board of supervisors shall consist of representatives of the shareholders and representatives of the employees, who shall account for no less than one third of the board of supervisors, and the specific proportion of representatives of the employees shall be provided for in the articles of association of the company. The representatives of the employees on the board of supervisors shall be democratically elected by the employees of the company through the convening of a meeting of employees and representatives or through other means.* '[55]

An important amendment made in 2006 seeking for higher independency of the boards prescribes accumulative voting.[56] The essence of the accumulative voting is that each share has as many votes as the number of members of the elected body. The voter can freely decide how to use his votes; he can distribute the votes between all candidates, fully upon one candidate, or as mixture of the

[54] Wei, Yuwa. Maximising the External Governance Function of the Securities Market: A Chinese Experience. International Company and Commercial Law Review, No. 3, 2008, p. 35
[55] Article 118 Company Law
[56] Article 106 Company Law

previous two. This measurement shall protect the minority shareholders, because it increases probability, that a candidate not proposed by the majority shareholder can be elected. For example in the normal voting system each share has one vote. When 3 BOS members are to be elected and there are 100 shares in total the majority shareholder needs 51 votes to elect a desired member. In the accumulative vote each share equals 3 votes (3 seats), but one member needs 100 votes to be elected. If the majority shareholder's 51 shares is equivalent to 153 votes (51x3=153) the minority shareholders control 147 votes (49x3=147). Than it is very likely that the minority shareholders elect at least one member.

The accumulative voting has its limits. The majority shareholder can dominate the election, if having command over *x/y+1* votes' faction. *X* represents the number of members of the BOS to be elected and *Y* represents number of members to be elected in the election. According to foregoing example, when the majority shareholder owns ¾ of all votes, then he will carry through its candidates into the body.

This mathematical model does not take in account an important advantage of the majority shareholder; he does not need to concentrate his votes. Supposing that minority shareholders are in bigger number, not unified, less informed and less motivated, the majority shareholder might easily dissolve their votes in order to finally assemble the BOS according to his vision.

The independency of the body shall be secured by prohibition of concurrent occupation of position of BOD or company management. No other personal or professional requirement is requested from the members. Term of office was set to 3 years with possibility of re-election.

The chairman of the BOS[57] only has organizing powers, he convenes and presides the meetings i.e. sets up the programme of the meetings and secures the protocol from the session.[58]

[57] Article 52 Company Law
[58]Wang Baoshu and Cui JInzhi. Zhongguo Gongsifa Yuanli. Beijing: Shehui Kexue Xuewen Xianchuban, 2006, p. 186

3.5.2 The duties of the BOS set down in Article 54:

1. *to examine financial affairs* – the company assets reflect the management of the situation and embody the relationship between profit of creditors' shareholders thus it is a major duty of the BOS. BOS can exercise this duty alone or it can get an external auditing or counselling person who can help control the company`s assets[59]

2. *to supervise acts of directors and managers violating the laws, administrative rules and regulations or the articles of association of the company during their performance of the functions* - This provision could be considered as a right to exert continuous supervision,[60] but the BOS is not given a special tool for supervision. Only the Article 111 Company Law allows the supervisors to attend the meetings of the BOD, which shall be notified 10 days prior to the convening. Besides that the BOS has a right to propose convening of an interim meeting of the BOD. These rights are only procedural not material and do not increase the power of the BOS over the BOD.

   There actually is no legally stipulated reason, why the BOD should cooperate with the BOS - it alone cannot take any measures to affect the BOD. It is hard to imagine that a BOD conducting an inappropriate action would be willing to allow the BOS to intervene without resistance. Moreover when a BOS discovers misconduct it lacks instruments to prevent current misconduct (unless it is a violation of laws, administrative rules and regulations). Albeit the BOS can perform a continuous supervision it can influence only operations already performed. This provision can be considered as an effort of the legislator to exhort the BOS to vigilance, but not as authority to watch over the executive organs of a company.

3. *to demand the directors or the managers to make corrections if any of their acts is found to have damaged interests of the company* – this provision is very obscure. It could be considered as a very powerful authority over the BOD. This right could be

[59] Jiang Ping, Li Guoguan. Zuixin Gongsifa: Nanyi Shijie. Beijing: Renmin Fayuan Chubanshe. 2006, p. 251

[60] Wang Baoshu and Cui JInzhi. Zhongguo Gongsifa Yuanli. Beijing: Shehui Kexue Xuewen Xianchuban, 2006, p. 196

used in two ways, first, in its extensive interpretation the BOS creates standards for managers and BOD to follow the instructions given by the BOS, thus the BOS can actually assign tasks to the BOD, the second interpretation offers possibility to just control BOD operations.

The first interpretation is supported neither by literature nor the Company Law. It does not fit in the conception of weaker the BOS which only supervises and is not a partner to the BOD in order to prevent damage. The second interpretation is broadly accepted, although it seems to be rather redundant in view of previous right to supervise, because this provision does not give any more power to the BOS to enforce its intentions. '*Such an action of request for a correction is an act of the board of supervisors enforcing the official powers stipulated by law, board of directors, high rank managers shall respect the official powers of the board of supervisors and adopt the proper corrective measures.'* [61] It is hard to coerce the executive bodies of a company into observing the corrections when only a weak power '*shall respect the official powers of the BOS*' is given.

Besides that, this provision finds use when applying the right of a shareholder to raise a claim against the BOD according to Article 152 Company Law. The petition is usually given to attention of the BOS, which shall decide whether to appeal to the court or search softer solution through this provision.

4. *To propose convening of an interim shareholders` general meeting* – This is an organizational provision which finds use when the BOD is not able to exert its function, the BOS replaces it and convenes the SHM to correct the situation. The board of supervisors is then in charge of the meeting and exercises duties that usually belong to BOD when a meeting takes place.[62]

5. *To propose draft resolutions to the shareholders meeting* – this provision was amended in the 2006. It increases the authority of the BOS because there were set no limits within which the BOS is authorised to draft a resolution. The mostly mentioned applicability of this provision is to propose the dismissal of a director or

[61] Jiang Ping, Li Guoguan. Zuixin Gongsifa: Nanyi Shijie. Beijing: Renmin Fayuan Chubanshe. 2006, p. 251
[62] Article 41 Company Law

the whole BOD.[63] Before the amendment the only way to provoke a withdrawal of a director was to inform the SHM about the BOS opinion and the SHM then decided how to handle it. But now the SHM has to decide about the proposal. Thus this provision slightly strengthened the position of the BOS.

6. *To initiate legal proceedings against any director or senior officer in accordance with the provisions of Article 152 of the Company Law* – this provision was also added in 2006. The Article 150 Company Law precisely prescribes what a director, senior manager and implicitly a member of BOS shall avoid doing:
   (1.) to misappropriate any funds of the company;
   (2.) to deposit funds of the company in bank accounts opened in their own names or in the names of others;
   (3.) to lend funds of the company to others or put up assets of the company as security for others in violation of the articles of association of the company or without approval of the shareholders' meeting, the shareholders' general meeting or the board of directors;
   (4.) to enter into any contract or transaction with the company in violation of the articles of association of the company or without approval of the shareholders' meeting or the shareholders' general meeting;
   (5.) to take advantage of their positions to obtain for their own benefit or the benefit of others any business opportunities that belong to the company or to engage in the same type of business as that of the company for their own account or for the account of others without approval of the shareholders' meeting or the shareholders' general meeting;
   (6.) to accept commissions on transactions between others and the company and keep such commissions as their own;
   (7.) to disclose any secret of the company without authorization; or
   (8.) to commit any other act that is in violation of their duty of loyalty to the company. Gains made by a director or a senior officer in violation of any of the provisions of the preceding paragraph shall belong to the company.'

[63] Wei, Yuwa. Maximising the External Governance Function of the Securities Market: A Chinese Experience. International Company and Commercial Law Review, No. 3, 2008, p. 54

Article 150 Company Law stipulates, that if a director violates laws, administrative regulations or articles of association of the company during the performance of his function, thus causing any losses to the company, shall be liable for compensation for such losses.[64] When a company seeking to redress the losses, the Article 152 Company Law is applicable and the BOS shall represent the company when raising this claim. But special conditions should be fulfilled.

When a BOD member or senior manager commits such an act the proceeding before an action is brought to court is as follows. A qualified shareholders owning together at least 1 per cent of company shares for more than 180 consecutive days has two possibilities 1) sent a written petition to the BOS asking for initiation of legal proceedings or 2) when the situation is so emergent that the company will suffer irreparable losses if legal proceedings are not initiated immediately the qualified shareholder can apply directly to the court.

If the qualified shareholder follows the first proceeding, the BOS has 30 days to decide about the petition. It may investigate the issue and decide to use its power stipulated in Article 54 paragraph 3 Company Law and induce the BOD to correction or to appeal to the court. The situation results either in the BOS refusing to initiate any proceedings, or failing to refuse or initiate it within 30 days. The same rules apply when the BOS is concerned, but the responsible body for this proceeding is the BOD.[65]

On the first view, this provision could be considered as a progressive one, because it is trying to settle the issues before going to the court and it makes the BOS equal partner to the BOD. But it still has certain flaws.

First shortcoming is the information asymmetry. The shareholder (especially the minority shareholder) in most cases lacks all the relevant information. The possible channel of information is his own investigation – timely and financially expensive – or information provided by the BOS. When taking in account the second channel is more likely to be used, then a question arises why to use so much complicated proceedings. The BOS has already all necessary information, thus more direct process would be more effective. It would be better not to wait until a shareholder delivers a written demand, but to directly prescribe

[64] Article 150 Company Law
[65] Article 152 Company Law

to the BOS to demand on the BOD to make correction within 30 days of the day when it have learnt about the misconduct. If it fails to do so, or if the BOD does not correct the flaw in this period, then the issue can be brought to the court directly.

This leads back to above-mentioned notice of the Supreme Court prohibiting courts from accepting cases when shareholders are claiming damage caused by insider trading, market manipulation and misleading financial statements, this notice excludes the possibility of shareholders to bring their case to the court without support of the BOS.

In fact this provision strengthens the theory of the weak position of the BOS in the Chinese system, since it is not allowed to take any significant measures against the BOD without support of the SHM. Moreover presents the BOS as crucial body in terms of defending minority shareholders` rights.

3.5.3 Participation in the company

The supervisors are allowed to hold company shares, but they have to abide special condition in order to prevent speculation or intentional misconduct. They shall declare to the company the shares they hold and changes in them. The supervisors are limited in amount of shares to be sold annually to twenty five per cent of owned shares. When the company transfers to a publicly listed company the supervisors are not allowed to sell their shares within one year after the date the shares of the company are listed and traded. Similarly when a BOS member has left the company, he shall not sell any shares within a half year.[66]

On violation of this provision shall be applicable the Article 150 and 152 Company Law, which according to the BOD or qualified shareholder is endowed to raise a claim before court. Although the BOD can seek to redress only violations committed when the offender has been in office. It remains a question how to obtain compensation for damage when the shares were sold within half year after the office has been left.

[66] Article 142 Company Law

3.5.4 Conception

It is obvious, that the Chinese conception of the BOS is substantially different from the German. Despite lacking definition of the functions of the BOS in the Chinese Company Law we may determine its features. The BOS is not the highest body of a company, but a mere '*supervision committee*' of the executive part of the company. The BOS is placed higher and has only limited possibility to enforce its requests. Due to its position BOS is only endowed by subsequent supervision. It has no possibility to exercise preliminary control, thus it can reconcile with searching flaws in already closed deals. It would surely be more reasonable to follow the BOD operation constantly – create a general strategy to obey (preliminary check), then continuously supervise business operation (continuous check) with a right to cancel any business and finally control if everything has passed properly (subsequent check). Chinese conception just allows claiming damage before court, which is very time-consuming and often very risky action in China.

The law provisions are also considerably brief. It in fact does not provide much background for supervision. The BOS does not enjoy any concrete rights, which would oblige the BOD, company bodies or others to cooperate, or which would lay down how the BOS should achieve tasks stipulated by the law.

Surprisingly in the view of these legal shortcomings the institution has not undergone many changes in conception or concretization.

3.5.5 Practical issues

Identically with the German model the BOS functions as a representative of the major owner of the company. Thus, when it has found out misconduct during supervision it probably shall inform the majority owner. He will through the BOS convene the SHM and dismiss the BOD. This process is very ineffective; moreover it is not much applicable in the framework of the Chinese shareholder structure.

For the smaller family-run companies, it is inconvenient to have an active BOS, because they mainly do not sell their shares, because their general source of investment are bank loans, concurrently, the owner himself runs the business, so

he does not need to control his own operations.[67] The BOS is completely under control of majority shareholder and in fact cannot exercise its powers. The primary reason why a company creates supervisory organs disappears in this case.

The reason why this way of company supervision would not work in large state enterprises is very specific. Because the firms are controlled by the state or by a state-owned company the company functions tend to be occupied politically through the *keiretsu* groups. The local (provincial) government favour local *keiretsu,* national ones are connected to the central government. As stated above, k*eiretsu* builds up a network system, where regardless of many relationships are institutionalized (special rights of the ministries, party committees, governmental associations etc.), many are still based on personal connections, e.g. SASAC organizes manager exchanges between the committee and a company directly. Besides that, the Communist Party of China supervises enterprises on each level. It is stated that 1/3 the national SOEs' employees are party workers.[68] The state delegates in the supervision body cannot air their own views, but follow the party line given by state.[69] However, the state then misuses his influence to not to enhance company performance, it seeks to fulfil social tasks such as employment rate or merger with big enterprises of low performance or non-performing loans etc. This behaviour is often very destructive for a profit-driven company. For example, if the civil aviation authority buys too many aircrafts, they must be sold somewhere, companies (mainly China Southern Airlines and China Western Airlines) are then forced by the state as a majority shareholder to buy them.[70]

In this environment of mutual dependencies the supervision body is not able to exert the power in the interests of the company because a) has to follow

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[67]Chun Liao. The Governance Structures of Chinese Firms. New York: Springer, 2009, p. 97-107

[68] Lin, Li-Wen and Milhaupt, Curtis J., We are the (National) Champions: Understanding the Mechanisms of State Capitalism in China. Columbia Law and Economics Working Paper No. 409. (2011): http://dx.doi.org/10.2139/ssrn.1952623, p. 25-30

[69] Hu Xiaojing. Rechtsfragen der chinesischen Corporate Governance. Frankfurt am Main: Peter Lang, 2006, p. 89

[70] Clarke, Donald C. The Independent Director in Chinese Corporate Governance. Delaware Journal of Corporate Law, Vol. 31, No. 1, pp. 125-228, 2006, p. 133

the whole group goals and subordinate partial efforts of the company to the bigger entity; b) the BOS members will follow their own needs.

The BOS and BOD officers often come from the same *danwei* (social unit). The *danwei* inferiority and superiority relationship remain within the company, as the BOS membership is more prestigious, its members are usually higher positioned in a *danwei* than BOS members. It than cannot be expected that the BOS will not take this into account in this relationship. Consequently the BOS members' re-election depends on the BOD support.[71] This environment causes that the BOS is practically not independent. Being a result of the conflict of interest of so many pressures the BOS candidates are incompetent, inexperienced people considering this position as a temporary episode of their career or occupying more positions concurrently. The law does not stipulate institutional background for deep cooperation with other company structures. Further issues originate from this situation – the BOS does not meet regularly, because it does not meet regularly it does not possess accurate information and depends on information provided by the executive bodies. It is no wonder that the remuneration is not attractive and dedicated funds are not much valuable.[72]

Scholars commonly accord that the Chinese BOS effectiveness is very low and that it needs improvement. A research showed that the BOS could be divided into four categories: 1) puppet BOS, 2) BOS merely proposing suggestions, 3) supervising, but not issuing material data BOS; 4) supervising and issuing material data BOS. Not surprisingly, the first type was the most common one.[73]

Another research provided data based on whether the BOS accepted annual reports presented by the BOD, 66% of BOS has accepted presented paper without any admonition.[74]

We come to the same conclusion, when considering employee participation. Traditionally, the communist China emphasized good position of employees, high standard social security and high employment rates were

[71] Luo Liping. Jianshihui Yu Duli Dongshi: Bingcun Haishi Heyi. Bijiaofa Yanjiu, Vol. 3, p. 87, 2009, p. 90
[72] *Ibid.*
[73] Wang Shiquan; Li Wei'an. Jianshi Zhili Lilun De Yanjiu Mailuo Ji Jinzhan. Changye Jingji Lilun, Vol. 8, No. 1. 2009 , p. 29
[74] Wang Shiquan; Li Wei'an. Jianshi Zhili Lilun De Yanjiu Mailuo Ji Jinzhan. Changye Jingji Lilun, Vol. 8, No. 1. 2009 , p. 26

fundament. After the opening of the job market during the 1990s the employee care decreased and labour unions weakened. The participation in the BOS was hope for employees to stand up for their rights.[75] However, the law obliged to create employee participation in every company, however nominally broader than in other countries which introduced the BOS system, but the implementation laid in hands of companies, which had not slightest interest to extend employee interference in the company powers.

3.5.6 Comparison

The German and Chinese concept of the BOS is very different, however the models have been converging in recent years, namely the Chinese model is adapting to the German. One can assign it to the natural evolution of the BOS. Similarly, until 1938 the German supervisors had alike position as the Chinese nowadays. The position of the German BOS shifted after more than fifty years since its creation.

The question is what would be further Chinese progress in this field. The 2006 novelization enhanced some features of the BOS, but did not strengthen the position against the BOD. Directors are still the supreme power of the company and the supervisor can only make performance of their function unpleasant, but cannot really control and correct.

Being in weaker position makes the BOS unable to conduct preliminary and continuous checks, which is crucial for prevention of damage that may the directors cause when managing the company.

If China strengthened the position of the BOS in the system, it would solve some practical issues. A stronger institution would require more educated staff with broader interest in company operations, stronger BOS would be able to secure more funds to conduct control and to hire professional audit companies, which would help them improve the supervision.

A huge problem, which did not much concern the legislator, is the independency of the BOS from the BOD and external influences. German model has already focused more on the independency of the members of BOS from

[75] Nakamura, Masao. Changing Corporate Governance in China and Japan. Basingstoke: Palgrave Macmillan, 2008, p. 26

directors. Traditionally the participation of state in companies is very low and the state is globally less active in the private sphere of business than in China. State participates as common shareholder or through the institution of delegate member.[76] This delegate member shall stand up for his own opinions.[77]

The Chinese BOS cannot be considered as an independent body, it is subordinate to the BOD, party and state. We might believe that it was the legislator`s intention to keep the BOS in this specific position in order to let especially the party and state to exert influence on the organ. But independency in decision-making is a key feature of the company's health defence.

The German conception of the employee participation in the supervision can play a very positive role, because it can bring a broader cooperation between the company and its labour unions. When the labour unions in China do not work properly, the employee participation could be further more important than in Germany, but the Chinese not very elaborated provision does not provide to the employees broader background to use this right.

Late development in China shows a gradual rejection of the BOS system, because it did not work well in the past twenty years. The scholars begun to search for new ways how to take control over the BOD, but the question is whether it is just one fashion wave or an upcoming long-term trend.

4 Independent Directors

4.4 The US concept

The US corporate governance system used to be defined as market orientated Typical characteristic of the market-orientated system is frequent change of ownership through merger and acquisition, thus the companies exist independently from their owners in contrast to the German model where the ownership penetrates the company structure. This foreshadows the relationship of the owner to the employees; because the owner has no special relationship with them, thus the strict corporate structure towards them is obligatory.

[76] §100 of the Stock Corporation Act
[77] Hu Xiaojing. Rechtsfragen der chinesischen Corporate Governance. Frankfurt am Main: Peter Lang, 2006, p. 89

Companies usually attract financial resources not through bank loans but through capital investments which makes the ownership structure dispersed with lot of small and middle shareholders. Highly competitive environment between not much cooperating companies force to take risk in developing modern innovative technologies.[78]

This market structure predetermines what would be suitable for the corporate governance. It should be quick effective system defending small and middle shareholders who invested in a company. The structure should be relatively independent from the owners in order to protect long-term policies even when the ownership changes.

Corporate governance structure of the United States is composed of the one tier BOD. Whose part are the independent directors and whose role in the system of corporate governance is to solve the agency problem.[79]

Independent directors started to play important role in 1940, when the Corporate Investment Act passed and stipulated that the BOD shall consist of at least forty per cent of independent directors.[80]

In 1970s proportion of independent directors increased to over one half in BOD by courts decisions. In 1977 the New York Stock Exchange ('NYSE'), prescribed that NYSE listed companies should establish audit committee entirely made of independent directors, consequently independent nomination committee conception was created in 1990s.[81]

4.4.1 Independent director – Theory

German scholars explicitly declares, that the purpose of the BOS is to protect majority shareholder interest; it has advanced little bit to middle and small shareholder protection through in Corporate Governance Code recommended

[78]Chun Liao. The Governance Structures of Chinese Firms. New York: Springer, 2009, p. 10-24

[79]Clarke, Donald C. The Independent Director in Chinese Corporate Governance. Delaware Journal of Corporate Law, Vol. 31, No. 1, pp. 125-228, 2006, p. 154

[80] Lu Tong. Development of System of Independent Directors and the Chinese Experience. Institute of World Economics and Politics. (2009): http://hdl.handle.net/123456789/21923, p. 2

[81] Lu Tong. Development of System of Independent Directors and the Chinese Experience. Institute of World Economics and Politics. (2009): http://hdl.handle.net/123456789/21923, p. 3

independency in the last years. Independent director in the USA, on the other hand, aims to protect all investors equally.

The most common conception of the independent directors is that they represent shareholders against the BOD and are able to act freely and air their view either in the BOD both outside the boardroom and mirror the decisions of the BOD. Another less used theory is that independent director represents not only interest of the shareholder, but also those of employees possibly creditors, customers, suppliers and others or society as whole. This theory is less accepted, because directors responsible to many groups are in fact responsible to nobody.[82] It could not be expected that independent director would represent other groups in a way which would harm the interests of his voters – shareholders – and in doing so risk losing his position.

Independent directors should not protect interest of a majority shareholder, who is supposed to be able to defend his own rights by appointing suitable persons into the function; however, it is very difficult to fulfil this premise. In reality the majority shareowner will often struggle for unrestrained influence within the company.

Independent directors in the corporate governance could fulfil one of three functions: They can be considered as substitute for external regulation. This is typical in situation where state is not willing to get involved in the business and corporate governance decisions of private entities, which are perceived as more suitable to take these decisions. Independent directors then supervise the company management within the limits set by law, but are not bound by orders of any person or authority. It offers some ground for cooperation between independent and executive directors.

Secondly, the independent directors can serve as implementers of external regulation. In this case the supervising organs act as state agents in the company. The agent should control if the company is abiding with standards set up by external authority. This could be done by internal forcing of company bodies to do so, or by alerting outside authority. It usually creates a gap between

[82] Clarke, Donald C. The Independent Director in Chinese Corporate Governance. Delaware Journal of Corporate Law, Vol. 31, No. 1, pp. 125-228, 2006, p. 155

the independent and executive directors. The executive directors will try to control the independent ones or will not cooperate.

Thirdly, independent directors could certify that certain standards have been complied with like annual reports or balance sheets.[83] But this function is normally entrusted to an external audit company.

Even though the corporate governance matters are in jurisdiction of federal states some common aspect could be found. The US model of independent directors generally supports the functions of directors who do not substitute the state supervision, however, they do not need to supervise outer standards. The US independent directors do not just supervise the compliance of annual reports or balance sheets themselves; they have to delegate this duty to a outside independent auditing companies. They act only on behalf of investors.[84]

But this general idea is not widely accepted, some jurisdictions created, conceptions of *disinterested* directors (for example Delaware) who do not serve as generally authorized independent director, but find use when a transaction of conflict of interests occurs. The disinterested directors then judge and approve transaction between the firm and a shareholder, directors or high management. The US Securities and Exchange commission, the highest body supervising stock exchange markets, supports the view that the independent directors shall represent broader interest range than just those of shareholders.[85]

4.4.2 Independent Directors in the Law

For purposes of an easier explanation we will focus only on general theory and federal regulation of the institution. We have chosen as the most important norms the federal Sarbanes-Oxley Act and the rules of the New York Stock Exchange, which is one of the leading institutions promoting the independent directors requirements.

After series of bankruptcy affairs in 2001 caused by low corporate governance structure the Sarbanes-Oxley act prescribed to companies to use independent directors on the audit committee, which is responsible for approval

[83] Clarke, Donald C. The Independent Director in Chinese Corporate Governance. Delaware Journal of Corporate Law, Vol. 31, No. 1, pp. 125-228, 2006, p. 149-153
[84] *Ibid.*
[85] Clarke, Donald C. The Independent Director in Chinese Corporate Governance. Delaware Journal of Corporate Law, Vol. 31, No. 1, pp. 125-228, 2006, p. 149-153

of balance sheets, annual reports and especially for hiring an independent auditor: '*In order to be considered to be independent for purposes of this paragraph, a member of an audit committee of an issuer may not, other than in his or her capacity as a member of the audit committee, the board of directors, or any other board committee*

(i) accept any consulting, advisory, or other compensatory fee from the issuer; or

(ii) be an affiliated person of the issuer or any subsidiary thereof.'[86]

The Sarbanes-Oxley act was crucial document which pushed the corporate governance issues from state to federal level and it dictates not only that a company has to have independent directors,[87] but it orders the establishment of the audit committee. The audit committee shall independently supervise the BOD actions and accounting which makes it an important tool of the independent directors.

The independency is a key feature of an independent director. The first level is the independence from the company management. The director shall be independent personally and financially, for example a director is not to be regarded as independent under NYSE rules if:

1. He or his immediate family member has been employed or served in the company executive management in the previous year or has been employed in another company where any present directors served in the compensation committee;
2. works in a company receiving compensation higher than 2% of company's gross revenue or more than one million USD, or he or his immediate family member has obtained in any twelve-month period within last 3 years more than USD 120,000 in direct compensation;

[86] Sec. 301 Sarbanes Oxley Act

[87] Huang Chi-wei. (2008). Worldwide Corporate Convergence Within A Pluralistic Business Legal Order: Company Law and the Independent Director System in Contemporary China. Hastings International and Comparative Law Review. Vol. 31, p. 404

3. he or his immediate family is or has been in the previous three years working in a firm providing internal and external services to the company[88]

These rules are extending the independency stated in the Sarbanes Oxley act; it shows how important it is to set a clear barrier for independency.

The second level is the independence of an independent director from the company as a whole. It is very questionable in which extent and way a director should be independent. Studies have shown, that an independent director should be linked with the interest of the company.[89] It is generally recommended to increase director's interest by company share, because he can connect his interests with those of the company. The independent director`s shareholding is not desirable when he shall represent other interests than those of the shareholders. It can then be even harmful to company`s efficiency. The NYSE rules state that the shareholding participation in company shall not exceed 10%.

4.4.3 Critics

A typical failure of independent directors was the Enron case. One of the US top ten companies was revealed to be a pyramid scheme on the turn of the 21St. It used a system of shell entities to artificially boost accounting profits up. Subsequently Enron started to use these entities by avoiding consolidating to cover financial reports. The firm grew and the investors raised investments and these in turn allowed further growth.[90]

The background for this situation was created by many factors. The management was not limited in the amount of company shares received as compensation and could freely trade them; this caused the drive for short term profit. Managers and directors pushed the market price and sold their shares with considerable commission.

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[88] NYSE Manual: Section 303A.02

[89] Clarke, Donald C. China: Creating a Legal System for a Market Economy. Asian Development Bank, 2007, p. 75

[90] Palepu, Krishna and Healy, Paul M., The Fall of Enron. Journal of Economic Perspectives, Vol. 17, No. 2, (Spring 2003): http://ssrn.com/abstract=417840 or http://dx.doi.org/10.2139/ssrn.417840, p. 15-16

Although the audit committee was personally equipped well enough to comply with its duties, it met only once a year and contented with information provided by the management. Auditor Arthur Andersen, who had confirmed most of the information, had been a long-term contractor with Enron. Consequently long-term cooperation with high audit fees created relationship, where the audit company hired by the directors served their interests. The analyst of the banks took part in the '*complot*' as well. Large banks had relationship with Enron and it would have been harmful for their interests, if they had issued bad statements.[91]

The Enron case shows a fundamental failure of the independent directors system. The first issue to discuss is the independence, which is very hard to achieve. In the Enron affaire the independent directors occupying posts on the audit committee were not interested in controlling the company at all. Another failure was that the directors were conspiring with the executive management. The point is, that it is hard to achieve a balanced independence, the relationship among company leadership are very complicated and difficult to be expressed on paper, while it can be stated that the more independent and external person the less informed and understanding of the company's situation, which is exactly the case of the Enron independent directors.

Another problem of independency is that the United States lack a system of appointment of independent directors who are often installed by the chief executive officers.[92] This fact in itself casts doubt on the independency of the appointed directors.

Further practical issue is that independent directors usually do not spend enough time in their function, because they occupy other academic post or functions in other firms, as it was in the case of the Enron directors.

The liability of independent directors is also an urgent problem. Their liability for the deeds of executive directors is not generally specified. Thus they are often considered to be a void function.[93]

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[91] *Ibid.,* p. 15-31
[92] Yin Shaoping, Guanyu Duli Dongshi Zhidu De Sikao. Zhongguo Zhengquan Bao. No. 16, 2001, p. 2
[93] *Ibid*., p. 18

Although independent directors control the majority of the BOD, they lack powers, information and interest to fulfil their duties. Moreover, besides the 'disinterested directors' aspect of their function other obligations are very vague. Vaguely specified duties are, in my view, the supreme issue of the system - it is a source of confusion which causes other nuisances.

Even the statistical data do not clearly support the independent director system. Some surveys[94] prove that the presence of independent directors on the BOD is beneficial others[95] that it do not bring any change to the company performance and efficiency.

The US profit-driven BOD tends unlike to Germany BOD and BOS increase the company wealth, thus they profit themselves, as they are connected to the company through shareholding. Companies based on the pyramid scheme are a frequent phenomenon. That is why independency is considered to be an important factor in the independent directors mechanism.

However, the US system does not rely solely on the independent directors system. The most effective mechanism is free market of directors and free stock market. Directors thus have to take care of their goodwill in order to secure a good position on the market. Stock market share price can reflect wrong actions of directors as well. The media can play an important role in this field by publicizing company's scandals and therefore prevent serious damages. An efficient judicial system offers to the shareholders a way to claim in the court either directly or in the name of the company,[96] way which allows even to the minority shareholders to defend their rights.

4.5 Evolution in China

The China Securities Regulatory Commission in December 1997 issued Model Articles of Association for Listed Companies, it stated in the Article 112: '*Listed companies can according to their needs appoint independent directors. Independent directors' position shall not be occupied by 1) shareholder or person*

[94]Yin Shaoping, Guanyu Duli Dongshi Zhidu De Sikao. Zhongguo Zhengquan Bao. No. 16, 2001, p. 1

[95]Clarke, Donald C. The Independent Director in Chinese Corporate Governance. Delaware Journal of Corporate Law, Vol. 31, No. 1, pp. 125-228, 2006, p. 75

[96] Clarke, Donald C. The Independent Director in Chinese Corporate Governance. Delaware Journal of Corporate Law, Vol. 31, No. 1, pp. 125-228, 2006, p. 209

holding position in the same working unit, 2) a company insider (like manager or employee), 3) person connected with the company or person having profit from connection with the company's management.

This measure was preliminary taken to examine the possibilities of implementation of independent directors system. It was not obligatory, but it confirmed the current situation where some foreign listed companies had had to appoint such person.

Subsequently, in order to enhance the work of established independent directors CSRC together with State Economic and Trade Commission published Further Standardizing and Reform of Companies Listed Outside China Opinion promulgated on 29 March 1999. This opinion prescribed that foreign listed company should appoint more than two independent directors and more than one half of the number of independent directors in the BOD. The legislator being aware of the situation of independent directors abroad prescribed, that a independent director should have enough time and knowledge, for performance of his function. They should have been given by all necessary information. They had the right to approve conflict interest transactions and right to convene the SHM, when 2 or more independent directors accorded upon. In case of misconduct, they had to inform SHM and CSRC.

The CSRC in the document Code of Corporate Governance for Listed Companies in China ('Corporate Governance Code') has been extending the duty having independent directors to the companies listed in mainland, the listed companies should have appointed at least two independent directors and fill no less than 20% of number of directors in 2000. The gradual amendments of the document finished in 2001.

At that time the CSRC was a body struggling for improvement of corporate governance in listed companies. While the insufficient law provision concerning the BOS was not amended till 2006, the independent director institution evolved. Finally the independent directors were implemented to the Company Law in the grand novelization in 2006: '*A listed company shall have independent directors. The specific method of appointing such independent*

directors shall be formulated by the State Council. '[97] But until today the State Council has not issued any suitable regulation and no other provision of the Company Law that does concern the independent directors.

4.6 The Chinese concept

There are many provincial and central government regulations regarding the independent directors. The most complex legislation was issued by the SCRC namely the Corporate Governance Code and the Principles of Corporate Governance for Chinese Listed Companies ('Corporate Governance Principles') issued on 11 September 2001[98] and Guidelines for Introducing the Independent Directors to the Board of Directors in Listed Companies issued on 16 August 2001 ('Independent Directors Guidelines'). The SCRC could be regarded as the highest authority in the area of corporate governance whose rules are obligatory for all listed companies listed in mainland China.

The Guidelines define the independent directors as directors who are independent from the major shareholder, are not employed by the company and hold no other post in it.

The independence of the company was more emphasized than the actual independence of the BOD and the rules were set stricter than in the USA.

Any person fulfilling or which has been fulfilling any of following conditions in previous year is not allowed to perform the function of an independent director: 1) one who or whose 'direct' relatives hold post in the company, direct relatives is interpreted very extensively, it includes close family members in direct line and persons *in law*, 2) one who holds over 1% of the outstanding company shares directly or indirectly, or who is counted among 10 largest shareholders, 3) one whose unite *danwei* owns more than 5% of the company outstanding shares or whose unite is counted among 5 largest shareholders.

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[97] Article 124 Company Law

[98] *There has been a discussion on enforceability of this regulation see:* Clarke, Donald C. The Independent Director in Chinese Corporate Governance. Delaware Journal of Corporate Law, Vol. 31, No. 1, pp. 125-228, 2006, p. 189

As not independent shall be also considered a person who is providing financial, legal or consulting services to the company or its subsidiaries and persons stipulated by the articles of association or determined by the CSRC.

Besides that an independent director has to meet the requirements for the executive directors and independence requirements, has to have special knowledge on the operation of listed companies and be familiar with the relevant laws and regulations having more than 5 years of work experience in law, economics or other field suitable for performance of his function. Moreover, the independent director shall attend a special course organized by the CSRC.

The independent directors quota was set to one third of number of the BOD members. The amount should be maintained, if decrease under appointed limit occurs the SHM should re-elect a new director. If a director resigned and his resignation would cause break-through of the barrier, his resignation would be suspended until a new independent director is appointed.

More than 1% of company shareholders submit their nominations for the post to the SHM and the company shall handle information on the nominee to the CSRC, which has to approve his nomination.[99] Then the election takes place according to the rules set down in the Company Law. It is conducted along with the accumulative voting system to decrease the majority shareholder's influence on the election.

Post of independent directors is strictly protected. He can be dismissed before expiration of his office only if he has lost qualification to be an independent director (personal qualification and independency requirement) or fails to attend the BOD meeting for three consecutive times.[100]

Independent directors enjoy the same rights and duties as other executive directors; however, five special powers are endowed to them. When deciding about matters in this special range, the independent directors shall decide separately by majority of their votes. The independent directors are obliged to give consent to transactions over 3 million RMB or 5% of company's net assets, the next power is to propose to the BOD appointment or removal of the accounting company, further only the independent directors (the executive

[99] Selection I Independent Directors Guidelines
[100] Section IV Independent Directors Guidelines

directors do not have the right to vote in this matter) have to appoint external auditing or consulting company. They can propose meeting of BOD and propose to the BOD to convene the SHM, lastly they have the right to solicit proxies before convening the SHM.[101]

Special subordinate committees such as remuneration, auditing or nomination committees shall have one half or more independent directors if these committees are set up on proposal of the SHM.

The independent directors do not take part in day-to-day managing of the company they participate only in decision-making. The Independent Directors Guidelines enumerate special matters where the independent director has to express his opinion. These matters are:

a. *Nomination, appointment or replacement of directors;*
b. *Appointment or dismissal of senior managers;*
c. *Any existing or new loan borrowed from the listed company by or other funds transfer made by the company's shareholders, actual controllers or affiliated enterprises that exceeds RMB three million or 5% of the company's net assets audited recently, and whether the*
d. *Company has taken effective measures to collect the amount due;*
e. *Events that the independent director considers to be detrimental to the interests of minority shareholders;*
f. *Other matters stipulated by the articles of association.*[102]

The attitude of the independent director should be expressed as a consent, reserved, negative or non-comment opinion. The opinion with all its reasons is to be attached to the minutes of the meeting. They would be used when liability of the BOD was investigated.

Guidelines provides rules if the subordinate committees are established, these provisions load the independent directors with other duties.

The strategic committee is responsible for determining the long-time strategic decisions and supervision of their performance. The audit committee shall investigate company`s accounting related reporting processes, internal

[101] Section III Independent Directors Guidelines
[102] Section VI, Article 1 Independent Directors Guidelines

controlling systems, possible risks and legal situation as well as communicate with external audit entities. The nomination committee is in charge of testing thoroughly the candidates for the BOD, BOS and high-level managers. The remuneration committee supervises the reward plans and policies with respect to the BOD, BOS and high-level management.[103]

The company has information duty towards the independent directors and has to provide them full information on company matters, if at least two directors find the disclosed information as not sufficient; they have the right to postpone the BOD meeting.

The independent directors have the right to receive sufficient allowance and work background on the account of the company, but shall avoid of receiving any additional remuneration from the company non disclosed or not approved by the SHM. The company is allowed to provide liability insurance to lower the risks taken during performance of the function.

4.7 Critics

The scholars generally agree, that the independent directors system does not work properly in China. The question is what it is a properly working independent directors system, since even in its cradle in the USA the scholars rather tend to deny acknowledging any enhancement, which the independent directors could have brought to the US corporate governance.

The main slogan of the Chinese authors is '*adapt to the local environment*' and '*do not blindly implement independent directors mechanism*'.[104] The Chinese obviously have not respected these rules and a copycat implementation has taken place. It suffers from the same defect as the US model, but its flaws have grown stronger due to absence of other protecting mechanisms and differences between US and China legal, economical and socio-political environment.

The shortcomings could be divided into three categories of issues: rights and duties, independency, incentives.

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[103] Chapter 13 Corporate Governance Code

[104] Cheng Zhongzhang; Woguo Bu Ying Mangmu Yinru Dulidongshi Jizhi. Henan Shifan Daxue Xuebao, No. 2, 2002, p. 7

4.7.1 Rights and Duties

The Sarbanes Oxley Act stipulated, that the main function of the independent directors is supervising the company through the audit committee. It is the only clearly defined function; meanwhile no trace of specific function is to be found in the Guidelines. Is thus the independent director a common director who has more duties and responsibility? Whom does he represent? What is his relationship to other directors? and so on. These questions are hard to answer without having the substance of this institution.

Some Chinese scholars assume that the amount of responsibilities loaded on the independent directors is adequate, but they call for greater specification especially towards the BOS.[105]

However, some scholars conclude that the Chinese independent directors are overloaded by duties. The amount of these duties should be decreased and the rest of the obligations should be more specified and concentrated to one area, they propose to shift the duties of independent director to the responsibilities of disinterested directors i.e. to supervise conflict-of-interest transactions.[106] This proposal seems justified, when taking into account that the time, which the independent directors invest into the company, is often limited. This applies even more as there is not clear common accord whose interests independent directors represent. Chinese independent directors often believe themselves represent primarily the state's interest in the company.[107] Which is contradictory to scholars who consider independent directors as representatives of the minority shareholders.

An important enhancement with respect to the effective enforcement of rights and duties the independent directors should rise in number to over ½ of board of directors, which is recommended by SCRS in Regulation on Equity Option Incentives from 2004.

Weakness in the board meeting and the same information misbalance as in the BOS is to be observed for the independent directors, because they do not

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[105] Yin Shaoping, Guanyu Duli Dongshi Zhidu De Sikao. Zhongguo Zhengquan Bao. No. 16, 2001, p. 2

[106] *Ibid.*

[107] Clarke, Donald C. The Independent Director in Chinese Corporate Governance. Delaware Journal of Corporate Law, Vol. 31, No. 1, pp. 125-228, 2006, p. 171

have the right to bring an action or directly convoke a SHM. The same applies for financials and other resources that should be provided by the executive.

Moreover, besides of the possibility to express an opinion, no other option than to disclose a scandal and harm the company publicly is left to the independent directors, which is considered as a very awkward matter in China. Another option is to inform the SHM, which can decide. But for convening of the SHM meeting approval of the whole BOD is needed, so this provision is obsolete.

4.7.2 Independency

Chinese independent directors should be absolutely independent of the company, but they usually are in connection with shareholder and the BOD. An independent director should be independent of anyone in three aspects: personnel matters, human and material relationships.

The personnel matters express the independency of shareholders and BOD, BOS and high-level managers. The relation with the shareholder is very delicate topic in the Chinese jurisprudence, because the independent directors system was introduced to China despite the fact, that the shareholder structure is highly inappropriate for this corporate governance institution.

Although the Chinese tried to use the accumulative voting system and low quota for proposal of an independent director candidate (1% of the shareholders), all these efforts missed their aim, because the available statistics shows that the third largest shareholder in the Chinese listed companies owns 1.82% of shares and the fourth largest owns 0.91% of shares in average. No matter which voting system was applied, with this deployment of forces in the company the minority shareholders would not assert their candidate.[108]

There are two parts of the issue to be solved. Firstly the nomination of a candidate should not be under control of the majority shareholder. There is general consensus, that the control could be diminished by establishment of the independent directors association (lawyer association bar, medical association etc.) which should in cooperation with the CSRC ensure independency, education

[108] You Xiuling. Duli Dongshi Zhidu Youxiaoxing Yanjiu. Zhejiang Daxue Xuebao. 2004

and other background.[109] The majority shareholder then has limited chance to choose a person who would be eager to cooperate with him. Especially when a listed company should have to pass a request to the CSRC, which draws a list of candidates suitable for the company.[110] Secondly the election seems to be an even bigger issue, because it is a substantial shortcoming of the whole system of the independent directors, who are rather to be used in jurisdiction with highly dispersed ownership structure. The Chinese seem to have not found solution yet. Even if the independent director is genuinely independent of the majority shareholder, when the majority shareholder`s patronage decides about his re-election or dismissal, then it is necessary to pay attention to this shareholder`s interests.

Together with the election, the term of office is important matter to be handled. The Company Law of the state Michigan has inspired some Chinese scholars, it states in Article 450, that an independent director is elected for three years, after having accomplished his term of office and re-elected to the BOD, then he lose his independent position.[111] This could partially solve the problem of majority shareholder control, but jeopardies fiduciary duties of independent directors, because a short term director tend to ensure rather his future than follow company interests.

Human relationships are also a theme in Chinese discussion regarding the implementation of independent directors. It is a similar problem as with the BOS, so called *mianzi* and *guanxi*. *Mianzi* refers to a sort of politeness, which prohibits the Chinese to criticize, disobey or in any other way directly disgrace a friend, colleague, superior etc. This is rather easier to avoid in non-face-to-face confrontation between BOS and BOD. *Guanxi* is interpreted as system of human relationships, which is every Chinese person building and which helps him to climb up the social ladder or supports him in difficult life situations. This aspect of human relationships displays a possible cultural barrier to independent

[109] Wang Shiquan; Li Wei'an. Jianshi Zhili Lilun De Yanjiu Mailuo Ji Jinzhan. Changye Jingji Lilun, Vol. 8, No. 1. 2009 , p. 65

[110] You Xiuling. Duli Dongshi Zhidu Youxiaoxing Yanjiu. Zhejiang Daxue Xuebao. 2004

[111] Hu Yuancong; Chen Peng. Woguo Yinjin Duli Dongshi Zhidu De Sikao. Jingji Fawang. Min Shang Falü Wang. (2008): http://article.chinalawinfo.com/Article_Detail.asp?ArticleID=65277, p. 4

directors system, when it is for a Chinese more important to build up a useful relationship with a BOD member or majority shareholder than disgrace a superior.[112] In order to prevent this relationships unfolding, there are proposals, that the CSRC should approve each independent director candidate as not having been in personal relationship or supplier or customer of the company. The impossibility of execution of such a duty is obvious. Another human relationship related issue is, that the Chinese do not trust people from the outside, which complicates development of good cooperation between executive and independent directors.[113]

The material relationship independence is highly connected with incentives, especially with the remuneration. We will discuss this matter in following section.

4.7.3 Incentives

We can divide incentives into positive and negative. Positive incentives are system of remuneration; the negative are system of responsibility.

Remuneration. Chinese scholars are aware of risks related to remuneration. They focus on who should provide the compensation. When the reward comes from the body whose work should be supervised i.e. from other executive directors, it can considerably endanger the independency of the independent director. Current situation where the remuneration is proposed by the BOD and approved by the SHM is not acceptable, because if the SHM is under control of the majority shareholder, then the BOD does too, so that the independent directors have no chance to be remunerated fairly. The executive can cut off resources of the independent director, who has been working well and have prevented some wrong actions of the executive. A new solution is therefore to be proposed: the CSRC together with potentially established independent directors association should draft up a tariff tables[114] or the SHM

[112] Chen Zhongzhang; Woguo Bu Ying Mangmu Yinru Dulidongshi Jizhi. Henan Shifan Daxue Xuebao, No. 2, 2002
[113] Nakamura, Masao. Changing Corporate Governance in China and Japan. Basingstoke: Palgrave Macmillan, 2008, p. 223
[114] Yin Shaoping, Guanyu Duli Dongshi Zhidu De Sikao. Zhongguo Zhengquan Bao. No. 16, 2001, p. 2

should suggest a wage[115] (but the SHM is often under control of the majority shareholder, which leads to the same situation as if the remuneration would be offered by the BOD executive members).

The remuneration should connect the interest of independent directors with the interests of the company, which means there should be some director stock plan to increase the efficacy of the director.[116] But in the Regulation of Equity Option Incentives from 2004 of CSRC opposes to this fact, which makes the independent directors probably more independent than it is suitable.

Liability. CSRC decided to make a deterrent case of Mr. Lu Jiahao in order to improve independent directors' awareness of their duties. Lu, a common member of the Chinese People's Political Consultative Conference Hubei province committee and a retired university English teacher an 'independent' director of Dengbaiwen company became in 1995 (when even the notion of independent directors was not introduced to China). The company was subject to money stripping scandal, Lu and his independent directors colleagues were fined 100,000 RMB each by the CSRC for having approved false balance sheets and annual reports. Damage, which occurred to the company, was nearly 20 million RMB, but the fine was considered to be very high for a retiree with 1500 RMB per month pension who performed his function without any compensation.

Lu defended himself that he accepted the function as consultative post which would help to develop the company. He participated two times per year on the BOD meeting, however he admitted that it was not enough to master the complexities of the company. The false documents did not lack any formal requisite; it passed the audit and BOS investigation. Lu thus had no reason to doubt about their truthfulness. Moreover no other supervising body than thindependent directors (BOS members or auditor) was fined.[117]

Although scholars do not refuse the measures taken by the CSRC, they suggest it would be better if the awareness of responsibility was enhanced. Civil

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[115] Niu Yuyan. Duli Dongshi Zhidu Yu Jianshihui De Chongtu Yu Xietiao. Fada Min Shang Jingji Falü Wang. 2010

[116] Clarke, Donald C. The Independent Director in Chinese Corporate Governance. Delaware Journal of Corporate Law, Vol. 31, No. 1, pp. 125-228, 2006, p. 171

[117] Ji Shuqian. Lu Jiahao Baisu De Qishi: Duli De Liang Nan Xuanze. Caijing Budao. (2002): http://finance.hebei.com.cn/system/2002/11/27/006432047.shtml

liability provided in the Company Law offered a good base, but particularly towards the independent directors the demands should be increased, to motivate them to watch the BOD. The most mentioned is the condition that if an independent director does not attend a meeting and sends no proxy, then one presumes he agreed with the matters discussed on the meeting.[118]

The problem of liability is connected with all other issues mentioned, the liability (risks) should be in adequate proportion to remuneration, the independent director should be granted independent by law to be able to bear all the responsibility and he should know what are his duties to know in which scope is he liable.

Nowadays, the independent directors are afraid of performing their duties when they take many responsibilities in broadly defined obligations. The liability makes them bear responsibility for other directors who can easily trick them. The independent director cannot trust anyone and has to investigate every matter in detail.[119] Moreover this situation is disproportionate when the independent directors have not much word in general company policies.

China has not yet developed a strong market for independent directors improving the independent director standards and non-legal liability. If there was a functional market, the directors would have to take care of their goodwill, when managing a company in order to find a new post when leaving previous position. A better medial control disclosing misconduct to the public and thus enhancing the efforts of all components of the company would work similarly.

Together with undeveloped market structure the *keiretsu* phenomenon also endangers the independent directors independency in the same way as the BOS.

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[118] Chen Zhong Judicial System. zhang; Woguo Bu Ying Mangmu Yinru Dulidongshi Jizhi. Henan Shifan Daxue Xuebao, No. 2, 2002

[119] Fang Liufang. Duli Dongshi Zai Zhongguo: Jiashi He Xianshi. Min Shang Falü Wang. (2003): http://article.chinalawinfo.com/Article_Detail.asp?ArticleID=64311

5 The Comparison of functions of the BOS and Independent Directors

5.4 Which Concept Suits China Better

We will use the conception of *micro* and *macro fit* introduced by Kanda and Milhaupt. '*Micro-fit is how well the imported rule complements the preexisting legal infrastructure in the host country. Macro-fit is how well the imported rule complements the preexisting institutions of the political economy of the host country.'* [120]

Micro-fit

The *micro-fit* of the BOS does not suit very well. The BOS is weakened by the central role of the SHM in the company; this causes the exertion of power in company very ineffective and slow. Secondly, the BOS is not strong enough to perform supervision over the BOD and the BOD is then free to make any decision. Nonetheless, until the conception of independent directors, there was no institution overtly concurrent with supervisors.

The independent directors *micro-fitted* very weakly in the Chinese system. They lack clearly stipulated rights and duties, incentives and liability make them a toy in hands of the majority shareholder and the other executives. Moreover, when the concept of independent directors was entering the Chinese environment a potential rival – the BOS – was already implemented.

The conflict between the BOS and independent directors resulted in higher corporate governance costs and an overlap of powers of two different bodies. Moreover, higher costs in this case do not mean better performance, on the contrary, the independent directors and the BOS are each on another side of the barricade, and they represent other interests and other bodies. Chinese scholars consider the independent directors as preliminary and continuous

[120] Kanda, Hideki; Milhaupt, Curtis J. Re-Examinging Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law. Columbia Law and Economics Working Paper No. 219. (2003): http://dx.doi.org/10.2139/ssrn.391821, p. 9

control, while the BOS performs the subsequent check.[121] This conception only sharpens conflicts between these bodies and disperses the control performance. It is more useful to have one body organizing the whole controlling process, than two competing organs. In a detailed consideration this construction is not very accurate, since the independent directors shall (on proposal of the SHM) build up audit committee, which is hiring auditors and *ex post* supervises company operations, so it directly combines full-scale control in the hands of independent directors.

We can ask whether the independent directors concept can even be a *micro-fit*, when its success in the country of origin has not been high. Furthermore, in a situation, where China lacks other necessary institutions such as direct and indirect shareholder action and effective independent judicial power the enforcement of this institution is difficult.

Macro Fit

The *Macro-fit* of BOS is quite good. It is suitable for less dispersed ownership governing the Chinese companies, it clearly represents the interests of majority shareholder. Recently, we could see some efforts to make the board more independent of the majority shareholder to increase the minority shareholder protection. It also does not depend much on the other external influences.

Independent directors on the contrary do not fit well in the system of majority shareholder dominance; they can easily loose their crucial feature, the independence. Furthermore, the Chinese environment lacks other market institution such as market for independent directors, which would positively motivate the independent directors to work with utmost effort for the company. The state will continue to struggle for holding the market power, as well as media under its control.

Paradoxically, despite the fact, that China calls for tailor made institution of the corporate governance the result is quite dubious. When China took over the German concept of the BOS and tried to suit it to its own environment a weak imitation occurred, one that in fact does not match the company needs. When

[121] Niu Yuyan. Duli Dongshi Zhidu Yu Jianshihui De Chongtu Yu Xietiao. Fada Min Shang Jingji Falü Wang. 2010

China implemented without conceptual changes the mechanism of independent directors a new failure has appeared.

5.5 What will follow

It seems as if the Chinese have been following the corporate governance fashion trends. The BOS model was very popular in 1980s when the economies of Germany and Japan were blooming, but in the 1990s the focus shifted to the US system of independent directors which suffered substantial harms at the turn of the century and more recently during the housing crisis. Analogically to this development, China adopted the BOS model and then since 1997 it started to introduce the independent directors system. Last important legislative change, which took place in 2006 did not strengthen the position of independent directors, but that of the BOS. China is apparently temporizing.

For further pondering one must take into account the development in the Chinese society in the recent years which does not seem to shift the *macro-fit* conditions. The state capitalism will persist. There are three ways, which are considered by Chinese scholars.

The Organization for Economic Co-operation and Development together with some scholars is of that view that the independent directors system has enhanced the corporate governance environment in China.[122] This does not seem acceptable, this system has to fight not only the same setbacks as the BOS (control of the majority shareholder, information misbalance, weak position), but it suffers from other diseases as well – insufficient market, independency guarantees etc. The current situation is untenable, the system needs to be adjusted.

Some call for synthesis of these two organs in an improved independent director BOS (that means abolition of the current independent director institution), namely this should solve the problems of independency of the BOS, which should be divided from external pressures, mainly the state and the

[122] OECD. Corporate Governance of Listed Companies in China: Self-Assessment by the China Securities Regulatory Commission, OECD (2011): http://dx.doi.org/10.1787/9789264119208-en, p. 88

party.[123] But it appears to be too strict a measure after more than fifteen years since the establishment of the independent directors in China.

The most supported opinion is that the BOS should be strengthened and receive German BOS rights over the BOD, even the independent directors rights should be restricted to prevent it from competing with the rights and duties of the BOS. It would therefore be necessary to find a new role for the independent directors.

First possible change in status is the redefinition of powers of both organs, in a way that none of them would have overlapping functions with the other. That means the BOS should take care of financial affairs of the company and the independent directors would take charge of the insider control.[124] But this may cause some misunderstandings between the two institutions, because financial and internal matters are often related.

The most convenient way would be to transform the independent directors into disinterested directors, who act normally on the board but are endowed with certain specific powers, such as conflict-of-interest transaction, and also deprive them of the right to create subordinate commission.

The strengthening of the BOS is the most reasonable progress which the PRC could do in current situation. It would improve the efficiency of the entities and the state would be able to withhold its leading position in the companies.

The independent directors could achieve some improvement in the corporate governance, but only in a supplementary role until the social democratic economy structure prevails in China.

If the state will seek to raise company founds by middle and small investments, it should handle with the low independency of the company bodies. Adjustments should be made, but not only in the internal corporate governance should be adjusted, but the whole *keiretsu* system with party and state influences should be abolished.

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[123] Luo Liping. Jianshihui Yu Duli Dongshi: Bingcun Haishi Heyi. Bijiaofa Yanjiu, Vol. 3, p. 87, 2009, p. 93-94

[124] Wen Ji. Shi Lun Woguo Duli Dongshi Zhidu De Falü Wenti Ji Duice. Zhonguo Min Shang Falü Wang. (2003): http://article.chinalawinfo.com/Article_Detail.asp?ArticleID=65960

6 Conclusion

We have to admit that China is following contemporary trends in strengthening the internal supervision and it is doing it in its own way, but we cannot say the PRC meets its own goals. China has created two different bodies which, when put together, cross over their rights and duties and lack a systematic implementation.

The whole current supervision system fits in the general notion of the Chinese law which we foreshadowed at the beginning. The lawmaker tries to nominally meet some requirements, but laws are not able to achieve them in practice. We can see the efforts of the CSRC to prevent stock market damages caused by the low corporate governance standards by introducing the independent directors, knowing that current board of supervisors are nearly paralysed, but this solution is not able to bear desired fruits.

With respect to the facts mentioned in the chapters 2 and 3, that the CSRS is sole external corporate governance institution and other external in institutions such as media, banks, developed stock market etc. are quite restricted, the need for reform to working internal corporate governance surveillance is more urgent.

Besides the lack of systematic solution the Chinese despite their slogans exhorting to follow the local conditions, in reality, did not do so. The most part of the regulations was blindly transplanted as we have seen in the chapter 4. Nevertheless the sole idea of using simultaneously both institutions is not unreasonable itself, but in the Chinese situation it is not necessary to create two different bodies exercising the supervision powers. Although the Chinese seek to improve this doubled system, it would be hard to avoid any overlapping authority which was subject to the chapter 5.

In my view it would be far more useful to create an independent board of directors which is endowed with supervising powers and powers to attend the meetings as well as to take part on some legally specified decision making, or creating special committees such as auditing or nomination committee and especially occupying the supreme post in the corporate governance hierarchy. Even though it closely resembles the German model of the BOS, it simply fits to

the Chinese environment. We can see that good things that the independent supervisors can bring to the company could be very easily incorporated into the BOS. This incorporation can also have a more beneficial utility, because it can be much less misused, especially because the Chinese system is not able to grant independent directors independence.

It surely would be very appropriate, if all the propositions of Chinese scholars made on the account of independent directors in terms of remuneration, election, liability and so on, were applied on at least part of the BOS members who filled the role of the independent directors.

But I am aware of the fact the in view of the recent development it is hardly possible that China would abolish the institution of the independent directors which is considered as the most advanced part of the Chinese law, on the contrary we can expect further development in the way of strengthening of the independent directors` position.

7 Teze diplomové práce

7.4 Úvod

Čína přitahuje pozornost současných vzdělanců. Hospodářský rozkvět posledních třiceti let nás nutí ptát se po podstatě čínského úspěchu. Samotná Čína usiluje o mezinárodní pozornost vytvářením nástrojů *soft power*, které by ji pomohly rozšiřovat moc na mezinárodním poli. Proto se ČLR snaží o vytvoření v mnoha ohledech vlastního systému zvaného *socialismus s Čínskými rysy*, který by mohl vytvořit protiklad z západnímu kapitalistickému zřízení a pomohl šířit čínský myšlenkový vliv.

Při hledání vlastní cesty ideologické a hospodářské vznikla situace, kdy se v čínském právu současně objevily instituce nezávislých ředitelů a dozorčí rady v čínských veřejně upsaných společnostech. Tento jev je ojedinělý, ne-li jedinečný.

Tato práce se snaží pochopit základní rysy systému dozoru v čínské *corporate governance* a přináší tak i cenné myšlenky o *corporate governance* jako celku.

První dvě hlavy práce uvádí stav čínského společensko-právního vývoje a hlavní myšlenku potřeby dozoru v *corporate governance*. Třetí kapitola se zaměří na dozorčí radu v německém právu, čtvrtá hlava se soustředí na rozvoj čínský protějšek. Podle stejného vzorce se pátá hlava bude zaobírat americkým systéme nezávislých ředitelů, následovat bude popis situace v Číně. Pátá hlava vyvozuje závěry z předchozích skutečností a snaží se odhadnout další vývoj.

Rozvoj internetu a nízká ochrana autorského práva v Číně zpřístupňuje mnoho jinak velmi těžko dostupných zdrojů této diplomové práce. V oboru čínské *corporate governance* byl již odveden velký kus práce panem Donaldem Clarkem, který se jakožto Američan téměř výhradně zaobíral pozicí nezávislých ředitelů v čínském právu. Podobně jsou nezávislými řediteli, jakožto nejmodernějším institutem čínského práva fascinováni i čínští protějšci, čímž zůstává téma dozorčí rady opomenuto, což může být dáno i výraznou jazykovou bariérou mezi ČLR a zeměmi (zejména Německem), které dozorčí rady využívají. Proto je část této práce týkající se dozorčí rady velmi cenným příspěvkem do diskuze, přinášející celkový podrobný náhled.

Otázky, jež si tato práce klade jsou především: Jakou roli mají hrát tělesa této dvouvrstvé instituce? Přijala Čína tyto instituty řádně, tedy v souladu se svými potřebami? Jakým způsobem by měly být tyto instituty upraveny?

7.5 Nedávný vývoj

Čínská lidová republika ("ČLR"). Ve svém vývoji prošla třemi základními fázemi vývoje. První fáze, takzvané období maoismu trvalo od roku 1949 do roku 1978. Pro toto období bylo charakteristické, že státní moc prostupovala do všech odvětví společnosti. Hospodářství bylo řízeno ústředním plánem a vzhledem k tomu, že valnou část této éry neexistovalo soukromé vlastnictví výrobních prostředků, bylo možno považovat státní hospodářství za jednu velkou obchodní společnost a státní podniky za její jednotlivé pobočky. Tento systém neumožňoval samostatnou *corporate governance* („řízení podniku"), tu provozoval stát skrze státní dozorčí orgány.

Po smrti Mao Ce-tunga se pozvolna začala rozbíhat druhá fáze vývoje, při níž stát postupně v menší míře povoloval vlastnictví výrobních prostředků a lákal zahraniční kapitál skrze spojené čínsko-zahraniční podniky. Toto období nevytvořilo ucelený právní systém a vše se řídilo spíše složitým systémem předpisů nižší právní síly.

Postupně se začaly prosazovat obecně závazné právní předpisy, z nichž pro nás nejvýznamnější byly Obecné zásady občanského práva z roku 1986, které jako první vymezily pojem právnická osoba.

I v tomto období udržel stát naprostou nadvládu nad obchodními společnostmi, snažil se pouze rozšířit odpovědnost a pravomoci ředitelů státních podniků tak, aby jednali samostatněji na vlastní zodpovědnost. Největší průlom zaznamenala tato snaha na sklonku tohoto období, čili v roce 1992.

Následovala třetí, současná, fáze. Izolace ČLR po Tchien-an-menském incidentu (1989) ukázala nutnost otevřít trh. V roce 1993 byl vydán Zákon o společnostech, který jako první uceleně tvořil pravidla pro všechny typy společností. Jeho hlavním smyslem nebylo ani umožnit zakládání nových soukromých společností, jako spíše umožnit transformaci státních podniků do svébytných podniků.

Stát při této reformě umožnil soukromým osobám převzít řízení menších a středních podniků, sám se při tom zbavil části svých podílů ve společnostech. V počátku si ovšem vždy udržel nadpoloviční podíl, čímž s pomocí menšího kapitálu začal ovládat více zdrojů, přitom ovšem přišel o významnou část s tím spojené byrokracie.

V tomto období se jeví jako nejožehavější právě státní účast ve společnostech, která zamezuje řádnému řízení podniků, neboť stát omezuje rozhodování firem a využívá je k socio-polickým cílům jako je například zaměstnanost, půjčky potápějícím se podnikům, nebo pomoc vládním úřadům. Zároveň ovlivňuje výběr vedení podniku a tím z něj opět dělá státní úřad upsaný na burze.

Čínské právo ve sledovaném období rovněž prošlo významnou proměnou od neexistence v době maoismu k postupnému budování právního systému. V průběhu první fáze nevznikal žádný ucelený systém, nýbrž soubor tajných interních vyhlášek, kterými se řídili jednotlivé státní úřady. Postupně se ovšem začaly objevovat plnohodnotné právní předpisy.

7.6 Současná situace v ČLR

Současný právní systém v ČLR má mnoho nedostatků. Zákony obecně trpí příliš obecnými formulacemi, kdy je sice stanoveno nějaké pravidlo, ale nejsou stanoveny podmínky pro jeho dodržení. Další významnou vadou systému je absence uceleného řádu právních norem. Je zde významný přesah moci výkonné a soudní do moci zákonodárné, kdy výkonné orgány a Nejvyšší lidový soud ČLR vydávají předpisy na úrovni zákonů. Kromě toho není ucelená hierarchie podzákonných předpisů, kdy každý správní úřad vydává nejrůznější předpisy, rozlišných názvů podobné síly.

Ve výkladu práva je upřednostňován autentický výklad, kdy ani soudy nemají možnost samostatně vykládat předpisy. Soudnictví v čínském právu není samostatnou mocí, nýbrž pouze v podstatě výkonným orgánem specializovaným na rozhodování sporů a jinou agendu. Dlouhou tradici má na území Číny mediace, která ovšem z pohledu řízení podniků je stěží uplatnitelná. Co se týče řízení podniků, Nevyšší lidový soud zakázal přijímat řízení náhrady škody z porušení práv řediteli společností.

ČLR se snaží pomocí nejrůznějších mechanismů udržovat přímý vliv a dozor nad národním hospodářstvím, v řízení podniků ovšem postrádá silnou základnu pro dozor. Takzvané vnější řízení podniků, tedy vně podnikové vlivy, které ovlivňují jeho samotné vedení, je v Číně poměrně slabé. Jednak zde příliš nefungují státem neovládané instituce, především pak svobodný trh a dohled sdělovacích prostředků. Státní dozorový orgán nad společnostmi s cennými papíry Čínská komise pro regulaci cenných papírů („SKRCP“) je sice vůdčím motorem změn a pokroku na poli řízení podniku, není ale dostatečně lidsky a materiálně vybavená pro vhodný dozor. Banky, které by skrze dozor na společnostmi, jimž půjčily, musí být považovány za státní dozor díky jejich vlastnické struktuře, v níž hraje stát hlavní úlohu. Obecně bankovní dozor selhává jak z nezkušenosti, tak z důvodu jejich politického vedení, které má jiné cíle než zdravého dlužníka, ale například opět zaměstnanost, sanaci jiných společností atd.

Z těchto důvodů by bylo vhodné, aby vnitřní řízení podniku bylo nastaveno tak, aby se co nejvíce předcházelo škodám. Čínské vnitřní řízení podniku je bohužel považováno za jedno z nejhorších na světě.

Světově jsou přijímány dva hlavní přístupy k řízení podniků – americký a německý. Přičemž obecně je zastávána teorie, že se tyto modely postupně sbližují.

Německý přístup je založen na větších podílnících, kteří jsou schopni ovládat společnosti, stát je zde jen minimálním podílníkem. Peněžní zdroje se čerpají z bankovních půjček, ne z investic menších investorů. Takovéto firmy tvoří dlouhodobá pracovní místa, která způsobila nárůst spolupráce mezi společnostmi, zaměstnanci a odbory. Takto se vybudoval model zaměřený na získávání prospěchu pro všechny zaujaté osoby, tedy i dodavatele, odběratele, věřitele a podobně, nikoliv pouze podílníky.

Pro americké podniky je typické, že mají rozmělněnou vlastnickou strukturu a podniky se snaží získávat peněžní prostředky od podílníků, nikoliv z půjček. Podniky se pak orientují na navýšení zisku podílníka.

ČLR má spíše blíže k německému způsobu řízení podniků. Jednak akcionářskou strukturou a jednak zaměřením na prospěch všech zaujatých.

7.7 Dozorčí rada v německém modelu

Německo se stalo kolébkou institutu dozorčí rady v právu společností, bylo první zemí, která vytvořila dozorčí radu a to v roce 1870 v akciovém zákoně. Původně pracovalo s koncepcí dozorčí rady v akciových společnostech, která byla podřízená představenstvu, fungovala tedy jako dozorčí komise představenstva, která si od něj udržovala nezávislost tím, že dozorčí rada byla jmenována valnou hromadou společnosti. Toto uspořádání ovšem bylo změněno v roce 1937, kdy dozorčí rada získala navrch oproti představenstvu. Postavila se jako nejvyšší firemní orgán, který získal právo odvolávat členy představenstva a určovat obecné firemní strategie.

Německá dozorčí rada je v současnosti volena valnou hromadou na čtyři roky. Rada posléze volí představenstvo, které může volně odvolávat. Toto oprávnění je velmi silný nástroj v rukou dozorčí rady, která tak může efektivně vykonávat svůj vliv a prosazovat obecnou strategii, kterou zadá. Zároveň můžou dozorci vymínit, že jí představenstvo musí předkládat určité druhy obchodů ke schválení. Zároveň dozorčí rada může zastupovat společnost před soudem, pokud by to v dané záležitosti znamenalo střet zájmů pro představenstvo.

Rozhodnutí dozorčí rady je možné zvrátit tříčtvrtinovým přehlasováním na valné hromadě.

Platí, že členové dozorčí rady nesmí být dosazeni ve výkonných funkcích společnosti, musí být nezávislí na členech představenstva i v rámci koncernu nebo v jiných společnostech a nesmějí být v pozici závislé na nějakém členu představenstva.

Rada je vedena předsedou a místopředsedou a skládá se z běžných členů, zástupců zaměstnanců a delegovaných členů. Zaměstnanci jsou dosazováni do dozorčí rady na základě zákona o spolurozhodování a hornického zákona o spolurozhodování. Poměry se odvíjejí od počtu zaměstnanců ve společnosti, zlomová hranice pro povinné zastoupení zaměstnanců ve společnosti je 500 pracovníků. Ve stanovách společnosti může být vymezen akcionář, který je oprávněn vysílat delegované členy dozorčí rady, poměr těchto členů nesmí překročit jednu třetinu všech členů rady. Toto oprávnění hojně využívá stát, který takto dosazuje své zástupce, kteří dozorují podniky se státní účastí.

Přičemž výrazným rysem vlastnické struktury německých společností je, že stát v nich mám minimální účast.

Do budoucna se bude německá koncepce řízení podniku sbližovat s americkým modelem, jak ukazuje koncepční dokument Kodex řízení podniku, který vydala spolková vládní komise.

Bude se postupně zvedat nezávislost dozorčí rady na většinovém akcionáři. Doposud totiž většinový akcionář mohl volně ovládat dozorčí radu a ta byla nástrojem jeho dohledu nad představenstvem. Zvyšování nezávislosti by mělo napomoci lepší ochraně menšinových akcionářů společnosti.

Dále jsou dávány požadavky, aby dozorčí rady tvořily specializované výbory jako je auditní výbor nebo výbor nominační, na které mají být delegovány povinnosti, aby se zvýšila efektivita práce rady.

Německá dozorčí rada je považována za velmi robustní orgán, který z důvody zastoupení širokého spektra zájmů v tomto orgánu, působí pomalu a neefektivně a není schopen brát na sebe veliká rizika. V případných korporátních skandálech je příznačné, že člen dozorčí rady začne zneužívat své postavení a těžit z něj neoprávněný prospěch, čímž sice poškozuje firmu, ubírá jí na efektivitě, ale povětšinou nemá pro společnost osudné následky.

7.8 Čínská dozorčí rada

Historie čínské dozorčí rady začíná v roce 1993 spolu se zákonem o společnostech z roku 1993. Podstatně byla reformována až v roce 2005 s velkou novelou tohoto zákona. Novelizace zvýšila odpovědnost členů rady, zvětšila jejich pravomoci a pokusila se učinit je více nezávislými.

Čínské právo vnímá dozorčí rady podstatně odlišným způsobem než německé, nachází se totiž ve vývojové fázi, kterou Německo překročilo v roce 1937, dozorčí rada je orgánem souběžně ustanoveným s představenstvem skrze volbu na valné hromadě.

Valná hromada volí na tři roky minimálně tříčlennou dozorčí radu, která je volena dle novelizace z roku 2005 na základě kumulativního hlasování. Kumulativní hlasování se liší od běžného semi-proporčního hlasování tím, že je dán každému voliči počet hlasů rovný počtu mandátů. Volič může s hlasy volně

nakládat a přerozdělovat je, čímž se umožňuje menšině prosadit alespoň jednoho svého kandidáta.

Ani toto ustanovení však nezvedlo nezávislost valné hromady, která je ovládána majoritním akcionářem do té míry, že ostatní menšinoví akcionáři jen stěží prosadí své kandidáty.

Členové rady ovšem mohou držet akcie společnosti, v níž vykonávají svou funkci, což samozřejmě zvyšuje jejich zájem na dobrém fungování společnosti. Zároveň zákon o společnostech nastavuje pravidla omezující možnost prodeje akcií společnosti, aby se předešlo spekulacím ze strany jejího vedení.

Na rozdíl od německé předlohy se zaměstnanci musí podílet na každé dozorčí radě. Míra účasti zaměstnanců není zákonně stanovena. Zaměstnanci musí být zvoleni demokratickým způsobem ve volbách, ve kterých hlasovali ostatní firemní zaměstnanci. Rada je řízena předsedou a místopředsedou, kteří nemají žádné jiné než organizační funkce.

Dozorčí rada má několik základních oprávnění k výkonu své funkce. Má právo a povinnost zkoumat peněžní záležitosti společnosti; dohlížet, zda členové představenstva a manažeři dodržují právní předpisy a stanovy společnosti během výkonu jejich funkce; požadovat nápravu, pokud se ukáže, že některé činy členů představenstva nebo manažerů poškodily zájmy společnosti; navrhovat svolání schůze valné hromady; dávat návrhy valné hromadě; a zahájit právní úkony proti členovi představenstva podle článku 152 zákona o společnostech, který naplnil skutkovou podstatu článku 150 zákona o společnostech.

Ačkoliv tyto oprávnění působí dojmem, že má dozorčí rada moc účinně dohlížet nad činností představenstva, není tomu tak. Dozorčí rada postrádá jakýkoliv donucovací prostředek, který by byl s to přinutit představenstvo ke spolupráci. Dozorčí rada nemůže odvolávat členy představenstva, dokonce ani nemůže sama podat žalobu, nýbrž musí nejprve předložit záležitost valné hromadě. Rada je tak ve výrazně slabší pozici oproti představenstvu a může jen stěží vykonávat svou funkci. Velkým nedostatkem tohoto orgánu je nemožnost předcházet škodám. Dozorčí rada se téměř výhradně soustředí na následnou kontrolu a není schopná předcházet možné škodě, což více oslabuje úlohu dozorčího tělesa.

I když se stát snaží postupně snižovat svou účast ve společnostech (nikoliv ale z nich úplně vystoupit, nebo ztratit významnou většinu), tak je systém dozorčích rad ohrožen vnějším systém, který se v ČLR vytvořil. Čína po japonském vzoru buduje soustavy společností *keiretsu*, ve kterých je jedna ústřední společnost, v níž má stát většinový podíl. Ústřední společnost řídí celý konglomerát, v němž jsou společnosti různého druhu – dodavatelské, odběratelské, finanční a jiné. Uskupení drží na základě vzájemných obchodních vztahů, akcionářských vazeb a prestiže. Společnosti se podrobují společné politice. Skrze tento systém a další politické vazby na ústřední společnost se stát snaží prosazovat svůj vliv ve společnostech, ve kterých má zmenšená akcionářská práva.

Dozorčí rady se potýkají s dalšími výraznými praktickými obtížemi. Tím, že jsou velmi slabé, jsou členy dozorčích rad lidé méně vzdělaní, kteří považují toto umístění na přechodný post na začátku své kariéry. Často také jsou v dozorčí radě lidé se stejné společenské jednotky *tan-wej* jako pochází členové dozorčí rady. Členové rady jsou pak náchylní být poslušni společensky nadřazených kolegů.

Dozorčí rada se střetává se zřejmým nezájmem jejích členů o dění v ní a tím, že se členové rady neúčastní jednání, nemají potřebné informace. Závisí pak pouze na informacích dodaných představenstvem, které tak může radu velmi snadno manipulovat.

Slabé postavení orgánu se pak také odráží na odměnách jeho členů a jeho finančních zdrojích. Špatně placení členové rovněž nemají zájem o společnost, stejně jako nemajíce fondy pro výkon činnosti nemohou získávat představenstvem nepřeceděné informace o chodu společnosti.

Množství průzkumů potvrdilo skutečnost, že čínská dozorčí rada nefunguje, jak by měla, a doplnění kontrolních mechanismů společnosti je zcela nezbytné.

Německo, které se do roku 1937 potýkalo s podobnými nedostatky dozorčí rady jako Čína, vyřešilo tyto potíže posílením postavení dozorčí rady. Čína se rozhodla pro odlišný postup a vytvořila další orgán, který má za úkol posílit kontrolní schopnosti společností.

7.9 Nezávislí ředitelé v právu USA

Americké obchodní společnosti jsou řízeny na základě monistického systému. Ten spočívá v tom, že je společnost spravována jen jediným orgánem, správní radou. Správní rada v sobě kombinuje jak prvky výkonné, tak kontrolní. Ve třicátých letech dvacátého století se do správní rady prosadil prvek nezávislých ředitelů, kteří se začali podílet na kontrolních pravomocech v rámci správní rady. Americká teorie vyvinula tři možné úlohy, jež může nezávislý ředitel plnit. První úkol je samoregulace, ta vzniká, pokud stát nechce zasahovat přímo do řízení firem a uznává, že obchodní společnost bude sama ve svém zájmu efektivněji řídit své záležitosti. Druhý možný úkol je, že nezávislí ředitelé neprovozují samosprávu, ale dohlížejí na implementaci vnějších norem s tím, že případné nedostatky hlásí příslušným úřadům. Třetí úkol je, že působí jako finanční kontrola společnosti, nahrazují tak svou činností práci vnějších auditorských a poradenských firem.

Ještě donedávna nebyly na federální úrovni dány požadavky na povinnosti nezávislých ředitelů, každý federální stát si proto mohl vytvořit vlastní úpravu, která více či méně spadala do tohoto třídění. Průlomem v této oblasti byl zákon Sarbanes-Oxley z roku 2001, který novelizoval celou řadu předpisů v reakci na řadu korporátních skandálů na přelomu tisíciletí. Ten přesunul úpravu nezávislých ředitelů do federálního akciového zákona. Výrazně konkretizoval povinnost nezávislých ředitelů obsadit celou auditní komisi, čímž jim svěřil dohled na chodem a financemi společnosti, a povinnost najímat nezávislého auditora. Tato úprava byla terčem silné kritiky, neboť postrádala širší zázemí pro provedení a byla v rozporu s již zavedenými mechanismy jednotlivých států.

Například stát Delaware svěřil nezávislým ředitelům pouze určité pravomoci týkající se kolizního jednání ředitelů společnosti. Kontrolní systém ponechal spíše v systému jednoduchých korporátních žalob, kdy se mohli akcionáři snadno domoci náhrady škody nebo donucení společnosti k jednání.

Zásadní obtíží nezávislých ředitelů je vymezení jejich nezávislosti. Tito ředitelé musí být dostatečně nezávislí na výkonných ředitelích, aby je mohli kontrolovat, aniž by se jimi nechali ovlivňovat, zároveň ale mezi výkonnými a nezávislými nesmí vzniknout příliš velké odcizení, aby obě strany byly ochotny

spolupracovat. Stejně důležité je vyváženě určit míru nezávislosti na společnosti, neboť studie ukázaly, že nezávislí ředitelé, nemají pro společnost žádný přínos, pokud na ni nemají žádnou vazbu. Vhodné je určit možnost získávat firemní akcie jako součást odměny. Míra podílu na společnosti musí být omezená, aby se předešlo spekulacím ze strany ředitele.

Jednotlivé předpisy stanovují různá pravidla pro určení nezávislosti, většina, například pravidla New Yorské burzy, jsou velmi konkrétní v této oblasti. Potíž ovšem je, že vhodné nastavení je zřejmě velmi obtížné vyladit na papíře.

Americký systém nezávislých ředitelů je velmi kontroverzní, poněvadž učenci se nemohou shodnout, zda jeho užívání má nějaký účinek. Tato skutečnost spíše svědčí o tom, že pokud nějaký účinek je, nelze jej přímo přiřknou nezávislým ředitelům.

Ještě před účinností zákona Sarbanes-Oxley vznikl ve Spojených státech významný korporátní skandál u společnosti Enron, která upsala akcie na New Yorské burze, takže byla nucena přijmout úpravu nezávislých ředitelů podobnou té v zákoně Sarbanes-Oxley.

Enron patřil do desítky nejpřednějších amerických společností. Kolem roku 2001 se ovšem ukázalo, že celá firma byla jen obří pyramidová hra. Enron sice zpočátku stavěl na slušných hospodářských základech, postupně však začal vytvářet sítě firem účetně maskujících jeho dluhy. Uměle tak nafukoval své hospodářské výsledky, postupně se dostal do situace, kdy musel cirkulovat investice akcionářů. Bez ohledu na to, že se této pyramidové hře přiživovali všichni zúčastnění (banky, ředitelé, auditoři…), tak nezávislí ředitelé zcela selhali, neprohlédli jednoduchou strukturu krytí dluhů, někteří se na pyramidě přiživovali spekulací s akciemi a nechali se plně ovládat výkonnými řediteli.

Enron je příkladem přemrštěné snahy amerických manažerů generovat zisk ve prospěch akcionářů a přijímat při tom vysoká rizika, což je pravým opakem pomalého rozhodování německý dozorčích rad. Proto i korporátní skandály jsou odlišné, Američané nafukují firemní zisky, což může vést mnohem většímu propadu než snahy Němců udržet si co nejdéle post a vybudovat síť dlouhodobé spolupráce a z toho těžit případné nezákonné požitky.

Americký systém ovšem nestojí pouze na nezávislých ředitelích, je propojením mnoha dalších faktorů, jako je svobodný trh ředitelů, který nutí ředitele pečovat o svoje dobré jméno. Stejně tak kvalitu ředitelů odráží akciový trh, který je schopen včas oznámit vznikající potíže. Výraznou úlohu rovněž hrají svobodné sdělovací prostředky, které mohou účinně provádět vnitřní rozbory společností a ukazovat na jejich neduhy.

7.10 Nezávislí ředitelé v čínském právu

V ČLR se nezávislí ředitelé začali prosazovat později než dozorčí rada. Velmi dlouho nebylo jejich postavení zakotveno v zákoně. Největší podíl na jejich prosazení měla SKRCP, která vydala v roce 2001 Směrnice pro uvedení nezávislých ředitelů do představenstva upsaných společností, které zavazovaly společnosti, které se chtěly nechat upsat na burze k zavedení tohoto institutu. Až novelizace zákona o společnostech z roku 2005 zakotvila nezávislé ředitele v zákoně, ale stanovila pouze, že upsané společnosti musí tvořit tento orgán, zbytek měl určit zvláštní předpis, který doposud nebyl vydán.

V ČLR existuje vícero lokálních snah o upravení jevu nezávislých ředitelů, nejucelenější je ovšem úprava SKRCP, jejíž základ je ve výše uvedené směrnici a zastupuje obecnou čínskou představu nezávislého ředitele. Mít nezávislého ředitele ve společnosti jsou povinny pouze společnosti upsané na burze. Ostatní společnosti tedy mají pouze povinnost zřizovat dozorčí radu.

Směrnice si velmi zakládá na přesném vytyčení nezávislosti nezávislého ředitele od společnosti, což v mnoha ohledech stanovuje podstatně podrobněji než například pravidla New Yorské burzy. Na druhou stranu již není tak explicitní při konkretizaci nezávislosti od představenstva.

Směrnice požaduje, aby každá společnost dosadila alespoň jednu třetinu nezávislých ředitelů do představenstva. Je dán požadavek, aby kandidáti byli lidé se zkušeností v oboru ekonomie, účetnictví, práva nebo jiném vhodném k plnění funkce. Voleni jsou také pomocí kumulativního hlasování.

Pro výkon své funkce jsou nadáni obecnými pravomocemi nezávislých ředitelů, tak i zvláštní pravomocí nezaujatého ředitele. K obecné pravomoci patří vyjadřování názorů k případům stanoveným směrnici , které se při vedení společnosti objeví. K povinnostem nezaujatého ředitele patří dozor nad

rizikovými transakcemi. Významnou povinností je najímání nezávislého auditora společnosti.

Pro zvýšení účinnosti práce nezávislých ředitelů mohou na návrh valné hromady zřizovat zvláštní komise, které se mohou specializovat na určité otázky. Doporučení jaké komise a s jakými povinnostmi navrhuje dokument SKRCP Směrnice o řízení podniků upsaných společností.

Podobně jako u dozorčí rady je dáno, že nezávislí ředitelé mají právo na informace, které jim jsou všechny orgány společnosti povinny poskytnout na náklady společnosti. Nezávislí ředitelé mají právo na náležitou odměnu za výkon své funkce.

Potíže nezávislých ředitelů mohou být rozděleny do tří základních tříd: práva a povinnosti, odpovědnost a pobídky.

Čínští nezávislí ředitelé mají široce vymezené povinnosti, zároveň nemají žádné významnější pravomoci, jak si vynutit spolupráci s ostatními výkonnými řediteli, zejména když jsou výkonní ředitelé v početní převaze. Obecně je požadováno, aby byl zúžen a zpřesněn okruh povinností ředitelů buď na finanční kontrolu, nebo kontrolu konfliktních transakcí. Toto také souvisí se tím, že nezávislí ředitelé a akademici se liší v názoru, čí zájmy mají zastupovat. Odborná obec se shoduje, že by ředitelé měli zastávat zájmy menšinových akcionářů, zatímco nezávislí ředitelé se domnívají, že mají zastávat zejména zájmy státu, čímž je zásadně ovlivněno, jak povinnosti zastávají a kterým úkolům dávají přednost.

Nezávislí ředitelé jsou přísně nezávislí na společnosti, na rozdíl od dozorčí rady nesmějí vlastnit žádné akcie společnosti, což snižuje jejich zájem pracovat. V americké teorii je tento jev považován za nežádoucí. Na druhou stranu nelze nastavit úplnou nezávislost na vnitro-firemních strukturách. Nezávislost na vnitřní struktuře společnosti je budována na základě personální, lidské a materiální nezávislosti. Personální nezávislost se prosazuje skrze snahu oprostit nezávislé ředitele od vlivu většinového vlastníka a ostatních výkonných orgánů, ta je velmi nedokonalá a prosazení kumulativního volebního systému neřeší problematickou situaci.

Specifikem čínského prostředí je jsou pojmy *mien-c'* a *kuan-si*. První je společenskou normou, která přikazuje neztratit tvář, stejně jako nepřinutit

někoho, aby svou tvář ztratil. Tento společenský zvyk brání přímým střetům mezi výkonnými a nezávislými řediteli. *Kuan-si* je síť osobních vztahů, která Číňanovi pomáhá stoupat po společenském žebříčku nebo mu pomáhá ve složitých životních situacích. Pro nezávislého ředitele je proto lepši navázat výhodný vztah s většinovým akcionářem nebo ředitelem, než zastupovat obecné zájmy.

Důležitým aspektem jsou pobídky. Ty mohou být kladné nebo záporné. Kladný je systém odměňování a záporný je systém odpovědnosti.

Odměňování je stále v područí většinového akcionáře, takže je v zájmu nezávislého ředitele s ním spolupracovat, aby dosáhl řádné odměny.

Odpovědnost souvisí s množstvím úkolů, které nejsou nezávislí ředitelé řádně plnit. SKRCP se rozhodla v rámci prosazování vyšší míry odpovědnosti nezávislých ředitelů učinit odstrašující případ z nezávislého ředitele Lu Ťia-chaoa, který spolu s ostatními nezávislými řediteli nedbale kontroloval společnost Teng-baj-wen. V jejich případně nešlo o zvláštní nedbalost, nýbrž o běžně zavedenou praxi v čínském prostředí. Výkonní ředitelé však ze společnosti začali vyvádět peníze a způsobili akcionářům velikou škodu. Nezávislí ředitelé a ředitelé, kteří spáchali zpronevěru, byli jediní potrestaní, ostatní zúčastněné kontrolní orgány jako dozorčí rada nebo auditní společnost zůstaly nepotrestané. Tento případ rozvířil debatu o pozici nezávislých ředitelů v ČLR, jednak bylo obhajováno, že je třeba zajistit přísný postih ředitelů, aby lépe vykonávaly svou činnost, jednak se zvedla diskuze o skutečných možnostech ředitelů tomuto předejít.

Kromě občansko-právní odpovědnosti by měli být nezávislí ředitelé vedeni k osobní odpovědnosti tak, aby pečovali o své jméno a udrželi se na trhu soukromých ředitelů. Proto se zdá čínské odborné veřejnosti nezbytné vytvořit cosi jako trh nezávislých ředitelů, buď regulovaný SKRPCP nebo alespoň volný. Ideálně by se vytvořila komora prověřených ředitelů, kteří by podobně jako auditoři nebo advokáti měli vlastní komoru a zásady výkonu své činnosti. Akcionáři by si pak nemohli volně vybírat kandidáty, ale museli by oslovit pouze člena komory.

7.11 Zasazení

Dozorčí rada sice nezapadá zcela vhodně do prostředí čínského právního systému, podmínky jsou pro ni ovšem nastaveny lépe nežli pro nezávislé ředitele, jejichž příchod do Číny znamenal přidání další překážky řádného fungování čínské dozorčí rady.

Rada na rozdíl od nezávislých ředitelů poměrně dobře zapadá do čínských společensko-hospodářských podmínek, kde si stát chce podržet hlavní slovo ve vedení společensky významných událostí. Oproti tomu nezávislí ředitelé se silně potýkají s nevhodným prostředím, které není uzpůsobeno zejména pro udržení jejich nezávislosti.

V ČLR probíhá diskuse o budoucnosti těchto institutů. Obecně není zájem o zrušení dozorčí rady, která je považována za páteřní část soustavy. Současné myšlení se ubírá směrem posílit dozorčí radu tak, aby mohla skutečně dohlížet na výkonné orgány společnosti. K tomu přistupuje snaha vypořádat se s již zavedeným institutem nezávislých ředitelů, kteří budou v rámci toho muset uzpůsobit své povinnosti, aby nekolidovaly s povinnostmi dozorčí rady, a buď jí činili rovnocenného partnera, který nebude zasahovat do jejích záležitostí, nebo bude jejich pozice podstatně oslabena na určitou specifickou funkci tak, aby nemohli vyvolat střet s pravomocemi dozorčí rady. Ač existují hlasy, které požadují zrušení funkce nezávislých ředitelů nebo jejich sloučení s dozorčí radou, nezdá se pravděpodobné, že k tomu někdy došlo.

7.12 Závěr

Musíme uznat, že ČLR se snaží sledovat současné trendy, které spočívají v posilování vnitřního dozoru ve společnosti a skutečně hledá svou vlastní cestu, nemůžeme ovšem říci, že se Číně daří dosáhnout svých cílů. Čína totiž vytvořila dva dozorčí orgány, kterým se navzájem kříží pravomoci a chybí jim systematické uspořádání.

Vnější *corporate governance* se ukazuje jako velmi málo účinná především s ohledem na celospolečenské zásahy státu. Bankovní instituce proto neplní plně svou dozorčí funkci, stejně jako media. Jediným fungujícím orgánem vnější *corporate governance* zdá se být SKRPCP, která plní dozor nad veřejně upsanými společnostmi.

Současný systém dozoru uvnitř společností odpovídá snaze Číňanů na první pohled naplnit požadovanou normu, ta však bývá neschopná naplnit zadání. SKRPCP se sice snaží nedokonalosti dohnat vytvořením instituce nezávislých ředitelů, když vidí, že dozorčí rada je téměř ochrnutá, toto opatření rovněž není schopno nést kýžené ovoce.

Kromě absence systematičnosti lze čínskému systému vytknout, že navzdory mnoha prohlášením prohlašujícím, že Čína nesmí slepě transplantovat cizí prvky a musí sledovat místní podmínky, tak tak nebyl činěno. Zdá se, že Čína pouze sleduje módní trendy nikoliv účelnost.

Dle mého názoru, by bylo podstatně užitečnější, kdyby byla vytvořena nezávislá dozorčí rada, která by byla nadána dozorčími pravomocemi, pravomocemi, které by jí zaručovali přísun informací a pravomocemi podílet se na klíčových rozhodnutích. Zásadní pro radu by bylo ovládání nejvyšší pozice ve společnosti. Jeví se, že většinu kladů nezávislých ředitelů je možné přenést do dozorčí rady. Méně těles ve společnosti pak také znamená menší střet zájmů a větší efektivitu vedení.

Je zajisté zřejmé, že takový vývoj nelze přepokládat vzhledem k nedávnému vývoji, kdy je instituce nezávislých ředitelů považována za nejmodernější součást čínského práva. Naopak lze očekávat vývoj směrem k upevnění pozice nezávislých ředitelů v čínských společnostech.

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Název práce v anglickém jazyce: **Competing Legal Transplants of the Independent Directors and Board of Supervisors in the Chinese Law**

Abstract

This work helps us understand the fundamental features of supervision in Chinese corporate governance system. Besides that it brings valuable thoughts on corporate governance as whole.

The first two chapters will introduce the situation of Chinese socio-legal development and general idea of need of supervision in relation to the corporate governance. The third chapter will focus on the board of supervisors in German law, in the chapter four the description of Chinese board of supervisors concept will follow. In the same pattern we will follow the US institution of independent directors, and that of its Chinese counterparts. The analysis of Chinese institution is the core of this thesis. Final part is the conclusion drawn from previous facts in chapter 5.

This thesis should answer questions such as: What role should each of the two-layer supervision body institution assume? Did China adopt these institutions properly i.e. in accordance with its own needs? Which adjustments should be done?

The author concludes that the Chinese system lacks systematic solution and the Chinese despite their slogans exhorting to follow the local conditions, in reality, did not do so. The most part of the regulations was blindly transplanted Nevertheless the sole idea of using simultaneously both institutions is not unreasonable itself, but in the Chinese situation it is not necessary to create two different bodies exercising the supervision powers. Although the Chinese seek to improve this doubled system, it would be hard to avoid any overlapping authority.

Having analysed Chinese local conditions, the author is of the opinion that PRC should move closer to the German idea of the BOS with independent directors elements. But the facts presume that such a change is not possible in the near future, with respect to he recent development.

Klíčová slova

Čínská lidová republika, nezávislý ředitel, dozorčí rada, corporate governance

Key Words

People`s Republic of China, commercial law, independent director, board of supervisors