



Discussion on the Board of Directors' Authority

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Abstract

Under the changes of structural reform in company law, the separation of powers in corporate governance has shifted from being abstract and vague to becoming more specific and defined. From the perspective of power distribution between the shareholders' meeting and the board of directors, the corporate governance model can be more specific, effective, and tailored to the market environment. The main purpose of the shareholders' meeting is to enhance the interests of shareholders and guide the company towards sustainable and stable development. On the other hand, if the focus is on the management of the board of directors, the overall business interests of the company will be prioritized for development. Therefore, the amendment of the company law should not only consider how to defend the interests of shareholders but also enable the board of directors to make more effective judgments on decision-making matters and enhance the company's decision-making power. The company should not only be responsible for the tasks of shareholders but also take into account the overall development of the company. The board of directors, as the executive body of the company, is more conducive to balancing the relevant interests of the company.

Keywords

Board centrism, corporate power, distribution of power

1. Presentation of the problem

Regardless of which centrism model is based on, the most important thing is to focus on how the company's resources and power can be reasonably allocated in front of the interests of different subjects. In contrast, the shareholders' meeting centrism is more focused on the interests of shareholders as the primary position of corporate governance, while the board of directors centrism to the overall interests of the entire company as an important goal of development, the two goals actually overlap, but not overlap where In essence, they reflect the changing views of society and academia on the ultimate purpose of the "corporate" form of organization. In the earliest days, since the establishment of the first company in the world, it was believed that the shareholders of a company invested in it in order to keep making profits. Therefore, it was the public perception that maximizing the profits of shareholders was the natural and most important goal of shareholders in the early days, and it was also the public trend.

However, time has changed, and the consensus of maximizing shareholders' interests has changed with the innovation of corporate law theories, mainly the emergence of the theory of separation of ownership and control, the development of the theory of each relevant interest subject, and the innovation of the development of the financial industry. Since contemporary times, Western societies have shifted more of the company's management power from the shareholders' meeting to the board of directors continuously in business practice, giving play to the board of directors' superior role in the company's operation and management. China's current Company Law, for many factors, is still dominated by the shareholders' meeting centrism, while adhering to the decentralized control structure, which is a relatively unique existence in the forest of the world's corporate system, with an advantageous side but also some drawbacks. The shift to board-centrism in this company law amendment is a good attempt to optimize the company's

business system.

2. Reform of the Board of Directors' Powers under the Draft Revised Company Law

2.1 Changes in the power of the board of directors as a result of the amendments to the Company Law

One is that "the board of directors is the executive body of the corporation and its powers exceed the powers of the shareholders under the corporate law and the Articles of Incorporation." In the amended Article 81, "A profit-making institution must establish a body to control and control its own actions." The directors, supervisors, and supervisors of the Company are the directors or supervisors of the Company. Second, amend the article to delete "Article 46 of the Articles of Incorporation provides that the company shall have the right to exercise the shares of the company, the company shall have the right to exercise the shares of the company, and the company limited by shares shall have the right to exercise the shares of the company. The new article 63: "The board of directors of a limited liability company with three or more members and 300 or more employees shall include representatives of the company's employees, and the board of directors of other limited liability companies may include representatives of the company's employees" (the same as article 124 of the joint stock company) states that the board of directors is It is no longer just a representative of shareholders' interests. Article 149 of the New Article states that "more than half of the members of the board of directors of a wholly state-owned company shall be outside directors, and there shall be representatives of the employees of the company", which also highlights that the members of the board of directors of a wholly state-owned enterprise are representative of a wide range of interests. The board of directors is no longer the main body representing the interests of shareholders.

Third, the amendment removes the provision of the original Company Law on the powers and functions of the board of directors, combining this provision with the relevant provision of Article 69: "Limited liability companies, limited liability companies, and limited liability companies may establish managers, who may be appointed or appointed. "Managers are responsible to the Board of Directors and exercise their powers in accordance with the provisions of the Articles of Association or with the authorization of the Board of Directors" (this provision applies to Article 131 regarding joint stock companies), eliminating the limitation of the rights of managers in the original legal provision, i.e., the amended provision gives all remaining rights to the Board of Directors. The distribution of the residual rights of the company among the shareholders, the Board of Directors, and the management creates an unstable rights space. The "vesting of residual rights" is a provision that guarantees the activeness, openness, and flexibility of the rights holders and reflects their dominant and central position in social life. In the corporate governance structure, the articles of incorporation define the residual powers of the company as a legal norm. For this reason, the company's articles of incorporation should be revised on the basis of the new Company Law amendments to ensure its authority and status in law so that it can better perform its duties.

Fourth, certain privileges are given to the board of directors of the company, such as in the stock market, issuing new shares, financing employee shareholding, etc., and in certain articles, certain privileges are given to the company to have more privileges. Article 97 of the Newly Revised Company Law "The articles of incorporation or the shareholders' meeting may authorize the board of directors to decide to issue shares in excess of the total number of shares to be issued at the time of establishment, and may set limits on the period and proportion of shares authorized to be issued." Article 164 "The articles of incorporation of a listed company and the resolution of the general meeting of shareholders on the issuance of new shares must be adopted by the general meeting of shareholders or by the general meeting of shareholders. Article 173 "The Company shall not acquire shares of the Company", except for "the use of shares for employee stock ownership plan or equity incentive", "the use of shares for the conversion of corporate bonds issued by the listed company which are convertible into shares, the Company may purchase the Company's shares in accordance with the Articles of Incorporation, or if 2/3 of the Board of Directors are present. Article 174 The Company and its affiliates shall not purchase shares of the Company from others by way of gift, loan, guarantee, etc., nor shall they give them to others in other ways. This restriction shall not apply to companies that implement employee stock ownership plans, or financial institutions engaged in general business operations. For the benefit of the Company, the Company may finance the acquisition of shares of the Company or its subsidiaries by others through a resolution of the general meeting of shareholders, or by the Board of Directors in accordance with the Articles of Incorporation or the authorization of the general meeting of shareholders, provided that the cumulative total amount of financing cannot exceed 10% of the total issued share capital. They can only be passed if a majority of the directors approve it."

2.2 Board Centrism-Related Definitions

(1) Overview of Board Centrism. In essence, it is also intended to address the issue of the distribution of corporate power, specifically by clarifying the Board of Directors as the executive body of the company and the exercise of residual powers by the Board of Directors beyond the powers of the shareholders' meeting as provided for in the Company Law and the Articles of Association.¹

(2) The U.S. model of the board of directors. The U.S. board of directors is a flexible system. For most of the public, the board of directors in a company is in fact mainly for supervisory purposes, and in order to prevent the larger shareholders from controlling the company, they want to strengthen their control over the management by establishing independent directors who can maintain independence from the management. However, in non-public companies, where the shareholders are usually the senior management or the de facto controllers, the board of directors can constantly expand its scope of competence to expand its powers and include some strategic decisions.

(3) Two different types of board systems in the UK and Germany. The UK board system maintains more of a strategic management function, or even a specialized management function, in judging the directors' responsibilities for their concerns. In addition, there should be a structure of non-executive directors versus executive directors, and non-executive directors are not required to be independent of the company (Zhao Xudong, 2022). For example, a company's legal counsel and accounting staff may serve as non-executive directors. The UK corporate governance structure places more emphasis on the influence of the corporate governance structure on the corporate governance structure than the US corporate governance structure, which emphasizes the influence of the corporate governance structure on the corporate governance structure. However, from an international perspective, the UK is gradually moving closer to the US system of independent directors, a trend that cannot be ignored. Internationally, compared with the UK and the US, another popular "two-tier model" is the board of directors model of German companies. In Germany, the board of directors model consists of two parts: two committees, one for stakeholders and one for shareholders. The subordinate committees, in turn, are assigned by the higher committee to implement strategic decisions and to manage the functions involved.

2.3 Changes in the middle of the first and second review drafts of the company law

The draft of the first trial showed a very strong board centrism, however, it is quite possible that the draft of the second trial started to go back again, and in the words of Mr. Zhou You, "the statutory terms of reference of the board of directors are re-stated, only that the provisions of "deciding on the company's business plan and investment plan" and "formulating the company's annual financial budget plan and final account plan" are deleted in line with the changes in the powers of the shareholders' meeting. " and "formulate the annual financial budget and final accounts of the company", and delete the provisions on the board of directors as the "executive" body of the company, and overall return to the practice of the current law "(Liu Bin, 2021). But the rules themselves are descriptive and, in general, are a return to the current legal system. For example, the division of powers between the general meeting of shareholders, the board of directors, and the managers in many matters of the company is not possible. The difference between the first and second review drafts is perhaps also due to a paternalistic consideration, fearing that the removal of the shareholder's authorization clause would lead to a lack of specific provisions and no specific regulations, which would lead to the provisions of the Company Law to give the rights of the board of directors to the shareholders' meeting by way of articles of association, resolutions of the shareholders' meeting, and agreements between shareholders, thus reducing its status in the company.

3. Impact of changes in board authority

The changes to the rights of the board of directors in the company law will significantly affect the overall management system of the company. The rights of the Board of Directors "from paper to reality" involve not only their own rights, but also other factors in the corporate governance system that can affect the exercise of their rights, but still require additional adjustments.

In the Draft Revised Company Law, a practical board of directors has been established to govern the abuse of power by major shareholders and beneficial owners, aiming to deal with the problem of "controlling" and "being

¹ Wang Ruiga: "Explanation on the Company Law of the People's Republic of China (Draft Revision) - December 20, 2021 at the Thirty-second Session of the Standing Committee of the Thirteenth National People's Congress".

controlled" by major shareholders and beneficial owners. This paper argues that, in the share structure of China's listed companies, the majority shareholder is still the absolute controller of the company, therefore, from any perspective, the central role of the board of directors in management should be emphasized; it is inseparable from the actual problems (Li Jianwei, 2018). The governance model of controlled companies should not be centered on the shareholders' meeting, much less the board of directors, but on the shareholders; from here we can see the role of shareholders in corporate governance with respect to corporate power. Despite controlling most of the company's operations, their rights are not statutorily managerial, but only a de facto right. The Company Law (Revised Draft), in Article 191, which supervises the majority shareholders, serves as an effective association mechanism to improve the operational efficiency of our listed companies and enhance their role in our listed companies. In a sense, the accountability of major shareholders and major shareholders is indeed a "cure" that can completely solve the conflicts of major shareholders.

4. Conclusion

Since the operation of the company involves high and uncontrollable business risks, many countries have established company laws that grant the board of directors greater decision-making freedom. With this freedom of control, the board of directors can fully utilize their own business acumen to ensure efficient operations of the company. It can better exercise its initiative to ensure the smooth operation of the company. In our system, litigation representing shareholders, securities disputes on behalf of litigation, and other litigation systems are continuously being improved. This is done through rigorous director accountability, which allows the board of directors to address areas where their power is not being adequately utilized. If this situation continues to spread, it will result in the loss of many talented managers, which is very detrimental to the long-term economic development of the entire market. It also hinders the virtuous cycle of the market (Xie, Y.Z., 2022). Company law is the fundamental framework for managing a company and serves as a crucial guide for its operations. It also plays a significant role in determining the allocation of rights within the company, with particular emphasis on the board of directors. In the above discussion, it is believed that the revised draft can be further improved in the following ways: It is necessary to address the issue of management changes and the rights of shareholders' meetings and the board of directors. The power of the board of directors should be regulated to effectively reduce the legal management scope of shareholders' meetings. This can be achieved by abolishing the provisions of the existing Article 37, Articles 1, 3, 6, and 8 of the Company Law. By doing so, the rights mentioned above can be reasonably allocated to the board of directors. This will expand the authority of shareholders' meetings to approve property issues and significant property changes. Third, the authority to appoint the legal representative should be vested directly in the Board of Directors. Additionally, measures should be put in place to ensure that any resolution by the Board of Directors to change the legal representative is effective. This will help resolve any conflicts that may arise between the company's representative rights and management rights.

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