

# The Exploration of Independent Director System in China: Problems and Solutions

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**Abstract:** An independent director system has been a part of the Chinese corporate governance structure for more than a decade, but it fails to play its key role in monitoring because it is suffering a number of problems and obstacles. The current Chinese corporate governance reforms cannot be achieved without removing the weaknesses and defects in the existing independent director system.

## 1. Introduction

In 1940, Investment Company Act was announced in America, which symbolized the birth of the Independent Director System (IDS).<sup>1</sup> On the basis of trusteeship<sup>2</sup>, American law rules that directors of a company shall bear strict responsibilities for their corporate governance, which refers to the dual duties of being fiduciary and diligent. Meanwhile, due to the developed outside supervision of stock market in America, it was unnecessary for US companies to have board of supervisors together with the board of directors under the meetings of stockholders. Under such condition, to realize the balance of powers among the manageable structures of an American company and to maximize its efficiency, progressives from the political and economic communities managed to establish a new system to make outsiders take part in the companies' management, supervising the processes of dealing with daily affairs and decision-making. These outsider supervisors were finally called independent directors. The relevant system was also set up after that.

In China, this system started with the release of *Suggestions Regarding Further Standardizing the Operations and Intensifying Reform of Companies Listed outside China* (the "*Suggestions*") by the State Economic and Trade Commission (SETC) and China Securities Regulatory Commission (CSRC) in 1999, which required that all

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<sup>1</sup> The Investment Company Act of 1940 is an act of Congress. It was passed as a United States Public Law on August 22, 1940, and is codified at 15 U.S.C..

<sup>2</sup> In common law legal systems, a trust is a relationship whereby property is held by one party for the benefit of another. A trust is created by a settlor, who transfers some or all of his or her property to a trustee. The trustee holds that property for the trust's beneficiaries. Trusts have existed since Roman times and have become one of the most important innovations in property law. See Austin Scott, "Importance of the Trust" (2014) 39 *U. Colo. L. Rev.* 177.

companies located in China but listed overseas shall have their systems of independent director. However, in 1997, CSRC had already mentioned it in *Guideline Concerning Articles of Association of Listed Companies* (the “*Guideline*”). Then CSRC issued *Guidance Opinions Regarding the Establishment of the Independent Directors System in Listed Companies* (the “*Opinions*”) in 2001 to formally establish this system in China, making it indispensable in all listed companies, whether in or outside China. The “*Opinions*” offered a number of particular processes and terms to support such a system.<sup>3</sup> And in 2002, *Corporate Governance Code of Listed Companies* (the “*Code*”) was announced by SETC and CSRC to set the minimum standard that one third directors in a listed company shall be independent. These two documents, the “*Opinions*” and the “*Code*”, are pioneer official announcements on corporate governance in the PRC.<sup>4</sup> After them, the *Provisions on Strengthening the Protection of the Rights and Interests of the General Public Shareholders* (the “*Provisions*”) in 2004 made an affirmation of the system’s status in the governance structures of Chinese listed corporations again. In fact, one of the purposes to establish IDS in China is to weaken the bad effects caused by the large proportion of stated owned shares in listed companies, because there are plenty of obstacles in the way of lowering such proportion.<sup>5</sup> At the end of 2012, there are 5,972 in-service independent directors in 2,494 companies listed in Shanghai and Shenzhen Stock Exchange in total.<sup>6</sup>

## 2. Current predicament: “Dependent” directors in China

Graph 1: The number of companies for which the in-service independent directors work in China in 2012

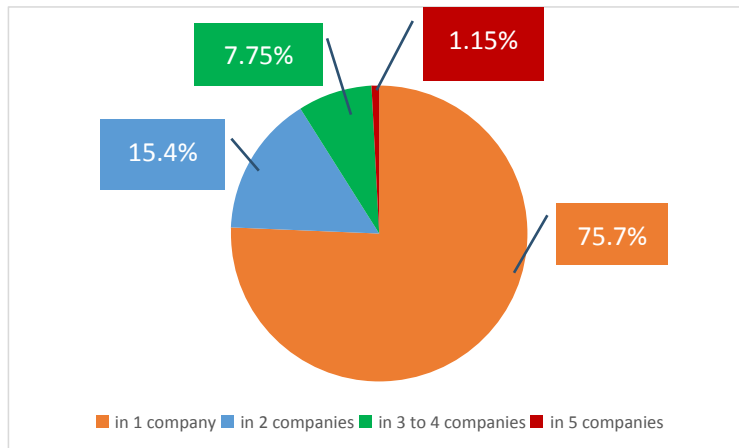
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<sup>3</sup> Yuan Zhao, “Independent directors in China: the path in which direction?” (2011) 22 *International Company and Commercial Law Review* 352.

<sup>4</sup> Alex K.L. Lau, “China: CSRC’s ‘Guiding Opinion’ on independent directors of listed companies - another first for China” (2003) 24 *Company Lawyer* 279.

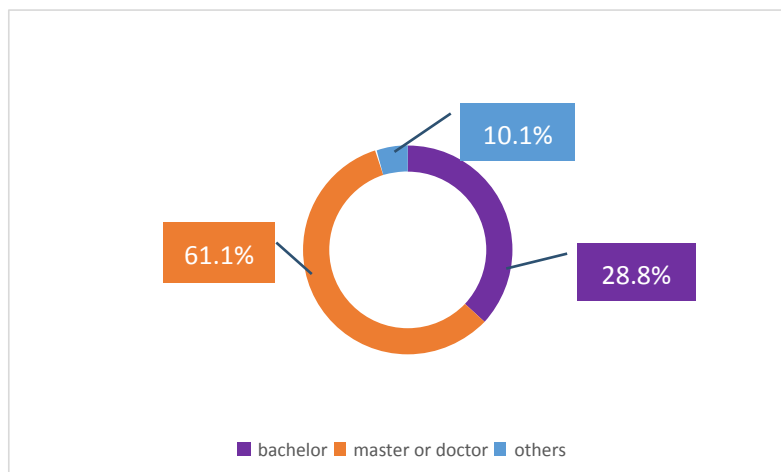
<sup>5</sup> Lilian Miles and Miao He, “Protecting the rights and interests of minority shareholders in listed companies in China: challenges for the future” (2005) 16 *International Company and Commercial Law Review* 275.

<sup>6</sup> The research group of A Guide Compiled by CAPCO, “There is Still a Long Way to Go for the Independent Director System in China”, *China Securities Journal*, 16<sup>th</sup> Jan, 2014.



Among all, 4,520 directors, which is 75.7%, only work in single listed company, 922 of them work for two companies, namely 15.4%, and 52, take such position in 5 companies simultaneously.<sup>7</sup>

Graph 2: Education background of independent directors in China in 2012

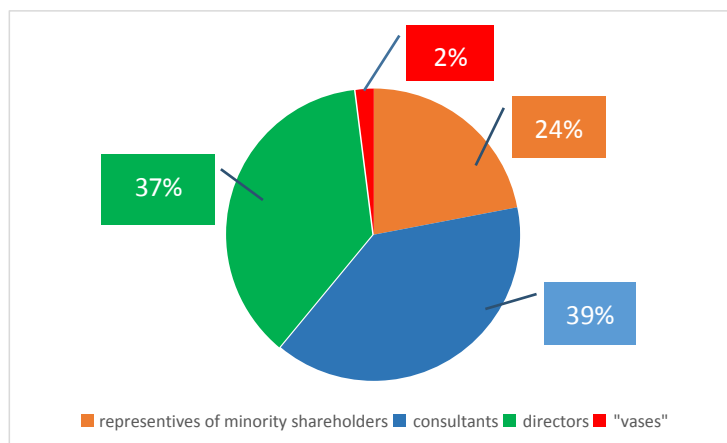


About the education background, those who are bachelors take up 28.8%, and directors who are masters or above take up 61.1%. Meanwhile, directors who are only educated in junior college or below also exists.<sup>8</sup>

Graph 3: a survey in 2003

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.



As the graph 3 above indicates, among all questioned ones, 37% believed that they do perform their duties, 39% defined themselves as consultants, while 2% of them thought that they were merely “ornamental” in a survey in 2003 on the roles of independent directors. And in 2011, it was found that only 4% independent directors had queried proposals of board of directors, worrying any adverse effects of them such as harming shareholders’ interests or risking to make investments in a project supported by National Natural Science Foundation of China (NSFC), whose authors are from PKU, UIBE and other top universities in China.<sup>9</sup> Meanwhile, another study of 2006 shows that there is no strong link between independent directors and corporate performance in China.<sup>10</sup>

The most significant value of the IDS is the independence of these directors, which guarantees them to do their duties without being interfered by other powerful shareholders or directors, while in China, this value is always decreased. Traditionally, the only practical option for minority shareholders to voice their disagreements with the management and policies of the company was to sell their shares in the company<sup>11</sup>. To avoid this kind of situation, IDS makes sense. However, why did things turn to be so different from the imagination of legislators at the time of law making? The reasons are complicated.

## 2.1 What makes them dependent?

Generally speaking, people who take the positions of independent directors in a company shall be those who are skilled at some professions<sup>12</sup>, so that they are able to

<sup>9</sup> Kangtao Ye, Jigao Zhu, Zhengfei Lu and Zhang Ran, “The Independence of Independent Directors: Evidence from Board Voting Behavior” (2011) 1 *Economic Researches* 126.

<sup>10</sup> Donald C. Clarke, “The Independent Director in Chinese Corporate Governance” (2006) 31 *Del. J. Corp. L.* 125.

<sup>11</sup> Patricia Wong and Colin Law, “Corporate governance: a comparative analysis between the UK and China” (2005) 16 *International Company and Commercial Law Review* 350.

<sup>12</sup> As is mentioned in the text, they need to have at least five years’ working experience in certain fields, such as

make independent statements in the company's decision making processes and represent the interests of a number of minor shareholders, counterbalancing the influence of major shareholders on the board of directors, competently and responsibly. Some possible factors led to the loss of independence.

### 2.1.1 The lack of sense of responsibility

One of the board secretaries' key tasks in China is to take flights to get their independent directors' signatures on the meeting records of the board, which ironically fits the truth told by Mace in 1986.<sup>13</sup> Another report also showed that the independent directors of almost all investigated or censured listed companies in 2008 had not made any difference in advance.<sup>14</sup>

In fact, some political or economic celebrities, like retired officials, are invited by the directors or senior managers to take the independent directors' positions.<sup>15</sup> 7/48 independent shareholders of the top 10 Chinese listed companies used to be government officials in 2013.<sup>16</sup> For the listed companies, these celebrity directors help build up their social images, which is not only diligent and admirable but also "socially worthwhile". Thus, these celebrities, as independent directors, only appear in a few events, such as ribbon-cutting and groundbreaking ceremonies, and do not take their responsibilities in improving corporate governance. Xu Jingchang, the one who was called "the top independent director in China", used to take such positions in 6 Chinese listed companies at the same time in 2013,<sup>17</sup> even if CSRC has regulated that one can be the independent director of at most 5 companies simultaneously. Many people queried if he really performed all his duties.

### 2.1.2 Personal incompetence

In the meantime, although the IDS is set to get independent statements from the independent directors based on their own fields, some of them, besides those celebrities without any professional background, seem to focus too much on their professions without any basic knowledge about corporate operations. Ironically, they even dare not sign any resolutions. Those listed companies who want to circumvent

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law and economics.

<sup>13</sup> Kangtao Ye, Jigao Zhu, Zhengfei Lu, and Ran Zhang, "The Independence of Independent Directors: Evidence from Board Voting Behavior" (2011) 1 *Economic Researches* 126.

<sup>14</sup> Wang Miao, "To Independent Directors: How Do You Work As 'Vases' of Decoration?", *China Reform Report*, 11<sup>th</sup> Jun, 2012.

<sup>15</sup> He Dong, "The Independent Directors Are Not Independent: the System Development Deviated from Reality" (2010) *Technology in Western China* 67.

<sup>16</sup> Junsheng Zhou, "The Independent Director System in Form must be modified", *Xinhua Daily Telegraph*, 13<sup>th</sup> Aug, 2013.

<sup>17</sup> *Ibid.*

the supervisory functions of IDS may recruit only technicians as their independent directors somehow.

What is more, Shanghai Stock Exchange (SSE) studied that every independent director in a Chinese company may be involved in many of the functional committees, such as audit committee, which takes them lots of time. Once they cannot have a good knowledge of what they need to do, the roles of these committees would not be played well.<sup>18</sup>

### 2.1.3 Personal relations or nepotism

Those celebrity directors are inevitably connected to some entities, including the government. In addition, since state-owned enterprises (SOEs) are the overwhelming majority of Chinese listed companies, there are many problems like the absence of the representative of asset owners, insider control, major shareholders' control over the shareholders' meeting in these enterprises. Some senior managers or directors make many of their relatives or friends who own a wide social affection become the independent directors in their own companies, which causes these directors plenty of difficulties in being objective when expressing their opinions and fulfilling their duties. In 2013, 90% of independent directors in Chinese listed companies are nominated by their largest shareholders.<sup>19</sup> Therefore, their attitude towards these shareholders is subtle.

### 2.1.4 Unfair elections

In China, even if the Company Law provides that a shareholder who holds more than 5% issued shares of a listed company is entitled to nominate candidates of independent directors in the shareholders' assembly of the company, under most circumstances, the minor shareholders hardly exercise this power about electing the persons who represent their interests for some reason or another, such as the lack of relevant consciousness or conditions. Furthermore, most of the considerable powers are under the control of major shareholders or powerful interest groups. Some sampling investigation made by specialists shows that those who are present in shareholders' meetings are almost major ones and members of powerful groups, leading such meetings and independent directors to be controlled by them. And the more shareholders of a company have, the more medium and small ones unwilling to

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<sup>18</sup> Yufan Luo, Yichen Yang, Yedi Hua, "Independent Directors Are Hardly Independent: A System in Form", *Xinhua Daily Telegraph*, 19<sup>th</sup> Aug 2013.

<sup>19</sup> Ibid.

vote.<sup>20</sup> Resulted from that, after the elections, those nominated directors are still on behalf of these groups as a matter of fact.

## 2.2 The results of being “dependent”

As is said, the problems in the elections of independent directors directly prevent these nominees from representing the minority shareholders’ interests, and the processes of decision making and executing are finally determined by powerful groups. The ultimate causes are in the medium and small shareholders themselves because mostly they give up or negatively exercise such nominating powers because of certain difficulties. Even if in recent years, minor shareholders seems not to be so indifferent to these elections, there are still many obstacles for them in exercising their rights, such as they cannot obtain the same quantity of information and news related to the nominees and the company as major shareholders. There is sometimes substantial delay in the implementation of major plans, as shareholders usually consult directors before making strategic decisions.<sup>21</sup>

The international comparison report about the statistical data of international enterprises in 1999 by OECD<sup>22</sup> showed that the percentages of independent directors in all members of director boards in British, French and US companies are respectively 34%, 29% and 62%. In Chinese listed companies, it is regulated that one third of the members are independent, which is slightly less than British percentage, but greatly lower than the one of USA. When such one third independent directors are mostly made up with “vase”, “dependent” ones, the voices from the minority are more easily ignored or neglected by the majority.

## 3. Theoretical and legislative foundations

### 3.1 Theory of Principal and Agent

An independent director of a listed company means one who does not take up any other positions in his company, also he does not have a certain relationship, which may prevent him from being independent and objective, with the listed company or its

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<sup>20</sup> Qingyuan Wu, “On the Innovation of the Election System of Independent Directors” (2011) 8 *China Economic & Trade Herald* 58.

<sup>21</sup> Patricia Wong and Colin Law, “Corporate governance: a comparative analysis between the UK and China” (2005) 16 *International Company and Commercial Law Review* 350.

<sup>22</sup> The Organisation for Economic Co-operation and Development (OECD) (French: Organisation de coopération et de développement économiques, OCDE) is an international economic organisation of 34 countries founded in 1961 to stimulate economic progress and world trade. It is a forum of countries describing themselves as committed to democracy and the market economy, providing a platform to compare policy experiences, seeking answers to common problems, identify good practices and coordinate domestic and international policies of its members. OECD.org - OECD <http://www.oecd.org/>.

major shareholders.<sup>23</sup> An independent director, outside director, or non-executive director takes neither another manageable positions nor professionally connected with the management of the company. Meanwhile, he would make independent judgments according to his personal career representing the interests of medium and small shareholders. According to the “*Guidelines*” promulgated by the CSRC, an independent director is defined as a director who assumes only a directorship position in a company and has no other relations with the company or with the major shareholders, which may adversely affect his independent and objective judgment.<sup>24</sup> All these versions of definition implies the same points: the first is that an independent director only takes this position in certain company; the second is that there should not be any relationship between this director and his company or major shareholders that may do harm to his independence; and the third point is the judgment made by an independent director should be independent and objective. And it need be noticed that in the definition of the “*Guidelines*”, the word “interfere” is explained as “adversely affect”.

The IDS was originally established in America in order to improve the corporate governance in a modern company, strengthening the functions of the board of directors. The most typical characteristics of modern enterprises are their clearly established ownership and well defined powers and responsibilities, which means the shareholders, as the owners of a corporation, shall not be its senior managers, like directors, at the same time. Theory of Principal and Agent<sup>25</sup> provides to make sure that the owners of an enterprise give the rights of management to a team of managers voluntarily and the acts of the managers do not deviate from the shareholders’ will; meanwhile, to prevent the insider control, the IDS must be set up to better and supervise decision makings in the course of corporate governance, balancing the powers of different departments in a same company. As a result, both parties, the owners and the managers, in the relation of Principal and Agent, will benefit from this “separation of ownership and control”.

IDS makes sense in protecting the interests of minority shareholders in China, even if the obvious feature of “separation of ownership and control” is the absence of a

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<sup>23</sup> Dong He, “The Independent Directors Are Not Independent: the System Development Deviated From Reality” (2010) *Technology in Western China* 67.

<sup>24</sup> Patricia Wong and Colin Law, “Corporate governance: a comparative analysis between the UK and China” (2005) 16 *International Company and Commercial Law Review* 350.

<sup>25</sup> The principal-agent problem or agency dilemma occurs when one person or entity (the “agent”) is able to make decisions that impact, or on behalf of, another person or entity: the “principal”. The dilemma exists because sometimes the agent is motivated to act in his own best interests rather than those of the principal. The agent-principal relationship is a useful analytic tool in political science and economics, but may also apply to other areas. Common examples of this relationship include corporate management (agent) and shareholders (principal), or politicians (agent) and voters (principal). K Eisenhardt, “Agency theory: An assessment and review” (1989) 14 *Academy of Management Review* 57.



controlling shareholder.<sup>26</sup> In some countries like German and Japan, such controlling shareholders are really common.<sup>27</sup> Considering the factual situations in China, in many listed companies transformed from SOEs, the state has become the controlling shareholder<sup>28</sup>, even in some other companies, the controlling shareholders are also really common. Although these majority shareholders ought to keep their eyes on the corporate governance and daily business to guarantee their own benefits, it does not mean the interests of minority can also be protected by the way. If the control of the majority is powerful enough, independent directors are still necessary in preventing the exploitation by the controlling shareholders. Thus independent directors play the role of an “accountability link” between the shareholders and the management, and they should keep a close watch on the performance of the latter.<sup>29</sup>

### 3.2 Qualifications and disqualifications of being an independent director in China

The second article of *the “Opinions”* released on 16<sup>th</sup> August of 2001 by CSRC gives the details of being an independent director, which regulates that if a person wants to be an independent director in a Chinese listed company, he shall:

- a) satisfy all requirements of being a director of a listed company in the law, administrative regulations and other relevant provisions in force, usually such requirements are only being an adult and consents;
- b) be of independence in accordance with this “*Opinions*” ;
- c) have a basic knowledge of the operation of a listed company and relevant law, administrative regulations, by-laws and rules;
- d) have at least five years<sup>30</sup> experience in working in the field of law, economics or so;
- e) satisfy other requirements in the articles of association of the company in question.

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<sup>26</sup> Yuan Zhao, “Independent directors in China: the path in which direction?” (2011) 22 *International Company and Commercial Law Review* 352.

<sup>27</sup> Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, “Corporate Ownership around the World” (1999) 54 *Journal of Finance* 471.

<sup>28</sup> Jane Duckett, *The Entrepreneurial State in China* (London: Routledge, 1998), p.13; Guy S. Liu and Pei Sun, “The Class of Shareholdings and its Impact on Corporate Performance: A Case of State Shareholding Composition in Chinese Public Corporations” (2005) 13 *Corporate Governance* 46; Wei Cai, “Path Dependence and Concentration of Ownership and Control of Companies Listed in China” (2009) 20 *International Company and Commercial Law Review* 281, at 285-287.

<sup>29</sup> Yuan Zhao, “Independent directors in China: the path in which direction?” (2011) 22 *International Company and Commercial Law Review* 352.

<sup>30</sup> The original text literally means all these conditions must be satisfied at the same time, but logically thinking, it should mean that any of the conditions is satisfied.

Meanwhile, its third article rules that these natural persons cannot be the independent directors if they:

- a) are the employees of a listed company or its subsidiary companies, or the direct relatives<sup>31</sup> or major social relations<sup>32</sup> of such employees;
- b) are the shareholders holding more than one percent of the issued shares of a listed company directly or indirectly or being the top ten natural person shareholders of a listed company or their direct relatives;
- c) are the employees of the entities directly or indirectly holding more than five percent of the issued shares of a listed company or of the top five entity shareholders of a listed company or their direct relatives;
- d) used to be a), b) or c) in the last year;<sup>33</sup>
- e) are the financial, legal or consultant service providers of a listed company or its subsidiary companies;
- f) are other natural persons laid down in the articles of association;
- g) are other natural persons designated in the legal documents of CSRC.

#### **4. The comparison between IDS and the board of supervisors (BOS)**

In China, the supervisory system in a listed company involves both BOS and the IDS, so they are competing mechanisms to some degree, particularly in their functions.<sup>34</sup> But in practice, both systems have their own meanings. Here is the comparison.

##### 4.1 Differences

The differences between BOS and IDS are as follows:

Firstly, the supervision of BOS is internal for the corporate governance of a company,

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<sup>31</sup> The direct relatives are a person's spouse, parents and heirs.

<sup>32</sup> The major social relations of a person involve siblings and their spouses, parents and children in law, and siblings of spouse.

<sup>33</sup> The original text literally means all these conditions must be satisfied at the same time, but logically thinking, it should mean that any of the conditions is satisfied.

<sup>34</sup> To balance the powers in corporate governance, the German mode makes the board of supervisors parallel with the board of directors under the shareholders' meeting; while the American mode establish the independent director system instead of BOS. But in China, both BOS and independent directors are in listed companies, which is because the BOS was too weak to balance the powers in a company before establishing the system of independent directors.

mainly serving as moral constraints<sup>35</sup> to all management staff, as some people said, it acts as a primary internal monitoring institution<sup>36</sup>; while independent directors exercise external supervision since they are outsiders of the company's management, providing their professional suggestions as the independent statements in the course of business running. The second provision of article 117 of China's Company Law rules that "The board of supervisors shall include representatives of shareholders and an appropriate percentage of representatives of the company's employees. The percentage of the representatives of employees shall account for no less than 1/3 of all the supervisors, but the concrete percentage shall be specified in the bylaw. The representatives of employees who serve as members of the board of supervisors shall be democratically elected through the assembly of representatives of the company's employees, the shareholders' meeting or by other means."<sup>37</sup> Judging from this provision, most of BOS members are insiders of a company who are quite familiar with its manageable affairs, which explains why the board is in the internal supervision system. However, people who are able to take the positions of independent directors shall be professionals in certain fields, like lawyers, accountants and scholars. As a result, their supervision can be of expertise and externality.

Secondly, as an internal organization of a company, BOS supervises every aspects of the daily operations of a company,<sup>38</sup> while the independent statements are only given to the significant processes<sup>39</sup>.

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<sup>35</sup> Yangping Qinyi: "On how to improve the Independent Director System in China" (2010) *Journal of Shandong Youth Administrative Cadres College* 121.

<sup>36</sup> Eddy Wymeersch, "A Status Report on Corporate Governance Rules and Practices in Some Continental European States", in Klaus Hopt et al. (eds), *Comparative Corporate Governance: The Status of the Art and Emerging Research* (Oxford: Oxford University Press, 1998), p.1078.

<sup>37</sup> See Art. 117 of Company Law of the People's Republic of China (2013 Amendment).

<sup>38</sup> See Art. 53 of Company Law of the People's Republic of China (2013 Amendment):

The board of supervisors or supervisor of a company with no board of supervisors may exercise the following powers:

- (1) To check the financial affairs of the company;
- (2) To supervise the duty-related acts of the directors and senior managers, to put forward proposals on the removal of any director or senior manager who violates any law, administrative regulation, the bylaw or any resolution of the shareholders' meeting;
- (3) To demand any director or senior manager to make corrections if his act has injured the interests of the company;
- (4) To propose to call interim shareholders' meetings, to call and preside over shareholders' meetings when the board of directors does not exercise the function of calling and presiding over shareholders' meetings as prescribed in this Law;
- (5) To put forward proposals at shareholders' meetings;
- (6) To initiate actions against directors or senior managers according to Article 152 of this Law; and
- (7) Other duties as provided for by the bylaw.

<sup>39</sup> See Art. 5 of the "Opinion": the Responsibilities of an independent director:

(a) after the independent director recognises a significant connected transaction (this means when the listed company and a connected person intend to enter into a related transaction whose total amount is over RMB 3 million or over 5 per cent of the listed company's latest audited net asset value), the transaction should be submitted to the board of directors for discussion. Before the independent director makes a judgment, he can retain a referral organisation to present an independent financial consultation report, to be used as the basis for making his judgment;

Thirdly, concerning the legal hierarchy, BOS is regulated by the law in detail, especially in its functions; but article 122 of the Company Law only rules that “A listed company shall have independent directors. The concrete measures shall be formulated by the State Council.” And indeed almost all the rules or regulations are about IDS in China are provided by CSRC and SETC.

#### 4.2 Similarities

Firstly, regarding social relations, many supervisory directors have strong affiliations with majority shareholders and the government, so do independent directors,<sup>40</sup> even if they shall not have these relations according to the law.

Secondly, although the responsibilities of BOS and independent directors are complementary to each other in the supervision system of a company in theory, there are still conflicts between them in practice. The second provision in article 53 of Company law requires BOS “[t]o supervise the duty-related acts of the directors and senior managers, to put forward proposals on the removal of any director or senior manager who violates any law, administrative regulation, the bylaw or any resolution of the shareholders' meeting”<sup>41</sup>. And the article 49, 50, 52 and 54 of the “Code” all regulates that independent directors have the powers of monitoring the financial affairs, corporate business and personnel, recognizing connected transactions and doing other illegal operations in the company. Accordingly, financial affairs of the company are concerned by both systems. Besides, article 55 of this “Code” empowers independent directors to give their professional opinions to the board of directors in the company when making important decisions, to scrutinize and to comment on the nominees of directors and managers. Meanwhile, in its article 53 and article 151, Company Law authorizes BOS to make motions about personnel and lodge actions against directors and senior managers who have violated the law or other regulations. So another conflict between the two supervision systems' responsibilities lies in personnel affairs. In short, at least in supervising financial and personnel operations, the powers of BOS and IDS are overlapped.

Some people believe this “double-check”, namely the coexistence of BOS and IDS,

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(b) making suggestion to the board of directors to retain or fire an accounting firm ;

(c) to request the board of directors to convene an extraordinary shareholders' meeting ;

(d) to suggest the convening of a board of directors' meeting;

(e) to independently retain external auditing organisations and consultation organisations;

(f) before the commencement of a shareholders' meeting to openly accumulate voting rights from shareholders.

<sup>40</sup> Q. Qiang, “Corporate governance in state owned shares in China listed companies” (2003) 14 *Journal of Asian Economics* 771, at 777-778; and J. Dahya, Y. Karbhari, and J.Z.Z. Xiao, “The Supervisory Board in Chinese Listed Companies: Problems, Causes, Consequences and Remedies” (2003) 9 *Asia Pacific Business Review* 118, at 125 and 126.

<sup>41</sup> Ibid.

can work better than abandoning either of them, but in fact, it is more possible to cause inefficiency and conflicts between the two. To better exercise the functions of both two systems, perhaps it would be more efficient to make a clearer division between their powers by legislation or in other ways.

## **5. The possibilities of bettering IDS in China**

The problems of Chinese IDS could be solved from four perspectives.

### 5.1 From the elections

To make medium and small shareholders take part in the processes of election, the following ways could be taken into consideration:

First, it may help to make name lists of potential nominees and oversee the elections. On the one hand, some governmental department, like CSRC or SETC, can make name lists of persons who are competent in exercising the responsibilities of independent directors in different fields and repeatedly renew such lists, just like the name lists of arbitrators provided by CIETAC<sup>42</sup> and other boards of arbitration and the Director's Registry Candidate Match of the National Association of Corporate Directors. Certainly, the very nominees of a company should be decided by themselves considering plenty of factors, especially the social relations of these people. On the other hand, the governmental department, like CSRC, can also supervise the processes as the "*Opinions*" rules that the CSRC has the right to veto these appointments of independent directors. If there is any illegal nomination noticed by or reported to its officials, they could require the company in question to make corrections, or it would be punished according to some law or regulations.

Second, cumulative voting system could be adopted in the elections. Article 31 of the *Code* provides: "The election of directors shall fully reflect the opinions of minority shareholders. A cumulative voting system shall be earnestly advanced in shareholders' meetings for the election of directors. Listed companies that are more than 30% owned by controlling shareholders shall adopt a cumulative voting system, and the companies that do adopt such system shall stipulate the implementing rules for such cumulative voting system in their articles of association." Through this system, minority shareholders may be able to ensure the election of their candidates as

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<sup>42</sup> The China International Economic and Trade Arbitration Commission (CIETAC) is one of the major permanent arbitration institutions in the world. CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION <http://www.cietac.org/index.cms>.

directors by concentrating their votes on one or a small number of directors.<sup>43</sup>

Third, companies could organize election committees in their governance structure, then hold preliminary selections and recruitment. Every listed company can establish a special committee made up of minor shareholders to nominate independent directors. Before the elections in the shareholders' meetings, this committee can have some pre-discussions about the candidates who are on behalf of them. And it is also able to have a preliminary selection and recruitment before the formal election in the shareholders' meeting. The professional skills, reputations and personal relationship of all participants shall be filtrated and scrutinized strictly. Comparing all of these conditions comprehensively, the candidates they would like to nominate in the shareholders' meeting can be finally defined.

Fourth, voting technologies will enhance the efficiency and convenience. To make it easier for medium and small shareholders to enforce their powers, some modern technologies, especially information related ones, can be used in the elections of independent directors. For example, companies can make some webpages about these elections on the internet and inform their shareholders, who are entitled to vote, of the time, website and other details through all kinds of media. The "Provisions" also suggested companies to adapt new ways of voting online in order to encourage individual shareholders to exercise their powers.<sup>44</sup> In 2005, *Notice of the China Securities Regulatory Commission on Piloting the Share-trading Reform of Listed Companies*<sup>45</sup> issued by CSRC and *Law of the People's Republic of China on Electronic Signature* have also justify this way of voting, which lowers the expenses comparing traditional ones as well. Of course, there are still two points about online voting should be emphasized. One is that the security of this method need to be guaranteed by the companies or even government in case that some people want to control or change the results; and another is that the identities of those entitled to vote should be defined and scrutinized somehow.

Fifth, it is necessary to comply with the law strictly and dismiss or transform "dependent" directors timeously. The qualifications and disqualifications of taking the positions of independent directors need be known more clearly and carried out more accurately. According to the current rules, direct relatives and major social relations of a listed company's senior managers or directors cannot take the positions of

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<sup>43</sup> Lilian Miles and Miao He, "Protecting the rights and interests of minority shareholders in listed companies in China: challenges for the future" (2005) 16 *International Company and Commercial Law Review* 275.

<sup>44</sup> D. Lee and E. Iritani, "China's Economic Growth Sizzles", *Los Angeles Times*, January 26, 2005, at [www.latimes.com](http://www.latimes.com).

<sup>45</sup> *Notice of the China Securities Regulatory Commission on Piloting the Share-trading Reform of Listed Companies* is now expired.

independent directors in this company. But in practice, “major social relations” may involve more than its present regulated meanings. And although such rules are announced, they are always not obeyed for the reasons explained in the former text. Another kind of directors have lost their independence after they take this position for two or more years. Both of these two types shall be dismissed timely, and for the former, such dismissal is a remedy because they have already been disqualified from the beginning. The relevant motions ought to be put forward by the committee of minority shareholders mentioned in the third point to make sure their own interests. What’s more, for the latter, considering their knowledge about their companies, they are able to be transformed into other directors after being not independent to make more contributions to their companies in other ways. As the result of losing independence, the term of six years ruled in the article 4 in the “*Opinions*” should not be treated rigidly; therefore it can be understood as “for at most six years”.

## 5.2 From the duties and obligations

It has been noticed that it is really difficult to find any law or regulations about what punishment shall be given if an independent director cannot fulfill his duties, thus making the way of getting awarded or punished clear may help to encourage independent directors. The first article of the “*Opinions*” requires “independent directors of a listed company to carry out fiduciary and diligent duties towards the company and its shareholders; to take their responsibilities carefully, preserving the whole corporate interests, especially the legitimate interests of minority shareholders; not to be adversely influenced in the course of implementing their duties by the majority shareholders, the real controller, other people or institutions of his major social relations; to take this position in at most five different companies whose shareholders are different, making sure themselves enough time and energy in exercising their duties in every company”. Seeing this together with other laws and regulations, it can be noticed that there is no extra obligation or punishment about the infringement of independent directors’ responsibilities ruled in China so far. Besides, most independent directors have limited personal belongings and their positions are not full-time. These factors work together to prevent them from being liable for their illegal or improper operations. Hence it is necessary to establish a system to define the possible adverse results they might get. Such system can also function with the relevant liability insurance system mentioned by CSRC to not only improve their sense of responsibility but also offer them some remedies when there is any risk.

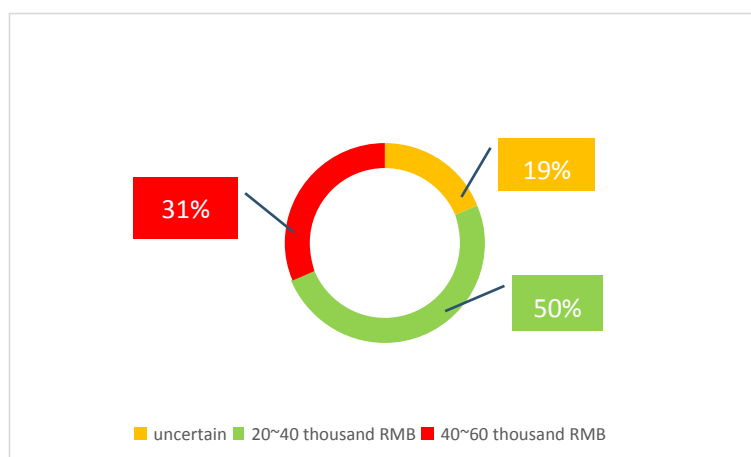
## 5.3 From the distribution and cooperation between the internal and external supervision

Since it is known that both supervisors and independent directors have the power of monitoring some common affairs in a company's governance, a clearer distribution of their lines of duties is necessary to make them work together for the improvement of efficiency, from the perspectives of both insiders and outsiders, as is analyzed in 4.2. Also it is known that BOS generally focuses more on the financial issues, and independent directors pay more attention to the processes of decision making.

There is another suggestion that supervisors and independent directors can have periodical joint meetings or conferences to share the information from each other, so that independent directors can make more sense when expressing their professional opinions. The reason is that any listed company should guarantee their independent directors to have the access to information as other directors.<sup>46</sup>

#### 5.4 From the remuneration

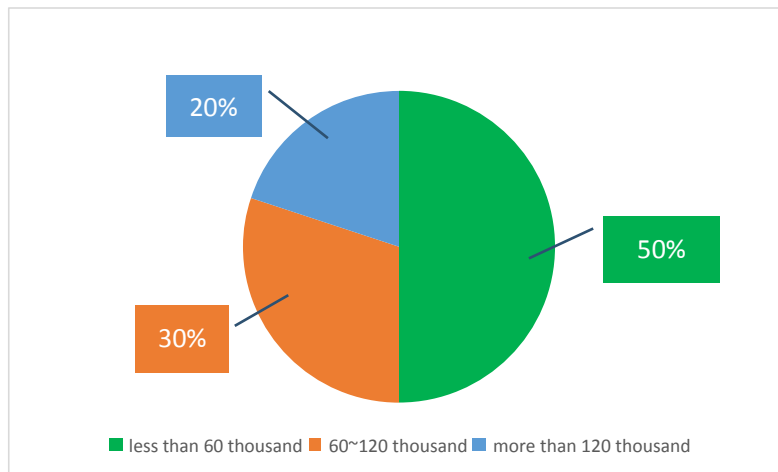
Graph 4: Annual remuneration of independent directors in China in 2003



Graph 5: Annual remuneration of independent directors in China in 2012

<sup>46</sup> Alex K.L. Lau, "China: CSRC's 'Guiding Opinion' on independent directors of listed companies - another first for China" (2003) 24 *Company Lawyer* 279.





Korn-Ferry concluded that in 1995, the average remuneration of American independent directors is nearly forty thousand dollars.<sup>47</sup> And according to some researches in 2003, they receive twenty to forty thousand every year and one to five thousand every time they take part in a meeting of the board of directors as the extra allowances. Meanwhile, in China, 31% of all independent directors earn 40 to 60 thousand dollars, and 50% earn 20 to 40 thousand as Graph 4 shows. In 2012, such statistics are different, 50% of all in-service ones could get 60 thousand or above, among them, the annual earnings of 20% are more than 120 thousand.<sup>48</sup>

It is found that the remuneration package of many independent directors does not work as an effective stimulus to their diligent performance.<sup>49</sup> The “*Opinions*” has already regulated that “listed companies shall give their independent directors some reimbursement that has been budgeted and proposed by the board of directors, deliberated, examined and approved by the shareholders’ meeting and disclosed to the public in the corporate annual reports. Except for such reimbursement, the other undisclosed interests or benefits from the company, big shareholders or other organizations and persons of major social relations cannot be accepted by independent directors”.

In 2012, Ye Tan, a well-known Chinese financial commentator, was employed by a company “\*ST<sup>50</sup> Tian Mu” and voluntarily decrease his own yearly pretax allowances to the 20% of the ordinary amount of what the other independent directors

<sup>47</sup> An Analysis on Chinese Independent Director System, <http://doc.mbalib.com/view/8b1a6359a60c41f705f9e5fc2305024f.html>.

<sup>48</sup> The research group of A Guide Compiled by CAPCO, “There is Still a Long Way to Go for the Independent Director System in China”, *China Securities Journal*, 16<sup>th</sup> Jan, 2014.

<sup>49</sup> Yuan Zhao, “Review on Incentive System of Independent Directors in China” (2011) 12 *Business Law International* 215.

<sup>50</sup> “\*ST” means Special Treatment, which is a warning of high risks in making investment by CSRC.

get, which means 100 thousand RMB, in the same company.<sup>51</sup> But since not everyone can be Ye Tan, as part of the encouragement to people who work as independent directors, it is still really necessary to give them appropriate remunerations to keep them do their duties responsibly and actively.

Because independent directors enjoy the powers of supervising the corporate governance of directors and senior managers, their salaries should not be decided by those people they supervise. Or, they are factually under the control of these supervisees. Namely, the more money they get from supervisees, the less motivation they have to handle their responsibilities. Based on this point, the committee of nominating independent directors mentioned before, or the law is able to determine the methods of calculating salaries or allowances of independent directors in every single company. In addition, how diligent an independent director is, how much time he has spent working for certain company and the comments from shareholders on his performance shall also be taken into consideration when deciding his remunerations.

## 6. Conclusion

In 2012, Chong Qian Beer Vaccine was exposed to be a lie without any word from its four independent directors. That is a warning for the legislators that although the IDS have made a few achievements in China, its flaws shall not be ignored. It is not only the responsibility of the government, but also the mission of the whole community to keep a good environment of making and attracting investment through the perfection of the existing systems, if China wants to stay competitive in today's world. Considering the legislation and practice in the past twenty years, to improve the IDS of China and eliminate conflicts with other systems, especially BOS, Chinese corporate governance improvement is really urgent. And such system, as the essential part of the improvement, shall be optimized frequently. The efforts shall be made mainly from the next perspectives: First, from the practice of the present law, the qualifications and disqualifications of independent directors shall be strictly observed. Second, from the completion of legislation, especially the methods of giving encouragement and punishment to independent directors on the basis of their different performances and a definite clarification between the functions of BOS and IDS shall be drafted. Third, from the preparations and technologies used in elections, a committee of minor shareholders shall be organized, and the way of online voting shall be applied. Fourth, from the mental independence of directors, their independence can be maintained through the name lists of potential independent

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<sup>51</sup> Wang Miao, "To Independent Directors: How Do You Work As 'Vases' of Decoration?", *China Reform Report*, 11<sup>th</sup> Jun, 2012.

directors made by CSRC and timely dismissal or transformation. All of the measures above are aiming at enlarging positive effects of Chinese IDS, because better systems bring better corporate governance. And the ultimate goal is to guard the interests of minority shareholders, namely common people, which is very purpose of the modern Chinese corporate system reform.