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Judicial Independence and the Company Law in the Shanghai Courts

Nicholas Calcina Howson

The essence of corporate and commercial laws is to protect business and commerce from the threat of political power.

– Zheng Guanying (1893)¹

This chapter draws on a detailed study of corporate law adjudication in Shanghai from 1992 to 2008. The purpose of the study was to better understand the demonstrated technical competence, institutional autonomy, and political independence of one court system in the People’s Republic of China (“PRC”) in a sector outside of the criminal law. The study consisted of a detailed examination and comparison of full-length corporate law opinions for more than 200 reported cases, a 2003 Shanghai High Court opinion on the 1994 Company Law (describing a decade of corporate case outcomes),² a 2007 report on cases implementing the Company Law in 2006 (more than 760 cases),³ and extensive interactions with Shanghai court officials handling such disputes⁴ – all for a wide diversity of Shanghai

¹ Li Yu, *Wan qing gongsi zhidu jianshen yanjiu* [Development of the Corporation System in the Late Qing], (Beijing: The People’s Press, 2002), p. 100.

² Reviewing cases from the previous decade (1993–2003), see Shanghai High Court ed., *Gongsifa yinan wenti jixi (di san ban)* [Company Law Issues: Problems and Analysis (3rd Edition)], (Beijing: Law Press China, 2006), pp. 231–236 (“Shanghai Company Law Opinion”).

³ Shanghai High Court No. 2 Civil Division ed., “Shanghai fayuan xin ‘gongsifa’ shishi yi zhounian sifa diaocha” [“Judicial Investigation of Application of the New ‘Company Law’ in the Shanghai Courts After One Year”] in *Gongsi falu pinglun (2007 nianjuan)* [Company Law Review (2007)], pp. 38–51 (“Shanghai Company Law Report”).

⁴ Corporate law cases heard in the Shanghai courts vary. In 2006, Shanghai courts heard 768 corporate law-related cases. The three claims addressed most often and accounting for 76 percent of the total were: (i) shareholders rights (241 cases, or 31 percent of the total); (ii) share transfers (261 cases, or 34 percent of the total); and (iii) information rights (81 cases, or 11 percent of the total). Among the remaining 24 percent, the Shanghai courts heard suits involving: dividend distributions, distribution of residual assets on liquidation, shareholder qualification, share inheritance, and – in a direct response to changes in the 2006 Company Law – shareholder applications for corporate dissolution, invalidation of shareholders’ resolutions, and challenges to “illegally” convened shareholders’ general meetings.

jurisdictions⁵ and procedural postures.⁶ Due to space limitations, this chapter focuses on the demonstrated independence, and to a lesser extent autonomy, of the Shanghai courts when faced with a completely altered Company Law.

THE NEW JUSTICIABILITY OF THE COMPANY LAW

Corporate law theory holds that in jurisdictions like the PRC, where the judiciary is regarded as underdeveloped, buffeted by political and other external pressures, and deficient in handling complex cases, company law must be largely self-enforcing and may not be structured to “depend on fast and reliable judicial decisions.”⁷ China’s first post-1949 company law, effective in 1994,⁸ was a textbook expression of this

The High Court acknowledged that the Shanghai courts took relatively few cases involving corporate management rights and obligations – breach of corporate fiduciary duties – because of the relative complexity involved. The totality of the cases reviewed for the 1992–2008 period reveal much the same case composition (December 2008, Chief Judge of the Shanghai High Court No. 2 Civil Division; Shanghai Company Law Report, pp. 39–51; and Shanghai Company Law Opinion, pp. 231–236.)

- 5 The courts include every district in Shanghai, from the expected Pudong New District (situs of the Shanghai Stock Exchange) to far off Baoshan, and even special courts like the Shanghai Rail Transport intermediate court. In many cases, the Shanghai courts are forced to deal with competing proceedings and/or prior rulings from other jurisdictions, especially courts in the Yangtze River Delta.
- 6 The procedural postures are consistent. Most start at the district level, whence they are subject to appeal (to the intermediate level) at the litigants’ initiative. Less frequently they begin in intermediate court, with appeal to the Shanghai High Court. In only one example in the sample does the case reach the Supreme People’s Court. Many of the case opinions indicate seemingly endless rehearings, often by the same court level (but by different panels of judicial officers). For instance, one case shows a dispute heard twice by the district court, an appeal to the intermediate court, remand to the original district level, and then appeal again to the higher intermediate court. The Chinese courts do not hold to the fact-law distinction between trial and appellate courts known in the United States, England, and many non-Chinese jurisdictions. Accordingly, PRC appellate proceedings allow *de novo* pleadings of law and fact. Yet in the many cases reviewed for the study, very few show reversal at the second level of adjudication. Certainly higher level courts demonstrate how free they are to undertake factual investigations *de novo* and often apply different law and/or remedies, but the final judgments rarely change. That being said, the proportion of reversals or differentiated judgments seems higher in corporate and commercial cases when compared to criminal prosecutions or criminal appeals. For just 2006, the Shanghai High Court reported the following with respect to corporate law cases: among first hearing cases, 55 percent gave rise to judgment, 11 percent were concluded through mediation, and 33 percent were subject to some kind of order; for cases subject to rehearing and/or appeal, judgments were issued in 43 percent of the cases, only 1 percent were resolved through mediation, and a much larger proportion – 55 percent – subject to court order. In its report, the Shanghai High Court asserts that the higher percentage of cases concluded by court order on rehearing/appeal is a result of settlement reached between the parties or the litigants withdrawing the case. This is rather unsurprising, as many Chinese litigants would probably work to settlement once they have understood – via the results of the first proceeding – how their claims will fare on appeal. The phenomenon is also an indication of the relatively low success rate of appeals in overturning the initial court’s decision. See Shanghai Company Law Report.
- 7 Bernard Black and Reinier Kraakman, “A Self-Enforcing Model of Corporate Law,” *Harvard Law Review*, vol. 109, p. 1914 (1996).
- 8 Adopted December 29, 1993, and with minor amendments on December 25, 1999, and August 28, 2004.

self-enforcing model. There is little in the 1994 statute inviting judicial participation in corporate disputes, whether for external actors (e.g., veil-piercing) or internal participants (e.g., fiduciary duties). The 1994 law's self-enforcing character was deemed entirely appropriate given common perceptions of PRC judicial institutions and the resource constraints of its more competent but overworked securities regulator, the China Securities Regulatory Commission ("CSRC") or the public prosecutor, the People's Procurate.

Notwithstanding continued real and perceived shortcomings of the judiciary, on October 27, 2005, the PRC's national legislature passed a wholesale reworking of the 1994 Company Law, effective January 1, 2006 (the "2006 Company Law"). In a head-spinning departure from the self-enforcing model of corporate law and governance, the Company Law was suddenly replete with broad invitations for sophisticated judicial involvement, including derivative lawsuits, invalidation of corporate resolutions, ex post application of corporate fiduciary duties, information rights, appraisal rights, a right for shareholders of companies limited by shares to sue senior management for any breach of law, regulation, or the company articles of association, and corporate veil-piercing. Even mainstream PRC corporate law scholars saw in the 2006 Company Law a robust invitation to judicial involvement, divining for instance a private right of action to enforce corporate social responsibility standards or check the degree of Communist Party involvement in company management.⁹

CORPORATE LAW IN THE PEOPLE'S COURTS: AUTONOMY AND INDEPENDENCE

Implications of the 2006 Company Law

Aside from the expanded technical mission foisted on the Chinese courts, the 2006 changes in the Company Law also signaled potentially significant impacts on the autonomy and independence of the judiciary. Specifically, the statute gave courts the bases and authority to act in corporate cases with a degree of expertise and autonomy far beyond the traditional role of China's Communist-era courts and in disputes with significant material interests at stake. The courts will now be asked to apply the newly justiciable corporate law in contests between independent commercial litigants and other more powerful political-economic actors. Consider, for example, a shareholder's lawsuit against a director representing the interests of a state agency-backed controlling shareholder – or the controlling shareholder itself – for breach of corporate fiduciary duties or minority shareholder oppression. Here the judiciary will be called upon to protect legal norms against the heretofore superior power of

⁹ Luo Peixin, "Judicial Plights in the Context of the New Company Law of China," in Asian Law Institute ed., *The Development of Law in Asia: Convergence Versus Divergence* (Shanghai: Collected Papers from the 3rd Asian Law Institute Conference: May 25–26, 2006).

the government (or party controlling it) – which power comprises administrative and fiscal domination of the courts hearing the case. The question is whether PRC courts can take up, or be permitted to take up, this provocative challenge.

Competence, Autonomy, and Independence Differentiated

The proposed effects of the 2006 Company Law require definition of three distinct concepts invoked here: competence, autonomy, and independence. Competence is the easiest to describe and goes to the technical expertise of judicial institutions in evaluating factually and legally complex disputes.¹⁰ More important in this volume are the seemingly synonymous concepts of judicial autonomy and independence. Autonomy is the ability of courts to act with their own institutional authority, even when on occasion they have no legal basis to act. An example is where Chinese courts accept, hear, and decide cases involving fiduciary duties, veil-piercing, petitions for dissolution, etc., without authority under statute or judicial regulations. Judicial independence is still another idea and goes to the ability of courts to act independently of, and against the interests of, political and military power. For example, a Chinese court might act autonomously to pierce the corporate veil and assess direct liability against the controlling shareholder of a debtor firm and yet prove

¹⁰ The findings on competence are positive, as the Shanghai courts evidence increasing skill in adjudicating corporate matters (with the occasional blunder). Sometimes that skill is demonstrated by judges choosing not to apply the law for corporations to what are really closely held corporate partnerships (instead intelligently applying partnership law principles) or adeptly handling business forms “left over from history” and firms formed spontaneously by entrepreneurs with no basis in any law. The study shows there is no connection between the relative level of a given court and its demonstrated competence, as the most expert adjudication in corporate matters is often performed by district courts far from the more sophisticated action in downtown Shanghai or the exalted premises of the High Court. This indicates that the education, intellect, and personal qualities of judicial personnel are important variables in determining competence and that the court system’s higher reaches may be staffed by bureaucratically adept administrative cadres rather than expert lawyers. The data also show that there are significant numbers of corporate law cases where the courts have no opportunity to demonstrate competence, or lack of it, because case complexity is so daunting. For instance, the Chief Judge of the No.2 Civil Division of the Shanghai High Court reported at the end of 2008 that the Shanghai courts have been cautious in accepting shareholder/creditor petitions for dissolution, even though the 2006 Company Law provides a clear legal basis for such suits, and the Second Supreme People’s Court Regulations on the Company Law were issued specifically to provide the principles of application. The same official also expressed the need for a higher level of expertise in handling liquidation matters, especially where creditors are involved and firm principals have moved on, and the need to involve other departments such as the State Administration of Industry and Commerce (the registration authority), the State Taxation Administration, the banking regulator, etc. A related competence problem identified by the Chief Judge is the mandatory prior mediation requirement in dissolution actions. The Shanghai courts see this as something they are ill-qualified to undertake in a situation where they lack sufficient information, and a waste of judicial resources with movement to the inevitable lawsuit. The same phenomenon is reported with respect to the use of judicial resources in mandatory pretrial mediation in labor disputes. See “Zhongguo zui mang de fating” [China’s busiest court], *Nanfang zhoumo*, Dec. 4, 2008 (“China’s Busiest Court”).

unable to act independently in enforcing that liability if the controlling shareholder is a powerful instrument of the state, party, or military.

Two other aspects of judicial practice in corporate cases provide a window into the degree of judicial independence manifested by Shanghai courts. First, there is a way courts act without independence when they implement state or party policy in contravention of what the law provides. In discussions of judicial independence in China, this failure is often exemplified by the application of criminal law in the service of social–political control and without regard to the rights of criminal defendants. Many would understand the 1983 Strike Hard campaign or the initial stages of the crackdown on Falun Gong as embodiments of this kind of failure.¹¹ Yet, as demonstrated below, even in the context of corporate law application, Chinese courts may be seen acting in the service of state or party policy and in contravention of the law. Second, and on the side of affirming judicial independence, court support for market and/or market–actor autonomy (including self-ordering) over the mandates of the state may express a kind of judicial independence. To the extent the judiciary has a role in applying such notions in modern China, it can be understood as a bulwark against an economic and financial system overwhelmingly dominated by the state and party as owner, manager, and regulator.

JUDICIAL INDEPENDENCE

Determining Political Background

As noted, my broader study focuses on the degree of competence and autonomy demonstrated in Shanghai corporate law adjudications. This focus is occasioned by the lack of transparency about the political power of litigants involved in the reported cases. The inability to obtain information about the political background of cases makes it exceedingly difficult to evaluate the demonstrated independence of judicial bodies in handling corporate law-related civil or criminal matters. The task is made doubly difficult because (i) many cases are simply not accepted due to public or internal bureaucratic direction or precisely because of the case’s political coloration, or (ii) even if initially accepted, such cases are not subject to adjudication (or not reported as such) again for fear of bumping up against extralegal power.¹² Thus, it may be assumed that the most politically sensitive cases never make it into the body of data analyzed.

¹¹ As Peerenboom has shown, the campaign against Falun Gong was at least partially “legalized” subsequently. Randall Peerenboom, *China’s Long March toward Rule of Law* (Cambridge: Cambridge University Press, 2002), pp. 91–102.

¹² The author, when a practicing lawyer, remembers representing a European bank in the mid-1990s against a large Shanghai financial institution where all levels of the Shanghai court system proved unable to act decisively or issue a final judgment for fear of ruling against the municipal government, which controlled the defendant.

There are two other reasons for the lack of identifiably political cases in the corporate sphere. First, many of the most politically powerful firms are still organized as state-owned enterprises (“SOEs”), or wholly state-owned company limited liability companies under the Company Law, and so they do not have shareholders or any separation of ownership and management. There are thus no shareholders to sue on governance concerns, or against corporate insiders, and most disputes are addressed between government departments in a wholly political forum. Second, only those SOEs that have been corporatized and then engaged in public capital-raising will conjure up a group of potential shareholder plaintiffs. Yet, as described more fully below, cases with respect to companies limited by shares with a public float are largely kept out of the courts by fiat or voluntary denial. As such, corporate lawsuits involving state- or party-backed firms, even corporatized, are almost nonexistent (although the picture is richer in securities law actions).

Intimations of Judicial Independence

Even with this limited ability to discern the political background of corporate cases, there is evidence of Shanghai courts ruling against political actors – cases where private litigants do battle against both government departments¹³ and SOEs or apparently commercial actors/investors with substantial political backing. In fact, in all of the more than 200 full opinions reviewed, where there is a discernable political interest, the Shanghai courts supported the nonstate/party interest.

This conclusion is illustrated by two examples, which, perhaps not surprisingly, are contract cases implicating state investment vehicles. In 2003, a district-level court enforced the rights of an industrial site occupier against a condemning local government agency because the relocation contract at issue was validly formed under law, and the rights arising thereunder were “to receive the protection of the law” (i.e., against the government).¹⁴ The defendant government agency’s unsuccessful defense against payment of compensation under the contract went directly to state power: it asserted execution of the contract “on behalf of the district government” and that it had failed to perform pursuant to the “instructions of higher [administrative] levels.” The court nonetheless ruled for the plaintiff against the government.

Similarly, a 2007 veil-piercing case went against the interests of a large central state entity, albeit in the more expected circumstance of a ruling against a non-Shanghai government power.¹⁵ There, a Renminbi (“RMB”) 32 million yuan creditor pierced

¹³ And distinct from administrative claims under the Administrative Litigation Law.

¹⁴ *Shanghai Kangpais Enterprise General Company v. Shanghai Municipal Administration of Industry and Commerce Huangpu District Branch, Shanghai Pushun Shunzhe Development Company and Shanghai Huangpu Market Development General Company* (Shanghai No. 2 Intermediate People’s Court, 2001, upheld by the Shanghai High Court, 2003).

¹⁵ *Shanghai Huaxin Electric Wire and Cable Company v. China Tietong Group Company* (Shanghai No. 2 Intermediate People’s Court (No. 4 Civil Division), 2007, upheld by the Shanghai High Court, 2007).

to the Beijing-based SOE parent of an undercapitalized Shanghai limited liability company debtor, with the Shanghai High Court specifically upholding the assertion of parent liability by litigation (i.e., by ex post application of standards by the judiciary) based upon “abuse of the corporate form” under Article 20 of the 2006 Company Law.

Shanghai courts have also proven able to grapple with the fraught circumstance resulting from SOEs existing alongside SOE-invested corporate vehicles and independently financed and nonstate corporations. Thus, the courts seem empowered to disregard formal corporate structures when they are offered as a defense against state or party cadre misfeasance. One 2007 case shows the trial-level court and the Shanghai High Court dismissing a first defense seeking to distinguish SOE-subsidary enterprise department actions from the interests of the SOE itself, and then a second defense that seeks to protect a corrupt cadre from prosecution because he has diverted funds to a (commercial) limited liability company promoted and controlled by him.¹⁶

A similar case from 2007 dismissed the defendant’s pleadings that admitted corporate misfeasance and breach of corporate law and regulation in respect of an SOE, but posited that such actions have nothing to do with the crime of “private misappropriation of public assets” because they occurred with respect to the internal affairs of a corporate entity (albeit a registered SOE).¹⁷ The court would have none of this theory and sentenced the defendant to prison and disgorgement of diverted income.¹⁸

As noted previously, another indication of judicial independence in the corporate sphere is the ability of the courts to protect some area of semi-autonomous activity against direct state regulation. In the many opinions reviewed, there is abundant rhetoric upholding market actor autonomy against the state and frequent invocation of private ordering in opposition to mandatory business regulation. A statement to this effect appears in one intermediate court’s 2007 commentary on a 2003 case,¹⁹ where the court had to choose between protection of statutory rights of first refusal due existing shareholders and the rights of a good faith transferee under a fraudulently approved transfer agreement:

First and foremost, the thing we must clarify is this: the jurisprudential logic underlying the giving of priority to the [right of first refusal] over the purchase rights of the transferee is absolutely not because the former right is in statute, and the

¹⁶ *PRC v. Xue Henghe* (Shanghai Rail Transport Intermediate People’s Court, upheld by Shanghai High Court, 2007).

¹⁷ *PRC v. Wang Haiqing et al.* (Shanghai Hongkou District People’s Court, 2007).

¹⁸ This is consistent with the same sensitivity and approach taken in a 2001 criminal case, where the establishment of a new, private, enterprise (by an SOE manager) designed to skim transfer value from the SOE’s sourcing transactions is a violation of the Criminal Law’s prohibition against “illegally engaging in the same business” (as an SOE where the criminal defendant is posted), see *PRC v. Shen XY* (Shanghai High Court, 2001).

¹⁹ *A. Investment Development Company v. Wang and Other Shareholders* (Shanghai No. 1 Intermediate People’s Court, on appeal, 2003).

latter is merely a contract right. This is because statutory rights are not always superior to contract rights – in fact, it is just the opposite. Approaching it systemically and adhering to the orientation which protects private ordering, regulation of the market requires that application of the law fully respect the freedom to contract to encourage successful transactions. . . . There is significant meaning in this.²⁰

This is a remarkable rhetorical position in the context of recent Chinese history and a departure from common views of Chinese law even through the 1990s.²¹ And the position is more than rhetoric, as seen in many Shanghai corporate cases. One 2005 opinion provides an excellent example where self-ordering memorialized in the articles of association completely swallows statutory norms like the fiduciary duty of loyalty.²² A 2006 opinion shows the extraordinary weight placed on partnership agreement-like articles of association as an expression of private ordering, which triumph over larger default provisions or doctrines contained in the Company Law itself.²³ Even with identification of fiduciary duties breach and fraud by a controlling shareholder, resolutions passed by a dissident shareholders' meeting are ruled invalid because the meeting was not called, and the voting was not effected, in technical conformity with the articles of association. The same heavy privileging of apparent self-ordering expressed in articles of association and entity regulations approved by the board is seen in another case that completely disenfranchised a shareholder²⁴ and a separate 2007–08 opinion where the intermediate court stated “the courts should not use the coercive power of the state to interfere with matters within the scope of a company's self-governance.”²⁵ Although this weighting of private ordering over statutory mandates does not constitute the sharpest expression

²⁰ Shanghai High Court ed., *2005 nian Shanghai fayuan anli jingxuan* [2005 Selection of Shanghai Court Cases], (Beijing: People's Court Publishing House, 2007), p. 111.

²¹ Or nineteenth-century reform officials, see Wellington K.K. Chan, *Merchants, Mandarins, and Modern Enterprise in Late Ch'ing China* (Cambridge: Harvard University Press, 1977), pp. 67–68 (two basic premises inherent in the views of officials and literati regarding commerce and industry were “that the state had the right to run, or at least intervene in, the affairs of any major business enterprise, and that the state had prior prerogatives over its profits . . .”).

²² *Shanghai Yingdafang Service Company v. Shanghai Yingdafang Zhangjiang Service Company et al.* (Shanghai Pudong New District People's Court and Shanghai No. 1 Intermediate People's Court, 2005).

²³ *Yu Xiaohui and 18 Shareholders v. Shanghai Changxin Accountancy Limited and Guo Hongtao* (Shanghai Changning District People's Court and Shanghai No. 1 Intermediate People's Court, 2006).

²⁴ *Shanghai Shenmao Dianci Factory v. Wang Longbao, Shanghai Shengmao Xiancai Company, Shanghai Guanlong Electrical Machinery Assembly Company and Taicang Municipal Guanlong Dianci Company* (Shanghai Nanhui District People's Court, 2004, upheld Shanghai No. 1 Intermediate People's Court (No. 3 Civil Division), 2004, overturned Shanghai No. 1 Intermediate People's Court (No. 3 Civil Division) 2006 on rehearing). In this case, the defendant actually pleads that assertion of law over the agreement memorialized in board regulations and the articles of association amounts to state interference.

²⁵ *Sun X. v. Li Y. and Shi Z.* (initial court hearing case and intermediate court hearing appeal not identified, but latter probably Shanghai No. 2 Intermediate People's Court (No. 3 Civil Division)), 2007 or 2008).

of political independence, in the context of China's historical political development and its reform-era legal construction program it shows a decidedly independent orientation at the courts.

In another demonstration of judicial independence, there are indications of the Shanghai courts acting as the guardians of a new corporate–commercial space. One April 2006 opinion considering the new Article 183 judicial dissolution mechanism refuses to grant relief to shareholder plaintiffs and yet directly scolds the directors of the subject firm for their failure to comprehend they are not political cadres operating a collective but rather shareholders with an economic interest – or corporate directors acting as fiduciaries of the owners – who have a radically different relationship to their coshareholders (the former worker–participants in the collective):

But, the court has also noticed that the three defendants, as directors of the company, have not really made the transition from their former role as leader-cadres of a collectively-owned enterprise to that of shareholders in a limited liability company. For instance, in calling shareholders' meetings they have not conformed to their notification obligations, have failed in bringing about discussion of corporate operating policies, and ignored the other related rights of the seven plaintiffs. In addition, in managing corporate finances, there seems to be in evidence action which includes the transfer of corporate funds into personal accounts and the holding out of corporate automotive vehicles as personal assets. And, the expenditures by the company have not been handled transparently, etc. The above-described actions by the defendants have certainly brought about the lack of trust by the plaintiffs, which has resulted in the disagreement [between shareholders].²⁶

This opinion shows a PRC court striving to remind participants in an altered economic–corporate law system that the new order entails real separation of enterprise and administration, which the same judicial institutions seek to protect and enforce. Insofar as it works directly against the interests of preferred political actors, it is also an expression of judicial independence.

Failures to Demonstrate Judicial Independence

There are several ways in which the Shanghai courts evidence serious independence limitations in the sense proposed above, most notably (i) by acting as the handmaiden of policy implementation in contravention of what the Company Law allows or directs, and (ii) by blanket rejection of public company/large plaintiff cases.

First, the 1992–2008 survey shows a large number of cases – and in every instance of shareholder petition for judicial dissolution – where the courts actually work against the law in the service of state policy aims. A 2006 judicial dissolution case²⁷ is indicative of this value choice cum doctrinal approach. It is the same approach

²⁶ *Yang Lizhi et al. v. Cao Zhengjie et al.* (Xuhui District People's Court, 2006).

²⁷ *Tang Chunshao v. Zhou Huizhong* (Shanghai No. 1 Intermediate People's Court, 2006).

adopted two years later in the Second Supreme People's Court Regulations on the 2006 Company Law,²⁸ articulated directly by the Chief Judge of the Shanghai High Court No. 2 Civil Division in December 2008 when discussing the courts' hesitancy in accepting and allowing dissolution–liquidation pleadings,²⁹ and the policy direction signaled in a December 2008 ten-point notice distributed by one Shanghai intermediate court. The case involves Article 183 of the new Company Law, where the court rejects plaintiff's suit for judicial dissolution of a thoroughly deadlocked company. In the expanded reasoning behind the simple judgment, the court declares it is loath to order dissolution of a corporate legal person – even a dysfunctional one – because such action would “necessarily impact in different degrees on market order and stability.”

Another 2006 case, where shareholders of a limited liability company (transformed from a collectively owned enterprise) also sought judicial dissolution, evidences much the same approach by the Xuhui District court.³⁰ There the application for dissolution is also refused because it is seen as a drastic and disruptive remedy, and – perhaps most importantly – it would alter arrangements whereby salary was being paid to laid-off workers. The Shanghai High Court in a commentary lauded the court's refusal to grant dissolution relief because of the negative impacts on market stability and the attendant social costs.

The consistent approach in these cases may be contrasted with an economic approach that encourages efficient redeployment of capital when shareholder relations become so difficult that they make firm operations impossible.³¹ Instead, what these case opinions evidence is the courts acting as administrative units – often directly in conformity with bureaucratic instruction – prioritizing national social and economic policy over and above more specific mandates (and rights) set forth in the Company Law.

Far more illustrative of potential limitations on judicial independence is the pronounced absence in the sample of case opinions having anything to do with

²⁸ Article 5, which for petitions under Article 183 directs the courts to emphasize mediation and then strongly pushes the courts to support an agreed buyout among the shareholders, reduction of capital, and exit of one or more partners, or any method which is not in contravention of a mandatory article of law or administrative regulation, to serve the overriding priority of maintaining entity existence.

²⁹ “We strive to keep the company in existence; we have to think about creditors, the social responsibility of the corporate person, and the fate of the employees.”

³⁰ *Yang Lizhi et al. v. Cao Zhengjie et al.* (Xuhui District People's Court, 2006).

³¹ Compare *Shanghai Jingfa Enterprise Development Company v. Shanghai Haining Petroleum Products Company* (Shanghai No. 2 Intermediate People's Court, upheld on appeal at the Shanghai High Court, 2003) where the put of equity interests owned by complaining shareholders to the other (breaching) shareholders is ordered to allow the company to continue normal operations and maintain employment of the company's accumulated value but also implicitly to allow the complaining shareholders to redeploy their capital to continuing productive uses. In this case, the rhetoric about market stability and continued use of productive assets is similar, but the court feels emboldened to fashion its own, implicitly, economically far more efficient, remedy.

companies limited by shares (joint stock companies)³² or such companies with listed capital, or their shareholders – less than 1 percent of the case opinions reviewed in detail between 1992 and 2008.³³ One result of this apparent rejection of public cases is that whole swaths of the Company Law are simply not used,³⁴ including numerous provisions supporting basic claims one expects to see in the application of a company statute in a country with two active stock exchanges.³⁵

Does this mean that companies limited by shares and their shareholders and directors and officers (and controlling shareholders) are not getting into trouble or are being operated without discord and in perfect conformity with the highest standards of modern corporate governance? Absolutely not, as divined from the daily reports in China's muckraking financial press of corporate governance sins too manifold to mention.

When considering why so few such cases appear in the Shanghai courts – which is after all the situs of the Shanghai Stock Exchange – there are a number of reasons that have little to do with judicial independence concerns. One explanation – focusing on the plaintiff, not court bureaucracy, side – is a substitute enforcement structure

³² It appears that Shanghai courts have had no particular problem dealing with the limited liability company form that actually predated China's entire corporate law system, the foreign-invested enterprise ("FIE") forms dominated by Chinese-foreign equity and cooperative joint ventures, each of which have their own specific statute and/or regulations governing certain aspects of their legal identity, operations, and shareholder relations. One of the reasons FIE-related cases are not seen in the Shanghai courts is that foreign investors and their PRC partners almost uniformly choose exclusive arbitration for dispute resolution.

³³ See *Zhang X. and Other Shareholders of Shanghai A Company Limited v. Shanghai A Company Limited* (first and rehearing courts not identified, 1995); *Lu Jianming v. Shanghai Light Industry Machinery Company, Limited* (Shanghai Jingan District People's Court, Shanghai No. 2 Intermediate People's Court, 2006); and *PRC v. Fang Kun, Ni Chunhua and Zhang Mingxia* (Shanghai Pudong New District Court, upheld by the Shanghai No. 1 Intermediate People's Court, 2007). In the 2003 Shanghai Company Law Opinion, reviewing more than a decade of corporate law cases in Shanghai, the only mention of public company cases is the allusion to "suits by public company shareholders to invalidate corporate resolutions" in a long list of "continuing difficulties," indicating that the courts receive such pleadings but perhaps do not accept them.

³⁴ For both companies limited by shares (listed or not) and limited liability companies (even the close corporation/corporate partnership form so prevalent in China's enterprise reality), the following are also absent: shareholders' civil suits against other shareholders for oppression; claims against control or actual control parties for harm to the company; specifically pleaded breaches of duty of care or duty of loyalty (including funds misappropriation, illegal lending or guarantees, self-dealing, corporate opportunity, corporate secrets); specifically pleaded claims against directors, officers, or supervisory board members for compensation; specifically pleaded derivative actions; adjudication of actual control person status; failure to make financial reports to shareholders; company dividend distributions; or breach of duties by court-confirmed liquidation group. Given the politicized capital structure of even nonpublic companies in the PRC, this paucity of claims may also be determined by political factors and thus have implications for the exercise of judicial independence.

³⁵ Equally glaring is the omission of any cases involving the new garb given SOEs, the wholly state-owned company subgenus of limited liability company. The absence of wholly state-owned limited liability companies conversely has everything to do with the reality of these firms as administrative units wholly controlled by state and party actors (even though reclad under the Company Law), with no shareholders' meeting.

for listed companies' cases via the public prosecutor³⁶ and the securities regulatory authority,³⁷ each prodded by the aggressive financial media in China. Another explanation, equally unrelated to judicial independence concerns, is what might be called the demand-side theory, where shareholders do not bring actions against the companies limited by shares they invest in either because of familiar collective-action problems or because they themselves do not understand that courts – as contrasted with the securities regulator – are the appropriate forum for hearing their claims.³⁸ The latter attitude is exemplified in the straight-faced pleadings reported in a 2008 private action against the CSRC.³⁹ There a defendant director, obviously negligent in fulfilling his corporate fiduciary duties, asserted he was not one of the named persons with a fiduciary duty under the PRC Securities Law – thereby completely ignoring the application of the Company Law to his role as a director of a public company limited by shares. Flawed in the legal sense, the defense highlights a common understanding in China of the separate worlds of limited liability companies on one side and companies limited by shares with listed stock on the other.

More likely explanations for the absence of public company cases are that the Shanghai courts (i) voluntarily avoid taking such cases, and (ii) are specifically directed not to take such cases. The distaste for public company cases, whether self-directed or ordered from the higher regions of the judiciary, was exemplified in the posture famously taken by the Pudong New District Court when it refused to accept the first public shareholders' suit against a capital markets issuer (and

³⁶ See, for example, the use of criminal law to punish breach of duty of loyalty in the prosecution of former New China Life chairman Guan Guoliang, "Yi shen Guan Guoliang" [First hearing for Guan Guoliang], *Caijing*, Dec. 8, 2008.

³⁷ Only one case sees a Shanghai court diminishing the power of the China Securities Regulatory Commission and taking a uniquely activist approach: *Lu Jianming v. Shanghai Light Industry Machinery Company, Limited* (Shanghai Jingan District People's Court, Shanghai No. 2 Intermediate People's Court, 2006).

³⁸ One Shanghai High Court judge told the author that the great proportion of closed company (limited liability company) cases and the absence of company limited by share/listed company cases are a result of "the relative completeness and clarity of the Company Law in addressing companies limited by shares" and because limited liability companies experience recurring problems of shareholder oppression and dual shareholder–employee status. This explanation seems dubious, especially as there is ample evidence of policy guidance constraining lower level courts from accepting such cases.

³⁹ Shenzhen Shenxin Taifeng Co., Ltd., where a fined director brought suit against the CSRC in a Beijing intermediate court pleading that he was "only a director appointed by a shareholder, and did not really participate in operation and management of the company" and so did not directly manage or operate the company, and thus is not one of "the only two kinds of people who can be fined under the PRC Securities Law." "Shang shi gongsi dongshi beifa zhuangao zhengjianhui" [Fined listed company director sues the CSRC], *Xinjing bao*, Dec. 7, 2008. See also the "flower vase director" case described at Nicholas C. Howson, "The Doctrine That Dared Not Speak Its Name: Anglo-American Fiduciary Duties in China's 2005 Company Law and Case Law Intimations of Prior Convergence" in Hideki Kanda, Kon-Sik Kim, and Curtis J. Milhaupt eds., *Transforming Corporate Governance in East Asia* (Oxford: Routledge, 2008), pp. 226–228.

its board, officers, and accountants) for false disclosure in 1999.⁴⁰ As the court wrote, “The plaintiff’s case regarding behavior in violation of laws and regulations in the stock market should be handled by the CSRC. The plaintiff’s suit regarding a securities dispute does not come within the jurisdiction of this court.” More recently, evidence of self-restraint comes both from discussions with Supreme People’s Court and Shanghai court officials between 2006 and 2008 and similar blanket refusals in respect of transferred nonperforming loan collection cases since 2005,⁴¹ as well as thousands of cases by public stock purchasers seeking remedies for capital markets manipulation and fraud between 1999 and 2003.

There is both documentary and oral evidence suggesting that the Shanghai courts have been specifically directed not to accept public company cases. These instructions can come via openly issued regulations or local-level opinions, such as the December 12, 2002, ban on acceptance of securities actions, the January 9, 2003, Supreme People’s Court regulations forbidding claims on manipulation and insider trading, and the June 2003 Shanghai Company Law Opinion command that Shanghai courts temporarily not accept shareholders’ claims seeking invalidation of resolutions by companies with listed shares.⁴² These instructions are also communicated internally, as noted in late 2008 by the president of one of Shanghai’s most expert district-level courts when alluding to the existence of an internal instruction from the Supreme People’s Court (not the CSRC) and apparently justified as part of the effort to discourage vexatious shareholder litigation nationally.⁴³

Regardless of the mechanisms the Shanghai courts use to shunt aside public company cases, rationales supporting the rejectionist stance are fairly well understood and relevant to a consideration of judicial independence. One rationale dictates that courts be told to decline or voluntarily refuse listed company cases for fear of large plaintiff groups, and the attendant perceived threat of social instability or impact on the “super-value” in Chinese administrative–political culture: social harmony. This is seen in the Shanghai High Court’s rejectionist response to group plaintiff actions (e.g., shareholders’ suits) generally and to shareholders’ suits to overturn resolutions, force dividend distributions, cause judicially mandated sale of equity, or spur dissolution, all at companies limited by shares or companies with publicly listed stock. The No. 2 Civil Division of the Shanghai High Court alludes to this

⁴⁰ The case against Hongguang Enterprise Co., Limited. See Xu Zhaoxiong and Zheng Hui eds., *Zhengquan anli jingjie* [Selection and Explanation of Securities Law Cases], (Shanghai: Oriental Publishing Center, 2001), pp. 58–64.

⁴¹ See “Buliang daikuan chuzhe xin guiding liang nan” [Two difficulties for new regulation of nonperforming loan arrangements], *Caijing*, Nov. 24, 2008 (“NPL I”) and “Buliang daikuan zhuanrang susong ‘jiedong’” [“The ‘unfreezing’ of litigation relating to the transfer of nonperforming loans”], *Caijing*, Dec. 8, 2008, <http://caijing.com.cn/2008-12-04/110034693.html> (reviewed Dec. 2008) (“NPL II”).

⁴² This instruction was reversed upon adoption of the 2006 Company Law.

⁴³ Remarks of the Shanghai Changning District People’s Court President, Dec. 5, 2008.

apparent redline in its grudging reversal of a pre-2006 policy barring lawsuits that seek to invalidate public company resolutions:

In view of the fact that these kinds of cases may give rise to issues related to mass litigation and volatility in the securities markets, [the Shanghai courts] have taken an especially cautious attitude towards accepting these cases; in accepting these cases, we ask that the shareholders provide related evidence showing why the shareholders or board resolution is invalid or should be invalidated, and we will examine this evidence strictly so as to protect against vexatious shareholder litigation.⁴⁴

A second rationale can also be perceived, albeit more subtly, in the Shanghai court system's consistent bias in favor of stability (including, as noted above, business entity preservation at all costs) over other values that might be held high in corporate law application, like transactional efficiency, redeployment of capital to most efficient uses, or fairness. Thus, even in the world of corporate law jurisprudence, where law, regulation, and fairness (often invoked by the Shanghai courts in corporate law cases) should be dispositive, there is a strong concern in the courts for political or social order, which either causes them to disregard the power they are clearly authorized to wield under the 2006 Company Law or causes their political and administrative masters to limit their jurisdiction in bald contradiction with the scope of their statutory power.

A third, largely unspoken rationale perhaps informing the rejectionist stance toward public company cases is twofold: (i) that such firms involve what were state-owned assets (albeit corporatized and repackaged as listed companies), and (ii) that the promoters, controlling shareholders, and directors, officers, and supervisory board members and other insiders are tied to superior political power, whether the state, the party, or the military. There is evidence that the courts will avoid cases concerning state-owned assets.⁴⁵ There is no document that describes the latter, sharper, political sensitivity, and no Shanghai court official approached in the course of the study alluded to it other than tangentially in connection with a discussion of the function of political–legal committees.⁴⁶ Yet it seems safe to speculate that

⁴⁴ Shanghai Company Law Report, p. 44.

⁴⁵ For instance, where a 2004 report by the head of the Hubei High Court warning of irregular activity and loss of state assets through transfers of nonperforming loans to asset management companies and then to third parties caused the courts to simply stop accepting or ruling on such cases in 2005. See NPL I and NPL II.

⁴⁶ According to officials at the Shanghai courts, most corporate and commercial case opinions are first drafted and then filed (*beian*) with the political–legal committee. Yet the same officials noted that if a specific case is particular (*teshu*) – potentially impacting on social stability (*wending*) or conflicting powers – the panel actually hearing the case and its court level administration will seek the opinion of the political–legal committee before accepting or deciding a case. These same officials declared that the notion of conflicting powers does not accommodate political conflict or political–economic privilege versus civil society, but instead conflicting jurisdictions (for instance, CSRC regulation against application of the corporate law by the courts).

the fear of involving far stronger political actors (and court paymasters if the defendants have organized the corporate entity in the same jurisdiction) or attempting to enforce against them animates the profound disinterest on the part of the court system toward application of the corporate law with respect to these firms.

The foregoing may explain the paucity of public company cases in the Shanghai courts, yet it does not excuse the same phenomenon. That lack of application constitutes a tragedy for China's corporate governance reform, precisely because it was the dire state of corporate governance at public companies that occasioned the 2006 Company Law amendments and the statute's new justiciability.⁴⁷ Indeed, one question for the future of the Chinese judiciary is the Chinese legal system's ability to sustain this defensive posture against mass-plaintiff cases.⁴⁸ Aside from the urgings of reformist intellectuals and lawyers, and despite older studies in 2001 and 2002 showing litigation adversity among China's urban and rural citizens,⁴⁹ individuals continue to push into the courts en masse. In late 2008, the Shanghai No. 1 Intermediate Court announced that it alone has seen skyrocketing numbers of group (qunti) lawsuits accepted in the past few years: from twenty-seven group cases suing on the same cause of action and 1,047 claimants in 2006 to fifty such cases (1,671 claimants) in 2007 and sixty-two such cases (1,449 claimants) by October 1, 2008.⁵⁰ Most of these cases pertain to labor disputes, residential housing management, administrative condemnation of land and buildings, and rural contracting. Other data demonstrate similar patterns nationally, with large numbers of group suits brought with respect to labor rights,⁵¹ official misfeasance,⁵² environmental torts, food contamination,⁵³ securities violations, etc. In response, one intermediate court in the Shanghai system

⁴⁷ Shanghai Stock Exchange ed., *Zhongguo gongsi zhili baogao (2003) nian* [China Corporate Governance Report 2003], (Shanghai: Fudan University Publishing House, 2003).

⁴⁸ See "Huajie minyuan: sifa ying ti zhengzhi huachu 'huanchongdai'" [Assuaging popular anger: the judiciary should be a 'conflict resolution area' substitute], *Nanfang zhoubao*, Nov. 13, 2008, and "Qunti peichang: quan yi yi yong an" [Mass compensation: rights and stability], *Caijing*, Oct. 13, 2008 (both doubting the long-term political sustainability of the current situation, even if justified at present by overburdened judicial resources).

⁴⁹ "Celiang shehui de hexie chengdu" [Measuring the degree of harmony in society], *Nanfang zhoubao*, Nov. 20, 2008.

⁵⁰ A doubling of cases in just twenty-four months, with no data on cases of the same type refused. "Shanghai shi di yi zhongyuan tansuo shenpan xin jucuo" [Shanghai Municipal No. 1 Intermediate People's Court explores new adjudication measures], *Xinmin wanbao*, Nov. 4, 2008 ("New Adjudication Measures").

⁵¹ One report in late 2008 shows how overburdened a very local-level court in Guangdong Province is. To November 15, 2008, a basic level court serving a subdistrict of Dongguan with only thirteen judges had to process 7,540 cases (mostly labor contract cases and disputes regarding laid-off workers), against a national average of forty-two cases/judge. That case acceptance and adjudication rate was already a 100 percent increase over the count for the same district in all of 2007. See China's Busiest Court.

⁵² "Parents of schoolchildren killed in China quake confirm lawsuit," *The New York Times*, Dec. 23, 2008.

⁵³ See "Milk scandal in China yields cash for parents," *The New York Times*, Jan. 17, 2009, and "Class action suit, rare in China, is filed over tainted milk," *The New York Times*, Jan. 21, 2009.

has now developed special procedures to handle such cases. The procedures are designed to provide an early warning system to the entire Shanghai court system of approaching group lawsuits.⁵⁴

JUDICIAL AUTONOMY

This chapter cannot present in detail the study's findings on the demonstrated degree of institutional autonomy in Shanghai corporate law cases from 1992 to 2008. In summary, the Shanghai courts showed increasing autonomy after the promulgation of the 1994 Company Law and through the end of 2005. This is shown by the acceptance of cases in areas and the fashioning of remedies without authorization under statute or judicial regulations. Immediately after the 2006 Company Law took effect, there was a notably aggressive invocation of the new statute, even with respect to claims arising prior to January 1, 2006.⁵⁵ However, in the years following 2006, there has been an authorization-constraint dynamic at work where the Shanghai courts draw back from acceptance and adjudication of cases they are now explicitly authorized to hear and did hear when they were not authorized to.

Important in any institutional autonomy discussion are the bureaucratic instructions liberally issued in the PRC court system. First are judicial regulations issued by the Supreme People's Court – often incorrectly called judicial “explanations” – that provide a procedural and substantive basis for claims rooted in explicit statutory provisions.⁵⁶ Second are local-level opinions like the Shanghai High Court opinion on the handling of corporate law cases distributed internally in June 2003. Third are occasional notices and opinions issued by individual court systems, some publicly, others internally. For example, during the accelerating financial crisis in late 2008,

⁵⁴ New Adjudication Measures.

⁵⁵ In the Shanghai High Court study of 2006 corporate law adjudications, of the 318 cases producing a judgment after a first hearing, 164 (52 percent) used the new Company Law in the judgment; of those 164 cases, 102 cases (62 percent) issued a final judgment based on the 2006 statute, whereas 62 cases (38 percent) issued judgments using the preamendment 1994 version. This result is noteworthy because fully 88 percent of this litigation arose from circumstances prior to January 1, 2006. It indicates that the Shanghai courts felt free to implement the new 2006 Company Law on claims arising when the governing statute lacked affirmative legal bases for such claims. The Shanghai High Court is explicit about this when it coyly points to several cases where it applied expanded legal rights bestowed in the new Company Law, even though the case arose from a time when only the much narrower rights granted in the 1994 law were available. (See Shanghai Company Law Report.)

⁵⁶ The Supreme People's Court issues three kinds of explanatory documents with something like the power of law or regulation: explanations (*jieshi*), regulations (*guiding*), and approving responses (*pifu*). Explanations by the court elaborate “law” (*fa*); regulations are issued to provide judicial institutions with direction on how to apply “law” to certain kinds of cases or common problems; and approving responses are Supreme People's Court responses to queries regarding correct application of “law” by Provincial High Courts and People's Liberation Army courts. To date, the Supreme People's Court has issued two regulations on the 2006 Company Law, the first on how courts should handle actions that straddle January 1, 2006, and the second on shareholder petitions for company dissolution. A third, on the derivative action mechanism, is expected in 2009.

when many of China's export-oriented producers in the Yangtze River Delta area experienced difficulties, the Shanghai High Court publicly issued an eleven-point document calling for heightened sensitivity to the impact of case decisions on distressed industries, reduction or elimination of litigation fees, deposit exemptions, and an emphasis on speedy adjudication of labor rights and compensation cases and enforcement. On December 2, 2008, one Shanghai intermediate court even issued its own ten-point document explaining how it would conform to the policy commands enunciated by the High Court, whose measures included unified and accelerated financial crisis-related case acceptance, hearing and enforcement, sensitivity to the capacity of firms to bear enforcement actions or asset attachment, and attention to the highest value of all noted above in the discussion of judicial independence: finding a way for distressed enterprises to keep operating even if technically insolvent or in default.⁵⁷

Supreme People's Court regulations can impact the application of a "law" (fa) in three important ways: (i) providing specific authorization for claims already described in principle in statute;⁵⁸ (ii) forbidding the acceptance of certain claims;⁵⁹ and (iii) providing new legal bases for adjudication beyond what is set forth in statute. For instance, the May 2008 regulations on application of the 2006 Company Law forbid the acceptance of shareholder petitions for dissolution of companies based on factors not explicitly included in Article 183; yet the same regulations provide for expanded justiciability of claims beyond what is permitted in the statute.⁶⁰ Regulations can also prod courts to restart adjudication on cases they have voluntarily refused to accept.⁶¹ Local-level instructions like the 2003 Shanghai opinion on corporate law cases show how local court bureaucracies may not wait for

⁵⁷ See "Jinrong weiji anjian youle kuaishen tongdao" [Financial crisis cases have an accelerated hearing channel], *Dongfang zaobao*, Dec. 3, 2008.

⁵⁸ As in the January 9, 2003, Supreme People's Court regulations allowing private lawsuits against false or misleading disclosure in the securities markets.

⁵⁹ As in the January 15, 2002, Supreme People's Court regulations mandating rejection of private shareholders' suits on securities law claims.

⁶⁰ Expanded justiciability with respect to creditors' lawsuits seeking confirmation of debts owed by the company subject to dissolution, and creditors' claims for joint and several liability for shareholders and controlling shareholders arising from their misfeasance or manipulation of residual assets in the dissolution and liquidation process. Another example is the 2003 draft regulation on Company Law adjudication issued before enactment of the 2006 Company Law, which regulation provided the basis for mechanisms absent from the 1994 Company Law, including: corporate veil piercing, derivative actions, shareholders' information rights, fiduciary duties, liquidation procedures, shareholders' lawsuits for invalidation of resolutions, etc. If the Company Law had not been amended in 2006 to include these items, and the draft had been actually issued as Supreme People's Court regulation, then the regulations would have provided the basis for a whole host of claims and procedures going far beyond the spare legal bases explicitly set forth in the 1994 law.

⁶¹ A good current example of this kind of regulation is the continuing effort to issue a document instructing the courts to recommence handling creditors' collection actions on nonperforming loans sold by commercial banks to asset management companies and then to third-party buyers. See NPL I and NPL II.

central approval before adjudicating claims not explicitly justiciable and similarly will not wait for regulations even on newly justiciable items. For example, in the 2003 Shanghai Company Law Opinion, there are detailed provisions on judicial veil-piercing, disregard of the corporate form, and derivative actions – none of which had any legal basis under the 1994 Company Law, Supreme People’s Court regulation, or in statute until the adoption of the 2006 Company Law. At the same time, the Shanghai Opinion also eliminated consideration of certain claims that courts were not authorized in statute to examine.⁶² One Shanghai High Court official acknowledged to the author that the Shanghai court system indeed issues its own explanations – sometimes openly, usually internally. The official acknowledged that although such documents are normatively not as authoritative as Supreme People’s Court regulations, in reality they can be more powerful in the handling of actual cases at the noncentral level.⁶³ The same judge also admitted that these local explanations are often issued before central bureaucracy instructions and thus gain authority by the mere fact of being in existence long before the national authorities get around to issuing a well-vetted regulation for the guidance of lower level courts.

There continues to be a fierce dispute in China on the real effect of judicial regulations. In the most common view emanating from the Chinese courts and academic circles, Supreme People’s Court regulations are a condition precedent to application of certain provisions of law or doctrine by courts. For instance, many Chinese academics, lawyers, and judges hold that important provisions of the 2006 Company Law – such as corporate fiduciary duties, veil-piercing, or the derivative lawsuit mechanism – simply cannot be applied until regulations specifically addressing use of the provision have been issued. This broadly accepted notion is an important block in many other areas of Chinese law, for instance with regard to the use and application of the new PRC Bankruptcy Law,⁶⁴ with the Chinese courts openly refusing to accept bankruptcy cases without a judicial regulation. Yet even the shallowest inquiry, the many cases reviewed in the period 1992–2008 for Shanghai,⁶⁵ and the rich body of subnational level court opinions available demonstrate that this perception is not vindicated in the reality of lower-level adjudication and that the courts habitually accept and adjudicate cases relating to claims and mechanisms they have no authority to hear.

That being the case, it makes the negative authorization-constraint dynamic in the Shanghai courts after 2006 all the more striking. That dynamic is the situation where courts do not apply doctrines specifically authorized in the 2006 Company

⁶² For instance, the Shanghai Company Law Opinion’s temporary prohibition against accepting corporate resolution invalidation claims for public companies.

⁶³ Shanghai High Court judge, October 2008.

⁶⁴ See <http://chinacourt.org/html/article/200707/11/256034.shtml> (reviewed Dec. 2008).

⁶⁵ And see Howson, *The Doctrine That Dared Not Speak Its Name* (early adjudication of corporate fiduciary duties claims and allowance of derivative suits).

Law after January 1, 2006, even though they freely employed them before when there was no legal basis for them.⁶⁶

Speculation on the reasons behind this counterintuitive reaction by the Shanghai courts is difficult. The purported civil law affiliation of the Chinese legal system is not helpful, precisely because Shanghai judges have demonstrated their autonomy in hearing claims without a formal statutory basis (or reference to academic or superior authorities) while even evidencing a common-law equity courts style of law application. Of course the courts may refuse to accept such cases or use such now-authorized doctrines because of some opaque political sensitivity – either by virtue of the parties involved or the ever-present risk of brushing up against state assets (as in the simple contract law nonperforming loan collection cases blocked since 2005). A more benign explanation may be the (temporary) reassertion of the Chinese court's basic bureaucratic identity. Before the 2006 authorization of key doctrines, courts may have felt relatively free to range about and implement common sense or justice- (fairness)-oriented solutions such as invocation of corporate fiduciary duties against obviously opportunistic or inattentive directors or ad hoc permission of a derivative suit even if not pleaded. With some of these doctrines now included in formal “law,” even if in principle, the courts as embedded bureaucratic actors wait to see how the apex of their bureaucracy system (the Supreme People's Court) will instruct implementation of these newly declared instruments. This view is not wholly satisfactory, however, as some Shanghai courts continue to implement new corporate law doctrine and remedies without regulations or superior direction (for instance, in adjudicating fiduciary standards, permitting derivative lawsuits, and veil-piercing). This explanation goes some way to describing the basis for the pronounced reversal in one kind of autonomy after 2006 and also reminds us of the origins and context of party-directed, bureaucratically embedded actors lacking the fuller freedom of more autonomous judicial institutions.

CONCLUSION

In North-Weberian terms,⁶⁷ China is still far from the complete rule of law state with seamless protection of property rights and expectations. Yet the corporatization program – and the implementation of a justiciable corporate law calling for ex post

⁶⁶ Space limitations make it impossible to detail the cases, pre- and post-2006, that show this. Aside from the cases reviewed for this study and information related by Shanghai judicial officials, the dynamic is noted in the remarks of professor Zhu Ciyun, Tsinghua Law School, at the East China University of Politics and Law in November 2008 (citing an internal Supreme People's Court study showing that the courts have shied away from accepting veil-piercing and derivative lawsuits even after such mechanisms were formally established in the 2006 Company Law).

⁶⁷ See “Self-Government, Law and Capitalism” in Max Weber, *The Religion of China: Confucianism and Taoism* (1922), pp. 84–104 (Hans H. Gerth, trans., 1964); Douglass C. North, *Institutions, Institutional Change and Economic Performance* (1990); and Donald C. Clarke, “Economic Development and the Rights Hypothesis: The China Problem,” *American Journal of Comparative Law*, vol. 58, p. 89 (2003).

application of law by a judiciary – has spurred the nation’s formal legal institutions to develop real competence, substantial autonomy, and hints of political independence in application of one kind of law so important for growth. Those developments and the expectation of future progress in the same direction have clearly provided the initial assurances necessary for growth-enhancing investment and participation in China’s capital markets. The critical question remains whether, in the technically complex world of corporate law adjudication, Chinese courts must achieve even greater judicial autonomy and independence to assure continued economic growth and hoped-for social stability, not to mention the equally important effect of enhanced institutional legitimacy for the judiciary itself.