



Introduction to
Chinese Laws

中国法丛书

(英文版)

Chinese Business Law

中国商法

Danling Yu 于丹翎 著





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Preface



中国商法

For the past three decades, China has been evolving into a major global economic power. As a practical matter, international legal academics, international law practitioners, law students and business students, and international business community regularly encounter and seek to find solutions to the legal problems or law related business problems that have the “China element”. Understanding China, a country that spans the larger part of the Asian continent while being one of the oldest surviving civilizations and the world’s most populated nation could be challenging to those from outside the country. Understanding Chinese legal system could be particularly challenging for that it is the product of centuries-old doctrinal evolution and development of the Chinese legal civilization, Chinese history, and foreign influence.

A book on Chinese business law is needed which offers an accurate description of the business law, explanation of the legislative intent, and discussion of the myriad of laws, rules, and regulations. *Chinese Business Law* is written with such design in mind. It is written for readers across the spectrum of both common law and civil law systems and the students and researchers who have already been introduced into the legal education. Business law covers a wide range of subject areas of law but there is no hard and fast rule as to what the business law shall specifically embody. *Chinese Business Law* embodies in its discussions the most fundamental parts of Chinese business law of corporations, securities, and foreign investment. These areas of laws are generally considered as having practical significance to international lawyers, law students and business students, and international business management as well as international business community. It focuses on the discussion, analysis, and interpretation of the relevant laws, rules, and regulations, the major development of legal history, and the evolution of major legal concepts, principles, and doctrines. It offers an in-depth discussion and analysis of the future trend for legislative endeavors and reform to bring to readers the perspectives and methodologies with which to

comprehend and anticipate the impending changes that are shaping the landscape of Chinese business legal regime. It provides helpful guidance in the comprehension of the intricacies and complexities of the Chinese business legal system. It also contains the authoritative translation of the Chinese business legal concepts, doctrines, and principles and may equate a practical handbook of legal jargons for users.

To the author, this book has been a strenuous task. Many of the legal concepts and principles under Chinese business law have never understandably been translated into the English language and many terms could hardly find their counterparts in English or in another legal system. My experience as an international business law attorney and arbitrator over the years has been found to be quite instrumental to this endeavor.

The author wishes to express her special thanks to China Renmin University Press without whose vision this book will not come to fruition. She also wishes to express gratitude to the friends and family who have infused the many hours and days of life with joy, warmth, and inspiration.

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PART I

CORPORATION LAW

1.1 Evolution of the Chinese Corporation Law

The development of the Chinese Corporation Law has been a part of the initiation to reform the overall legal framework of the business law. The initiation for the legal reform started in the late 70s of the last century which marked the early beginning of the opening-up reform of the country. The initiators of the reform were the sizable business entities both of the state and non-state sectors. Consequently, the beneficiaries of the reform were not only the state-owned business entities but also private business entities. The ensuing economic reform testified to the need for a uniform national legal framework for the business law. The need for a body of corporation law to guide business associations and organizations became evident.

This need for a national business law legal framework, however, was not validated by the national legislature until the year of 1993 when the Chinese National People's Congress promulgated the Corporation Law.

The Corporation Law of 1993 facilitated the undergoing economic reform that helped the transformation of a socialist planned economy into a market-oriented economic system. The Corporation Law of 1993 was subsequently amended by the National People's Congress in 1999 and

2004. The next revision was in 2005 with the revisions becoming effective January 1, 2006. The Corporation Law has been again revised in December of 2013 with the revisions becoming effective March 1, 2014. Each round of the revision of the corporation law has marked a milestone for the development of the Chinese Corporation Law. The amendment of the first instance resolved the issue with respect to the supervision and management of the state-owned property and aimed at promoting the growth of high technology by condoning a higher level of recognition for technology contribution to the registered capital of corporations. The amendment of the second instance abolished governmental approvals once necessary for the issuance of stocks above par value. The later revision of 2005 provided for the basic framework of the corporation law by adopting a more balanced approach toward the modern form of corporate governance. The revisions of 2014 mainly abolished the requirement of the minimum registered capital contribution for corporations. No minimum registered capital is required and the requirement of the initial contribution of the registered capital, that of the proportion of cash contribution and the schedule of contributions were abolished. The reform under the Corporation Law of 2014 is to transform the system of the paid-in contribution of the registered capital to that of the subscription of the registered capital. Under the newly established subscription system, shareholders may agree as to the subscribed amount, contribution methods, and the schedule of the registered capital contribution.

1.2 Legal Framework

The governing regime of the corporation law is consisted of the Chinese Constitutional law, the national laws promulgated by the Chinese

National People's Congress, regional and local laws enacted by regional and local legislative authorities, and the administrative rules and regulations enacted by the Chinese State Council as well as the departmental rules issued by the cabinet departments under the State Council.

The Chinese Constitutional law is the fundamental law of the land that provides for the overall governance structure for the regulation of corporations. Lending legitimacy to the existence and establishment of corporations, the Constitution states that the current economic ownership is a tiered ownership system consisting of public and private elements. Private ownership coexists with the public ownership with the public ownership remaining at the core. The Constitutional Law allows different modes of distribution which validates the existence of economic organizations of either public or private ownership. As it is written into the Constitutional Law, private business may legitimately function in the economic system. The role of governments is to protect the lawful rights and interests of business individuals and private businesses by guidance, supervision and regulation.

Aside from the Constitution Law, the Corporation Law, the Civil Law, the Securities Law, the Bankruptcy Law, and the Commercial Banking Law together form the main body of law for the governance regime of corporations. If a corporation involves foreign investment interest, it is subject to foreign investment related laws. Foreign investment related laws include, among other things, the Equity Joint Venture Law, the Cooperative Joint Venture Law, and the Wholly Foreign Owned Enterprise Law.

Administrative rules and regulations compose another important part of the governing regime. Administrative rules and regulations are issued by the State Council and the authorized agency departments to exercise regulation and supervision over corporations. The departments that issue rules governing corporations are mainly the State Administration of

Industry and Commerce (SAIC), the State Administration of Foreign Exchange (SAFE), the State Administration of Taxation (SAT), the State Asset Supervision and Administration Commission (SASAC), and the China Securities Regulatory Commission (CSRC).

1.3 Corporations

1.3.1 General Introduction

A corporation is an artificial entity created by law to act within the scope of the law to achieve designated purposes. Being an artificial entity, a corporation can act only through agents. The agents of the corporation are officers and managers who are entrusted with powers to act on behalf of the corporation.

A corporation has the capacity to undertake civil actions. Such civil acts include ownership of property, entering into contracts, and suing or being sued under the name of the corporation. In theory, a corporation may enjoy a perpetual existence. Under the Corporation Law, a corporation is a legal person that has independent business property and may exercise property rights attendant thereto.

A corporation has limited liability. As the corporation owns corporate assets, shareholders no longer own the assets or capital once their contributions have been made to the corporation. The corporation is liable for its debts to the extent of the entire property. Shareholders are liable for corporate debts to the extent of the shares they own or contributions they made to the corporation. The agents of the corporation including officers and managers are not generally liable to the debts of the corporation. The Corporation Law, however, still imposes certain personal liabilities on shareholders. The law may hold shareholders,

especially controlling shareholders, personally liable in the event that the shareholders have abused their shareholder position. To find otherwise would be tantamount to condoning an abuse of the limited liability protection of the corporation by giving the wrongdoers an unfair advantage over the rights and interests of creditors.

1.3.2 Piercing the Corporate Veil

The Corporation Law of 2005 has introduced the doctrine of “piercing the corporate veil”. The purpose of which is to impose liability upon shareholders, especially controlling shareholders that are found to have abused their positions. To pierce the corporate veil is to remove the identity of corporate legal personality to hold the shareholders or shareholder corporation liable. The doctrine may be applied under the circumstances where a shareholder abuses the independent identity of the juridical person of the corporation or shareholder limited liability to evade her liability with respect to the payment of debts or where the shareholder co-mingles her personal funds with the assets of the corporation. This may normally occur in a corporation with a single shareholder who would use the funds and assets of the corporation as if they were her personal own. The legal significance of this doctrine is to minimize the absolute effect of the limited liability born by the corporate entity.

China has written the doctrine of veil piercing into the Corporation Law when it was revised in 2005. Despite the fairly recent codification, the courts have sought to apply the principle of veil piercing even before 2006. The instance of this is the Supreme Court decision in 1994 that responds to an inquiry made by the High Court of Guangdong Province. The Supreme People’s Court implies in its response that the application of veil piercing may be permissible if the actual capital contribution made to a corporation is less than the amount of the capital registered under the

corporation concerned. It is indicated that under-capitalization could be a factor in weighing toward the application of the doctrine of piercing the corporate veil. However, it is interesting to note that the later revised Corporation Law does not include the response of the Supreme People's Court of 1994 in its codification that under-capitalization may serve as a consideration factor in cases of corporate veil piercing.

The Corporation Law of 2005 offers two provisions regarding the doctrine of veil piercing. The Corporation Law states that “where any shareholders of a corporation evades the payment of debt by abusing the independent identity of juridical person or the shareholder's limited liabilities, and thus seriously damaging the interests of creditors, it shall bear joint liabilities for the debts of the corporation.” It focuses on two factors that the courts should consider in deciding whether to pierce the corporate veil that (1) whether the abuse results in non-payment of debts and (2) whether this non-payment causes any actual injury to the creditor. The law further provides for the circumstance of the commingling of funds in a single shareholder limited liability corporation that “if the property of the shareholder of a single person limited liability corporation is not independent from that of her own, the share holder shall bear joint liabilities for the debts of the corporation.”

Currently, the factors for the courts to consider whether to pierce the corporate veil are largely of two parts as previously described. The concern under the law seems to be centered upon the protection and rights of creditors. The law, however, does not suggest the presence of fraud to be a factor for judicial consideration. The doctrine in effect grants the courts more discretion in holding shareholders liable for their abuses. The reading of the judicial practice has suggested that the courts may give a narrow reading of the law and limit the application of the doctrine to the circumstances where the rights and interests of creditors could be jeopardized.