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THE REPRESENTATIVE POWER OF THE SHAREHOLDERS' GENERAL MEETING UNDER CHINESE LAW

Charles Zhen Qu[†]

Abstract: Under China's company law regime, the power to represent the company resides not in the board of directors but in an individual person called a legal representative (*fading daibiaoren*) who is a senior officer of the company. The mechanism of legal representative, however, is often rendered ineffective as it is inherently susceptible to abuse. The mechanism becomes dysfunctional when the legal representative is unavailable. The legal representative's unavailability, especially when the board of directors is also ineffective, raises the question of whether the general meeting has the power to control corporate actions. To answer this question, this Article considers the legal nature of the legal representative's role, examines the allocation of the company's decisionmaking and representative powers, and reviews a small corpus of recent cases which have been or could have been decided on the basis of the general meeting's power of representation. This Article argues that the legal representative should be regarded as an agent rather than as an organ of the company, and a company's general meeting should be able to exercise the company's decision-making and representative power when both the board of directors and the legal representative are ineffective, given the nature of the legal representative's role and the power allocation under the company law regime in China.

I. INTRODUCTION

A company's ability to conduct proceedings is crucial to the protection of its interests and the interests of its stakeholders. It is, therefore, important to ensure that the company will be able to maintain its litigation competence at all times and in all circumstances. A company, as a legal abstraction, must act through natural persons.¹ Under China's civil law² and company law regimes, the power to represent the company is not vested in the board³ but in an individual person, termed the legal representative.⁴ The legal

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¹ PAUL L. DAVIES, *GOWER AND DAVIES' PRINCIPLES OF MODERN COMPANY LAW* 129 (Sweet & Maxwell 7th ed. 2003).

² The phrase "civil law" is used here to mean the law of civil or private rights rather than the Western European system of codified laws.

³ See *infra* text accompanying notes 54-56. There are exceptions in some specified circumstances.

⁴ In contrast, a company incorporated in a common law jurisdiction normally acts through two groups of individuals, namely, the board of directors and the shareholders' general meeting. The board of directors is, in ordinary circumstances, granted the power to manage the affairs of the company, which includes the power to represent the company in corporate proceedings. See DAVIES, *supra* note 1, at 294;

representative represents the company, as a legal person,⁵ to exercise its powers in accordance with the law and the constitution of the legal person.⁶ The legal representative of a company is normally the chairperson of the board of directors, or if the company does not have a board, the executive director or company manager.⁷ The legal representative's appointment must be approved by and registered with the Bureau of Industry and Commerce Administration ("BICA"), the government department responsible for company registration.

The mechanism of the legal representative, however, is often rendered inefficient because it is inherently susceptible to abuse. The mechanism becomes ineffective when the legal representative who is capable of faithfully implementing decisions of the company is unavailable. The requirement that the BICA approve and register the legal representative often creates circumstances where the company does not have a legal representative, for example, in circumstances where a legal representative is dismissed and the BICA does not complete approval and registration of the replacement legal representative. The previous legal representative whose name still appears on the BICA's registry before the re-registration is complete has opportunities to take unauthorized actions against the interests of the company.⁸ The representative is also unavailable when the legal representative decides not to act or to act inconsistently with the shareholders' interests. Because the power of representation is vested in a single person, the legal representative often has opportunities to take unauthorized transactional or litigational actions in the name of the company. These actions are often tainted with conflicts of interests or

G. D. Goldberg, *Article 80 of Table A of the Companies Act 1948*, 33 MOD. L. REV. 177, 180-81 (1970); Ross Grantham, *The Reserve Powers of Company Shareholders*, 63 CAMBRIDGE L.J. 36, 36-39 (2004).

⁵ A legal person is "[a]n entity on which a legal system confers rights and imposes duties." BUTTERWORTHS AUSTRALIAN LEGAL DICTIONARY 680 (1997).

⁶ General Code of the Civil Law (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987), art. 38, *translated in* STATUTES AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA, 1985-86, at 3 [hereinafter General Code of the Civil Law].

⁷ See JIAN FU & JIE YUAN, PRC COMPANY & SECURITIES LAWS—A PRACTICAL GUIDE 41-42 (2006). A limited liability company shall appoint a manager to manage the day-to-day business of the company to implement the decisions of the board of directors. Company Law (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 27, 2005, effective Jan. 1, 2006), art. 50, *translated in* ISINOLAW (last visited Aug. 11, 2007) (P.R.C.). Similarly, a company limited by shares is required to appoint a manager to manage the day-to-day business of the company to implement the decisions of the board of directors. *Id.* art. 114.

⁸ Shen Li, *You gu dong hui jue ding de fa ding dai biao ren ying ju you gong si de su song dai biao quan* [The Legal Representative Appointed by the General Meeting Should Have Power of Representation] (Shanghai Mun. First Interm. People's Ct.), <http://www.companylawyer.com.cn/gdqy/zxgdqydbh/20051215113225.htm> (last visited Dec. 17, 2007).

fraud.⁹ A legal representative, for example, will hardly ever be willing to implement the company's decision to sue that legal representative.

There have long been calls to abolish the legal representative system in China.¹⁰ However, after considering the aforementioned calls for its abolition, lawmakers in the 2005 amendment to China's Company Law¹¹ ("2005 Company Law") reaffirmed the role of the legal representative, making its abolition unrealistic in the near future.¹² To live with this system of representation, it is necessary to find ways to remedy the deficiencies of the system in a principled manner and consistent with legal doctrine. This Article first suggests that the legal representative should be regarded as an agent, rather than an organ, of the company. Then, when the legal representative becomes dysfunctional for any number of reasons, the company's general meeting should be permitted to exercise the company's decision-making and representative power for the company.

The remainder of this Article is organized into four parts. Part II charts the development of the company law regime in China. Part III provides an overview and background of the 2005 Company Law and its salient features regarding a company's governance structure. Part IV examines the role of the legal representative. Part V considers the circumstances in which, and the doctrinal bases on which, the general meeting has been, or should have been, given power to represent the company in litigation.

II. THE DEVELOPMENT OF THE COMPANY LAW

China's first company law legislation was promulgated by the late Qing Dynasty in 1904 for the purpose of competing against the foreign

⁹ See Yang Ji, *Zhongguo gu fen gong si fa ding dai biao ren zhi du de zun fei* [The Regime of Legal Representative for China's Joint Stock Companies: To Preserve or to Abolish?], 26(6) XIAN DAI FA XUE [MODERN LAW SCIENCE] 125, 127 n.1 (2004).

¹⁰ See *id.* at 125; Gu Minkang, *Gong si fa ding dai biao ren de bi jiao yan jiu* [Comparative Research on the Company Legal Representative], 1 HUA DONG ZHENG FA XUE YUAN XUE BAO [EAST CHINA COLLEGE OF LAW AND POLITICAL SCIENCE JOURNAL] 49 (1998); Xu Yanbing, *Fa ding dai biao ren zhi du de bi duan ji wan shan* [The Deficiency and Perfection of the Legal Representative System], 7 FA XUE [LAW SCIENCE] 10 (2004).

¹¹ Company Law (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 27, 2005, effective Jan. 1, 2006), translated in LAWINFOCHINA (last visited Oct. 25, 2007) (P.R.C.) [hereinafter 2005 Company Law].

¹² *Id.* art. 13. This decision was based on the consideration that the legal representative practice had already become a custom in the company law practice in China, and a good faith mechanism controlling company transactions was yet to be built up. THE NATIONAL PEOPLE'S CONGRESS LEGAL SYSTEM WORK COMMITTEE, ZHONGHUA RENMIN GONGHEGUO GONG SI FA SHI YI [P.R.C. COMPANY LAW COMMENTARY] 33 (Law Press 2005) [hereinafter THE NATIONAL PEOPLE'S CONGRESS LEGAL SYSTEM WORK COMMITTEE].

enterprises present in China.¹³ The legislation was based on the 1856 Joint Stock Companies Act of the United Kingdom and the Commercial Code of Japan.¹⁴ The company law statute of the Qing era was hardly used until the Qing Dynasty was overthrown in 1912.¹⁵ Two years later, the government of the Republic of China promulgated Company Regulations using the structure of Japan's Commercial Code.¹⁶ In 1929, the Nanjing Nationalist government continued the reform by enacting a new piece of legislation, the Company Law.¹⁷ This statute went on to become the foundation of Taiwan's Company Code.¹⁸

The 1929 Company Law became invalid in October 1949 when the People's Republic of China ("PRC") was established.¹⁹ Between 1949 and 1979, no official company legislation was enacted.²⁰ In 1979, after adopting the open door policy, the PRC enacted the Sino-Foreign Equity Joint Venture Enterprises Law ("EJV Law"),²¹ which governed the formation and operation of Sino-foreign equity joint venture companies.²² The EJV Law was enacted in response to the perceived urgent need for a predictable legal framework that would help foreign investors to invest in China.

In contrast, the need to enact a domestic company law was less urgent, given that most of the companies at that stage were state-owned or collectively-owned enterprises.²³ Between 1979 and 1993, the PRC enacted numerous statutes and regulations regulating foreign investment and domestic company activities. In 1993, the PRC enacted the Company Law ("1993 Company Law"),²⁴ the first company legislation applicable to domestic companies.²⁵ By the end of the last century, it became clear that

¹³ Louisa Lam & Lin Ketong, *Corporate Governance*, in 1 CHINA COMPANY LAW GUIDE ¶ 160-110, ¶ 160-120 (Kluwer Law Int'l 2004).

¹⁴ Graham Brown & Wei Xin, *Introduction to Company Law*, in 1 CHINA COMPANY LAW GUIDE, *supra* note 13, ¶ 10-110, ¶ 10-120. Brown & Wei Xin refer to the 1856 Act as "the British *Company Law* of 1856," although it is generally referenced as the Joint Stock Companies Act.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* ¶ 10-130.

²⁰ *Id.* Cf. *id.* (discussing a small number of regulations issued to regulate privately owned-enterprises during the relevant period, including *Provisional Regulations on Privately Owned Enterprises* 1950, and relationships among state-owned enterprises, such as *Regulations on the Working Relations Between State-Owned Manufacturing Enterprises (Draft)* 1961).

²¹ Law on Chinese-Foreign Equity Joint Ventures (promulgated by the Standing Comm. Nat'l People's Cong., July 1, 1979, effective July 8, 1979), *translated in* 1 P.R.C. LAWS 150.

²² Brown & Wei Xin, *supra* note 14, ¶ 10-130.

²³ *Id.*

²⁴ Company Law (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 1993, effective July 1, 1994), *translated in* 5 P.R.C. LAWS 269 [hereinafter 1993 Company Law].

²⁵ See Brown & Wei Xin, *supra* note 14, ¶ 10-140.

the 1993 Company Law was inadequate and had become an impediment to China's economic reform.²⁶ This led to a minor revision of the 1993 Company Law in 1999²⁷ and a major amendment in 2005.²⁸ The 2005 Company Law came into effect on January 1, 2006.²⁹

III. THE STRUCTURE OF THE 2005 COMPANY LAW AND THE SALIENT FEATURES OF THE COMPANY GOVERNANCE STRUCTURE THEREIN

A. *The Structure of the Company Law*

The 2005 Company Law regulates the incorporation, governance, and operation of two types of companies: limited liability companies and companies limited by shares.³⁰ These two types of companies are roughly equivalent to what are termed "private companies" and "public companies" recognized under the company legislation of commonwealth jurisdictions.³¹

B. *Salient Features of the Governance Structure*

The governance structure under the 2005 Company Law features the following five salient characteristics.

1. *A Company Functions Through Three Organs*

A company in China, regardless of its type, normally has three corporate organs:³² the shareholders' general meeting, the board of directors, and the supervisory board.³³ Critics contend that a company may have a company manager³⁴ and the company's legal representative as a

²⁶ Craig Anderson & Bingna Guo, *Corporate Governance Under the New Company Law (Part I): Fiduciary Duties and Minority Shareholder Protection*, in CHINA L. & PRAC., Apr. 2006, at 17-18. The inadequacy of the 2003 Company Law manifested in weak shareholder protection and a lack of civil enforcement mechanisms. The need for reform of the Company Law became clear when China experienced a number of high profile corporate scandals in the years immediately antecedent to the 2005 revision of the Company Law. *Id.* at 18.

²⁷ Brown & Wei Xin, *supra* note 14, ¶ 12-120.

²⁸ FU & JIE YUAN, *supra* note 7, at 5.

²⁹ See 2005 Company Law, *supra* note 11.

³⁰ See *id.* chs. II, IV.

³¹ See *id.* On classifications of companies in common law jurisdictions, see DAVIES, *supra* note 1, at 12; H. A. J. FORD, ROBERT P. AUSTIN & IAN M. RAMSAY, FORD'S PRINCIPLES OF CORPORATIONS LAW 148-49 (12th ed. 2005).

³² See *infra* text accompanying note 68 for a discussion on the meaning of the word "organ."

³³ See 2005 Company Law, *supra* note 11, ch. II, § 2, ch. IV, §§ 2-4.

³⁴ See, e.g., Lam & Lin Ketong, *supra* note 13, ¶ 163-520.

fourth or even fifth organ.³⁵ Where the scope of business or the number of shareholders is relatively small, however, the company may have one executive director instead of a board of directors, and one or two supervisors in lieu of a supervisory board.³⁶

2. *Corporate Powers Are Statutorily Allocated*

Under the 2005 Company Law, the general meeting is regarded as the company's power organ.³⁷ The powers of the general meeting include the power to determine the company's management policies and investment plans; appoint and dismiss directors and supervisors while determining the remuneration of the directors and supervisors; examine and approve reports prepared by the directors and supervisors; and examine the budget plan, accounting plan, and distribution plan.³⁸ The general meeting also has control over the board of directors,³⁹ as well as power to amend the company's constitution, change the amount of the company's registered capital, and issue debt securities.⁴⁰ The shareholders' general meeting forms the company's will and intention in the sense that the most important matters of the company are determined by the general meeting.⁴¹

The board of directors is the company's executive organ.⁴² It manages the company by exercising its powers in formulating various types of business plans, implementing the general meeting's resolutions, determining the company's internal management structure, and appointing management and financial staff.⁴³ The board reports to the general meeting and must implement the resolutions of the general meeting.⁴⁴ The board has the power, upon a request by the shareholders in writing, to bring actions against

³⁵ See, e.g., JIANG PING ET AL., XIN BIAN GONG SI FA JIAO CHENG [A NEW TEXTBOOK ON COMPANY LAW] 68 (1994).

³⁶ See 2005 Company Law, *supra* note 11, arts. 51, 52.

³⁷ See *id.* art. 37.

³⁸ *Id.* arts. 38, 100.

³⁹ See *infra* note 53 and accompanying text.

⁴⁰ 2005 Company Law, *supra* note 11, arts. 38, 100.

⁴¹ WANG BAOSHU & CUI QINZHI, ZHONGGUO GONG SI FA YUAN LI [PRINCIPLES OF CHINA'S COMPANY LAW] 47, 189-91, 194-95 (1998); JIANG PING ET AL., *supra* note 35, at 138. See also SHI SHAOXIA, GONGSIFA [COMPANY LAW] 102 (1996); GAO CHENGDE & XIAO ZHIHE, ZHONGGUO GONG SI FA SHI WU [PRACTICE IN CHINA'S COMPANIES] 34 (1994).

⁴² This is not expressly provided in the 2005 Company Law. However, the Legal System Working Committee of China's Parliament, the National People's Congress, states in its interpretation of the 2005 Company Law that the board of directors is a compulsory, permanent management decision-making organ of the company. See THE NATIONAL PEOPLE'S CONGRESS LEGAL SYSTEM WORK COMMITTEE, *supra* note 12, at 73.

⁴³ 2005 Company Law, *supra* note 11, art. 47; WANG BAOSHU & CUI QINZHI, *supra* note 41, at 114, 211-12.

⁴⁴ 2005 Company Law, *supra* note 11, art. 47.

an errant member of the supervisory board if the company has suffered a loss because of the defaulting supervisor's breach of law, regulations, or the company's constitution.⁴⁵ The board of directors forms the company's management will and intention.⁴⁶

The supervisory board is the company's supervisory organ. It supervises the activities of the board of directors.⁴⁷ It has the power to examine the financial affairs of the company and to make recommendations about the removal of directors or senior executives⁴⁸ who have breached the law, administrative regulations, the company's constitution, or the resolutions of the general meeting. The board also has the power to bring legal action against directors or senior executives upon the request of a shareholder if the company has suffered a loss because of these officers' breach of the law, administrative regulations, or the company's constitution.⁴⁹ The supervisory board forms the company's supervisory will and intention in the sense that the board makes the decision to remove—or to commence proceedings against—defaulting directors or senior officers.⁵⁰

3. *No General Power of Management Is Granted to the Board of Directors*

The powers that the 2005 Company Law allocates to the three corporate organs are all specific. Unlike in common law jurisdictions, the 2005 Company Law allocates no general power of management to the board of directors.⁵¹ The power allocation provisions in company constitutions tend to be identical or similar to the power allocation provisions of the 2005 Company Law.⁵²

⁴⁵ *Id.* art. 152. See also *infra* note 77 and accompanying text.

⁴⁶ WANG BAOSHU & CUI QINZHI, *supra* note 41, at 114, 211-12; SHI SHAOXIA, *supra* note 41, at 232. Note, however, that the directors are subject to the absolute control of the general meeting. They have a statutory obligation to implement the resolutions of the general meeting. 2005 Company Law, *supra* note 11, arts. 47(2), 109.

⁴⁷ 2005 Company Law, *supra* note 11, arts. 54, 119.

⁴⁸ "Senior officers" is defined to mean the company manager, the deputy manager, the chief finance officer, the secretary of a listed company, and other people defined as senior officers in the company's constitution. *Id.* art. 217.

⁴⁹ *Id.* arts. 54(6), 150, 152. The supervisory board was not given the power to sue delinquent directors under the 1993 Company Law.

⁵⁰ See 1993 Company Law, *supra* note 24, arts 48, 126; 2005 Company Law, *supra* note 11, arts. 54, 55, 119, 152.

⁵¹ In common law jurisdictions, the power of managing the business of the company is normally vested in the board of directors by virtue of a division of power regulation in the company's constitution. FORD ET AL., *supra* note 31, at 216; Charles Zhen Qu, *Some Reflections on the General Meeting's Power to Control Corporate Proceedings*, 36(3) COMMON L. WORLD REV. 231, 232 (2007).

⁵² See, e.g., *Guang gao jing ying gong si zhang cheng* [the model company constitution for an advertising company], CHINALAWINFO (last visited Dec. 20, 2007) (P.R.C.); see also ZUI XIN JING BIAN

4. *The General Meeting Has Ultimate Control*

The general meeting is in a position to control the board of directors. The board is obliged to implement the resolutions of the general meeting, and a director who refuses to do so may be removed.⁵³ Even though this feature of the general meeting has already been stated above, it should be stressed here again because of its central importance when considering the general meeting's litigational representative power.

5. *The Representative Power Resides in the Legal Representative*

Under the General Code of the Civil Law of the PRC ("GCCL"),⁵⁴ which is China's provisional civil code, a legal person exercises its powers through its "legal representative."⁵⁵ Under the 2005 Company Law, the legal representative of a company represents the company by entering into transactions and prosecuting proceedings on behalf of the company in normal circumstances.⁵⁶ However, the aforementioned litigational powers of the board of directors and supervisory board⁵⁷ supplement the representative power of the legal representative.

The adoption of the legal representative mechanism was not based on any doctrinal considerations. In fact, this mechanism originated from the former Soviet Union.⁵⁸ This system was first adopted in the revolutionary bases before the founding of the PRC in 1949 to ensure the productive efficiency of, and the party's leadership in, the war industry.⁵⁹ Since 1949, state-owned enterprises have used the system.⁶⁰ The notion of the legal representative was codified for the first time in 1979 when the EJV Law Implementation Rules were enacted.⁶¹ Rule 37 of the Implementation Rules provides that the chairperson of an EJV company is the legal representative

ZHONGGUO GONG SI FA SHI WU QUAN SHU [THE LATEST ENCYCLOPEDIA OF CHINESE COMPANY LAW PRACTICE] 200-07 (1994); QI YE GAI ZHI BING GOU FA LÜ SHI WU [LEGAL PRACTICE ON ENTERPRISE RECONSTRUCTION AND MERGER] 342 (2006), and GONG SI ZHANG CHENG FAN BEN DA QUAN [A COMPLETE COLLECTION OF MODEL COMPANY CONSTITUTIONS] (Zhongtian Law Electronic Press CD-ROM, 2006).

⁵³ 2005 Company Law, *supra* note 11, arts. 47(2), 54(2), 109.

⁵⁴ China does not have a comprehensive civil code yet. The General Code of the Civil Law serves as a provisional civil code. *See generally* General Code of the Civil Law, *supra* note 6.

⁵⁵ *Id.* art. 38.

⁵⁶ 2005 Company Law, *supra* note 11, art. 13.

⁵⁷ *See supra* text accompanying notes 45, 49.

⁵⁸ Yang Ji, *supra* note 9, at 125.

⁵⁹ *Id.*

⁶⁰ *Id.* *See also* Gu Minkang, *supra* note 10, at 49; WANG LIMING, ZHONGGUO MIN FA DIAN CAO AN JIAN YI GAO JI SHUO MING [A DRAFT CIVIL CODE OF CHINA AND EXPLANATORY NOTE] 295-96 (2004).

⁶¹ Yang Ji, *supra* note 9, at 125.

of that company.⁶² The concept of the legal representative was subsequently adopted in the GCCL⁶³ and in the 1993 Company Law.⁶⁴ As previously noted,⁶⁵ the concept and functions of the legal representative were kept intact under the 2005 Company Law.

IV. THE ROLE OF THE LEGAL REPRESENTATIVE IN CORPORATE PROCEEDINGS

The way in which the legal representative is conceptualized affects and changes the options available to the company when no legal representative is available or the legal representative is ineffective. When the legal representative conducts proceedings in the name of the company, the representative acts either as the company itself or as the company's agent. The legal representative can be regarded as the company itself only if the individual can be conceptualized as one of the company's organs. This section suggests that the legal representative should be viewed as an agent rather than an organ of the company.

A. *Is the Legal Representative an Organ of the Company?*

Neither the 2005 Company Law nor the GCCL contains express provisions on the nature of the relationship between the company and its legal representative. Article 38 of the GCCL provides that the legal representative is the person responsible for representing a legal person in the exercise of their rights and powers (*zhiquan*) in accordance with statutory provisions or provisions of the legal person's constitution.⁶⁶ Article 13 of the 2005 Company Law stipulates the types of company officers who may be appointed as the company's legal representative.⁶⁷ Neither Article 38 nor Article 13, however, refers to the capacity in which the legal representative represents the company to exercise its rights and powers. Most scholars of Chinese company law and civil law seem to agree that the legal representative, like the shareholders' general meeting, the board of directors, and the board of supervisors, functions as an organ rather than as an agent of

⁶² Regulations for the Implementation of the Law on Sino-Foreign Equity Joint Ventures (promulgated by the St. Council, Sept. 20, 1983), art. 34, *translated in* <http://english.mofcom.gov.cn/article/lawsdata/chineselaw/200301/20030100064563.html> (last visited Dec. 23, 2007) (P.R.C.).

⁶³ General Code of the Civil Law, *supra* note 6, art. 38.

⁶⁴ 1993 Company Law, *supra* note 24, arts. 45, 113.

⁶⁵ *See supra* note 12 and accompanying text.

⁶⁶ General Code of the Civil Law, *supra* note 6, art. 38.

⁶⁷ 2005 Company Law, *supra* note 11, art. 13.

the company.⁶⁸ None of them, however, has defined the meaning of “organ” or has based their claims on any proper legal authorities.

Most common law jurisdictions define corporate organs as certain groups of people in whom the company law vests an original authority to commit the company to the legal consequences of the decisions made for it or to delegate to others.⁶⁹ According to this definition, the corporate organs of a company mean the board of directors and the general meeting.⁷⁰ The Chinese judiciary seems to accept this conception of a corporate organ. For example, the Beijing Higher People’s Court expresses the view in its company law adjudication guidelines that board and general meeting resolutions constitute corporate acts.⁷¹ According to this notion of a corporate organ, however, the legal representative cannot be regarded as a corporate organ.⁷² The 2005 Company Law does not vest any power in the representative to commit the company or make any corporate decisions. The legal representative must act according to the will and intention of the company,⁷³ which are formed in normal circumstances by the general meeting, the board of directors, and the board of supervisors.⁷⁴

Admittedly, a limited liability company, in practice, may authorize through its constitution the chairperson of the board of directors, or the executive director where the company does not have a board, to make decisions on transactions if their amount does not exceed a certain limit.⁷⁵ However, this practice does not mean that the legal representative is granted decision-making power in relation to litigation matters. The 2005 Company Law is silent on the location of decision-making powers with respect to litigation. If a company’s management will and intention is formed by the board of directors,⁷⁶ and if the power to litigate falls within the general

⁶⁸ JIANG PING ET AL., *supra* note 35; ZHOU YOUFEN, XIN GONGSIFA LUN [A NEW SURVEY ON CORPORATION LAW] 80-81 (2006). *See also* PENG WANLIN, TAN YOUTU & LI KAIGUO, MIN FA XUE [CIVIL LAW] 136 (China University of Political Science and Law Press 2002); MINFAXUE [CIVIL LAW] 250 (Jiang Ping ed., China University of Political Science and Law Press 2000); WEI ZHENYING, MINFA [CIVIL LAW] 170 (Peaking University Press 2000).

⁶⁹ FORD ET AL., *supra* note 31, at 212. *See also* DAVIES, *supra* note 1, at 178.

⁷⁰ FORD ET AL., *supra* note 31, at 212.

⁷¹ Beijing Shi Gaoji Renmin Fayuan guan yu shen li gong si jiu fen an jian ruo gan wen ti de zhi dao yi jian [Some Guiding Opinions of Beijing Higher People’s Court on the Trial of Company Law Cases], (Beijing High People’s Ct., Feb. 24, 2004) LAWINFOCHINA (last visited Dec. 20, 2007) (P.R.C.).

⁷² *But see supra* text accompanying notes 47-50 (China’s company law regime regards the supervisory board as one of the company’s organs).

⁷³ WANG BAOSHU & CUI QINZHI, *supra* note 41, at 47-48.

⁷⁴ *See supra* text accompanying notes 41, 46, and 50.

⁷⁵ Interview with Jiang Da Xing, Professor, Nanjing University of Law School (Aug. 20, 2007).

⁷⁶ *See supra* text accompanying notes 42, 46.

power of management,⁷⁷ then normally the power to make decisions about litigation should reside in the board of directors.⁷⁸

In addition, the possibility for the company to delegate power to an executive officer to commit the company for certain transactional purposes does not mean that the legal representative is an organ of the company. When a company officer is appointed as the company's legal representative and has been granted the power to make a transactional decision, that power lies in the officer's capacity as the company's executive officer (if the individual is the board chairperson or the company manager) or the company's executive organ (if the individual is the company's executive director where the company does not have a board),⁷⁹ not the officer's capacity as the company's legal representative. The 2005 Company Law does not confer any decision-making powers on the legal representative.⁸⁰

If the word "organ" is used to describe the legal representative as the implementation organ for the company's decisions, then the usage of that word becomes conceptually inconsequential. Such usage cannot prevent the legal representative from being recognized as an agent of either the company or a company organ in which the power to commit the company is vested.

B. Can the Legal Representative Be Treated as an Agent of the Company?

The GCCL defines an agent (*daili*) as a person who performs civil juristic acts in the name of the principal within the scope of the granted authority.⁸¹ A civil juristic act is a legitimate act of a person or a legal person to establish, change, or terminate civil rights or obligations.⁸² The

⁷⁷ There is a consensus among common law courts that the power to litigate falls within the general power of management. See *Breckland Group Holding Ltd. v. London and Suffolk Properties Ltd.*, (1989) 4 B.C.C. 542 (Ch.); *Mitchell & Hobbs (U.K.) Ltd. v. Mill*, (1996) 2 B.C.L.C. 102 (Q.B.); *Massey v. Wales*; *Massey v. Cooney*, (2003) 47 A.C.S.R. 1 (Austl.).

⁷⁸ This is indeed the opinion of the Legal System Working Committee of the National People's Congress, although the view on the board of directors' power to litigate is expressed in a special context (where a need for suing a defaulting member of the supervisory board arises). THE NATIONAL PEOPLE'S CONGRESS LEGAL SYSTEM WORK COMMITTEE, *supra* note 12, at 218. The supervisory board's power to litigate where the alleged defendant is a director is apparently provided to address the concern that the board of directors is often reluctant to sue their board colleagues. See J.E. PARKINSON, *CORPORATE POWER AND RESPONSIBILITY: ISSUES IN THE THEORY OF COMPANY LAW* 237-38 (1993).

⁷⁹ The executive director of a company that does not have a board of directors constitutes the executive organ of the company. THE NATIONAL PEOPLE'S CONGRESS LEGAL SYSTEM WORK COMMITTEE, *supra* note 12, at 218.

⁸⁰ See *supra* text accompanying notes 72-73.

⁸¹ General Code of the Civil Law, *supra* note 6, art. 63.

⁸² *Id.* art. 54.

principal is responsible for the liability that the agent has incurred within the scope of the individual's authority.⁸³

Under the GCCL definition, the kind of service that an agent performs on behalf of the principal is restricted to civil juristic acts.⁸⁴ The concept of agency, however, can be broadly understood. If a person confers power on another to engage in activities with legal consequences, in so far as the former is bound by the legal consequence of the act done by the latter on the former's behalf,⁸⁵ the latter can be arguably viewed as the agent of the former, even if the act done on behalf of the former does not amount to a civil juristic act.⁸⁶

There is no problem in considering the legal representative as an agent of the company for transactional purposes even under the definition provided in the GCCL. The legal representative represents the legal person, the company, to exercise its powers granted by the law, including the power to do civil juristic acts.⁸⁷ The liability incurred within the scope of the legal representative's business activities is attributable to the legal person or the company.⁸⁸ To the extent that the power of the legal representative is exercised to perform civil juristic acts, there is no conceptual problem in treating the legal representative as an agent of the legal person.

In fact, the legal representative is viewed as an agent in China's civil law framework. An example is Article 50 of the PRC Contract Law, which provides that the legal person will not be bound to a contract entered into on its behalf where the legal representative has exceeded the limit of his or her authority if the other party to the contract knew or ought to have known

⁸³ *Id.* art. 63.

⁸⁴ *Id.*

⁸⁵ It is a basic tenet of agency law in both civil law and common law jurisdictions that the principal is bound to the legal consequence of the act done by her agent who acted within the scope of her authority. On the position in civil law jurisdictions, see MINPŌ, arts. 99-101, *translated in* MINISTRY OF JUSTICE, *THE CIVIL CODE OF JAPAN (TRANSLATION)* (1972); *Bürgerliches Gesetzbuch [BGB]* [Civil Code] Aug. 18, 1896, *Reichsgesetzblatt [RGBl]* 164-66 (F.R.G.). On the common law side, see F.M.B. REYNOLDS, *BOWSTEAD AND REYNOLDS ON AGENCY* 1, 303 (Sweet & Maxwell 17th ed. 2001); W.A. Seavey, *The Rationale of Agency*, 29 *YALE L.J.* 859, 869 (1920).

⁸⁶ See LIANG HUIXING, *MINFA ZONGLUN [GENERAL PRINCIPLES OF CIVIL LAW]* 251-52 (2d ed. 2001); MU XIAOYUAN, *DAI LI FA LI LUN YU SHI WU [THE PRINCIPLES AND PRACTICE OF THE LAW OF AGENCY]* 4, 14 (East China University of Science and Technology Press 1998).

⁸⁷ General Code of the Civil Law, *supra* note 6, art. 38.

⁸⁸ General Code of the Civil Law, *supra* note 6, art. 43; *Zui gao ren min fa yuan guan yu guan che zhi xing* "zhong hua ren min gong he guo min shi fa tong ze" ruo gan wen ti de yi jian (shi xing) [Some Opinions of the Supreme People's Court on the Implementation of the PRC General Principles of Civil Law (Trial)] *Fa (Ban) Fa* 1988 No. 6, art. 58.

about this fact.⁸⁹ The principle underlying Article 50 is the doctrine of apparent authority, which is a principle of agency law.⁹⁰

It is also possible to conceptualize the legal representative as an agent of the company for litigational purposes, at least once the broader notion of agency is adopted. A person who engages another person to conduct proceedings on that person's behalf will be bound by the consequence of the litigation so conducted.⁹¹ It is, therefore, conceptually possible to treat the person who conducts legal proceedings on behalf of another person as the agent of the latter-mentioned person.⁹² It is generally accepted in China that the relationship between a litigant and a person who conducts the litigant's civil proceedings is governed by the principles of agency.⁹³

In a civil law jurisdiction, a person who has the power to conduct the corporate proceedings can be technically treated as a statutory agent of the company for the purpose of civil litigation. The 1992 Code of Civil Procedure of Japan, for example, expressly provides that its provisions on statutory agents⁹⁴ are applicable *mutatis mutandis* to the representative of a legal person,⁹⁵ and a statutory agent of a person without litigation capacity shall be appointed pursuant to, among other things, the provisions of the Civil Code.⁹⁶

If the legal representative does not constitute one of the company's organs and if it is conceptually and technically possible to regard the legal representative as an agent of the company for both transactional and litigational purposes, then in the absence of contrary provisions, the legal representative should be viewed as an agent of the company.

⁸⁹ Contract Law (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 15, 1999, effective Oct. 1, 1999), art. 50, translated in LAWINFOCHINA (last visited Dec. 23, 2007) (P.R.C.).

⁹⁰ General Code of the Civil Law, *supra* note 6, art. 66; MU XIAOYUAN, *supra* note 86, at 50.

⁹¹ MU XIAOYUAN, *supra* note 86, at 15.

⁹² There may be some difference between the role of a company's legal representative and that of a lawyer who is retained to conduct proceedings on behalf of the company. However, insofar as the act of the legal representative in representing the company in its proceedings binds the company, the nature of the relationship between the company and the legal representative is comparable to that between the company and a litigation agent.

⁹³ WEI ZHENYING, MINFA [CIVIL LAW] 171-72 (2000); MINFAXUE [CIVIL LAW] 247 (Kou Zhixin ed., 1998); MINFAXUE [CIVIL LAW] 142 (Zheng Li & Wang Zuotang eds., 1995).

⁹⁴ The phrase "statutory agent" is used here to mean a person who acts as a litigation agent for a minor, an incompetent person, or half-incompetent person, etc. See MINSOHŌ [Code of Civil Procedure], ch. III, sec. 1, translated in EHS LAW BULL. SER. no. 2300 (2005).

⁹⁵ *Id.* art. 37.

⁹⁶ *Id.* art. 28.

V. RECENT CASES AFFIRM THAT THE GENERAL MEETING CAN BE GIVEN CONTROL OVER A COMPANY'S LITIGATION

Several cases decided since 2002 demonstrate the need to recognize the representative power of the general meeting. These cases illustrate that the general meeting's power of representation may be at issue when the company needs to make and/or implement decisions respecting litigation and both the board of directors and the validly registered legal representative are unavailable. A validly registered legal representative may be unavailable for the following reasons: the previous legal representative has been removed but no replacement has been made yet, the attempted registration for the replacement legal representative is invalid, the registration of the replacement legal representative has not been completed, the legal representative is physically unavailable, or the legal representative's qualifications to continue as the legal representative are in doubt.

A. *Case Study: When the Previous Legal Representative Has Been Removed but No Replacement Has Been Appointed*

During the interim between the removal of a company's previous legal representative and the appointment of his or her replacement, the company does not have a legal representative. In this situation, the people's courts have shown a willingness to permit the general meeting to make a decision to litigate on behalf of the company where the board of directors is not in a position to act.

This principle is demonstrated in *Jiangsu Cold Roll-Forming Steel Association v. Wang Xigen*,⁹⁷ although the court did not base its judgment on the recognition of the general meeting's power of representation.⁹⁸ In *Jiangsu*, the two plaintiff companies founded Jiangsu Province Jinxing Cold Roll-Forming Steel Commodities Sales Co. ("Jinxing") in September 1996.⁹⁹ The plaintiff companies were the only two shareholders in Jinxing.¹⁰⁰ Wang Xigen was appointed as the chairperson of Jinxing's board of directors, as the company's legal representative, and as its general manager.¹⁰¹

The company did not, however, operate properly under Wang's management. On March 25, 2002, the board of directors purportedly held a

⁹⁷ REN MIN FA YUAN AN LI XUAN 2005 DI 2 JI [SELECTED CASES OF THE PEOPLE'S COURTS 2005, VOLUME 2] 223-27 (Sup. People's Ct. China Applied Legal Studies Research Inst. ed., People's Court Press, 2006) [hereinafter *Wang*].

⁹⁸ *Id.*

⁹⁹ *Id.* at 223.

¹⁰⁰ *Id.* at 224.

¹⁰¹ *Id.* at 223.

meeting in which they resolved that Wang be discharged from all positions he previously held in Jinxing and that he return the company's financial books, company seal, and other company property in his possession within two days.¹⁰² No replacement legal representative, however, was appointed after the meeting. A similar resolution was subsequently passed in a second general meeting demanding that Wang return the company's property and the company seal within five days.¹⁰³ Despite being notified, Wang failed to attend either of the two meetings.¹⁰⁴ Wang further refused to comply with the resolutions of both the board and the general meeting.¹⁰⁵ The company's two shareholders brought an action against Wang to recover Jinxing's property.¹⁰⁶

The trial court dismissed the action because both the purported board meeting and the general meeting suffered from procedural defects.¹⁰⁷ The court pointed out that Articles 43 and 48 of the 1993 Company Law required general meetings be chaired by the chairperson of the board of directors, and that board meetings similarly be called and chaired by the chairperson of the board.¹⁰⁸ Both the board meeting and the general meeting of Jinxing, however, were not called or chaired by Wang.¹⁰⁹

The appellate court, the Nanjing Intermediate People's Court, upheld the shareholders appeal.¹¹⁰ The court ruled that the resolutions of both the board and the general meeting were effective and ordered Wang to return the company property within ten days.¹¹¹ The court reasoned that although both the board meeting and the general meeting suffered from minor procedural defects, the resolutions of the two meetings, the content of which was lawful, reflected the will and intentions of the shareholders.¹¹²

Neither the trial court nor the appellate court appeared concerned about the nature of the action, even though the issue of the plaintiff's standing was quite apparent. The cause of action belonged to the company, yet the plaintiffs were the company's only two shareholders rather than the company itself. This might suggest that the action be considered a derivative action, but a closer reading reveals that it is not.

¹⁰² *Id.* at 224-25.

¹⁰³ *Id.* at 225.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 224.

¹⁰⁷ *Id.* at 225-26.

¹⁰⁸ *Id.* at 225.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 226.

¹¹¹ *Id.* at 226-27.

¹¹² *Id.* at 226.

The 1993 Company Law did not provide for derivative actions.¹¹³ The circumstances and the manner under which a derivative action could be brought were provided in the relevant guidelines issued by the higher people's court of the individual province or of the municipality with provincial status.¹¹⁴ The guidelines issued by the Higher People's Court of Jiangsu province,¹¹⁵ where the *Jiangsu* case was decided, stipulated that a shareholder might bring a derivative action only when the company was

¹¹³ In practice, however, derivative actions were permitted before the enactment of the 2005 Company Law, which provides for such actions. Derivative actions taken before January 1, 2006 were based on a judicial interpretation provided by the Supreme People's Court in 1994 entitled, *Zui gao ren min fa yuan guan yu zhong wai he zi jing ying qi ye dui wai fa sheng jing ji he tong jiu fen, kong zhi he ying qi ye de wai fang yu mai fang you li hai guan xi, he ying qi ye de zhong fang ying yi shei de ming yi xiang ren min fa yuan qi su wen ti de fu han* [Reply of the Supreme People's Court on When Chinese-Foreign Equity Joint Venture Has an External Controversy over Economic Contract, and the Foreign Side Which Controls the Joint Venture, Has Direct-Interest Relations with the Seller, in Whose Name Shall the Chinese Side of the Joint Venture File a Lawsuit to the People's Court] (promulgated by the Sup. People's Ct., Nov. 4, 1994), CHINALAWINFO, dispatch no.: fa jing [1994] 269 hao (last visited Dec. 23, 2007) (P.R.C.). In the above-mentioned judicial interpretation, the Supreme People's Court expressed the view that, where the board of directors had made a decision not to sue a party who was connected to the controller of the company and who had injured the interests of the company, a shareholder should be permitted to take an action on behalf of the company. The judicial interpretation, however, did not mention whether the action should be taken in the shareholder's own name. It was not necessary to do so, given that the contract in the case in question contained an arbitration clause and the Supreme People's Court expressed the view that the dispute should be resolved through arbitration, not a court action. For a case where derivative actions were allowed under the previous company law regime, see *Dong shi zhang de xing wei sun hai gong si li yi, gu dong shi fou you quan xiang qi ti qi su song?* [Does an individual shareholder have the right to sue the chairperson of the board of directors where the chairperson has injured the interests of the company?] in 2 YI FA SHUO FA—GONG SI HE HUO JIU FEN AN LI [DISCUSSING LAW THROUGH THE LAW—CASES ON COMPANY AND PARTNERSHIP DISPUTES] 182-85 (Wang Ming & Song Caifa eds., 2006) [hereinafter *Individual Shareholder*]. See also Yan Gengbin, *Dui yi qi gu dong pai sheng su song an de fa lu fen xi* [A Legal Analysis of a Case on Derivative Actions] in GONG SI FA YI NAN WEN TI JIE XI [ANALYSIS ON DIFFICULT COMPANY LAW ISSUES] 204 (Qi Qi & Zhou Bihua eds., 2d ed. 2005). It has always been recognized in China that a company's right can only be enforced by the company itself, and derivative actions were and are permitted only where the company fails to exercise the right. See *Individual Shareholder*, *supra* at 184. On the right of shareholders to take derivative actions under the current company law regime, see 2005 Company Law, *supra* note 11, art. 152.

¹¹⁴ See, e.g., Shanghai shi gao ji ren min fa yuan guan yu shen li she ji gong si su song an jian ruo gan wen ti de chu li yi jian (yi) [Shanghai High People's Court's Opinions on the Adjudication of Company Law Cases (one)] (Shanghai High People's Ct., June 12, 2003), § 1(5), available at <http://www.luxinlaw.com/News/Show.asp?id=1382> (last visited Dec. 20, 2007) (P.R.C.); Jiangsu sheng gao ji ren min fa yuan guan yu shen li shi yong gong si fa an jian ruo gan wen ti de yi jian (shi xing) (yi) [Jiangsu Province High People's Court Opinions on the Adjudication of Company Law Cases (trial) (one)] (Jiangsu Province High People's Ct., Jun. 3, 2003), § 17, available at http://www.lawyerwu.com/data/2005/0907/article_1120.htm (last visited Dec. 20, 2007) (P.R.C.) [hereinafter *Jiangsu Opinion*]; Beijing shi gao ji ren min fa yuan guan yu shen li gong si jiu fen an jian ruo gan wen ti de zhi dao yi jian (shi xing) [Beijing High People's Court Guiding Opinions on the Adjudication of Company Law Cases (trial)] (Beijing High People's Ct., Feb. 9, 2004), available at http://www.ny148.cn/main/news_view.asp?newsid=1133 (last visited Dec. 20, 2007) (P.R.C.). These court opinions are reprinted in BEIJING HIGHER PEOPLE'S COURT, *GONG SI FA XIN XING YI NAN AN LI PAN JIE* [A STUDY OF THE NEW AND COMPLICATED COMPANY LAW CASES] 281-99 (2006).

¹¹⁵ Jiangsu Opinion, *supra* note 114, § 17.

unable, or otherwise failed, to take action against a senior company officer or a controlling shareholder who had allegedly injured the interests of the company. The guideline also stated, “[t]he company shall be joined in the action as a third party.”¹¹⁶

A people’s court may allow a third party to join a proceeding where the outcome of the litigation will affect the interests of the third party.¹¹⁷ Where this occurs, the name of the third party participating in the action will normally appear in the court judgment.¹¹⁸ In *Jiangsu*, there was no indication that the company itself was unable, or otherwise failed, to take action against Wang before the proceeding was commenced. In addition, Jinxing’s name is not recorded in the judgment of the case, proving that the company did not join the action as a third party. The proceeding, therefore, could not have been a derivative action.

It is also impossible to view the action against Wang as having been brought by Jinxing’s board of directors. The plaintiffs were not directors of Jinxing even though they each nominated a director to the board.¹¹⁹ Nor did the purported board meeting on March 25, 2002 result in a decision to take a legal action against Wang.¹²⁰

The proceedings of the *Jiangsu* case can, however, be considered as having been authorized and raised by the general meeting because the two plaintiffs were the only shareholders of the company.¹²¹ Although the general meeting was not held to specifically make a decision on the commencement of the action against Wang, the result of such a meeting, even if held, would be the same.¹²² If the purported general meeting on April 15, 2002 could not be rendered ineffective based on procedural defects, as the court held,¹²³ then the lack of such a procedure should not bar viewing the shareholders’ decision as a decision of the general meeting. Indeed, under the 2005 Company Law, unanimous consent by the

¹¹⁶ *Id.* (emphasis added).

¹¹⁷ Civil Procedure Law (promulgated by the Standing Comm. Nat’l People’s Cong., Apr. 9, 1991, effective Apr. 9, 1991), art. 56, *translated in* 4 P.R.C. LAWS 185, 196 [hereinafter Civil Procedure Law].

¹¹⁸ Interview with Sun Jian Han, Judge, Huzhou Intermediate People’s Court (Nov. 1, 2006).

¹¹⁹ See *Wang*, *supra* note 97, at 224.

¹²⁰ *Id.* at 224-25.

¹²¹ *Id.* at 224.

¹²² This is the position taken by common law courts. See, e.g., Justice Neville’s observation in *Marshall’s Valve Gear Company, Ltd. v. Manning Wardle & Co. Ltd.*, (1909) 1 CH 267, 272 (U.K.).

¹²³ The problems caused by requiring that the general meeting be called by the board of directors and be chaired by the chairperson of the board under the prior Company Law have been recognized and remedied under the 2005 Company Law. Under Article 41, where the board of directors and the board of supervisors refuse to call for a general meeting, such a meeting can be called and chaired by shareholders holding ten percent or more voting rights. 2005 Company Law, *supra* note 11, art. 41.

shareholders is the equivalent to a decision of the general meeting, even if no general meeting has been held.¹²⁴

In *Jiangsu*, the court appears to have recognized the representative power of the general meeting. The court's approval of an action brought by the only shareholders of the company, which, as stated previously,¹²⁵ can be seen as an action commenced by the general meeting, must be based on the court's recognition of the general meeting's representative power.

As discussed in Part IV, there is no doctrinal barrier to recognizing the general meeting's representative power. The legal representative can be treated as the company's agent in litigation. When this agent is unavailable or ineffective, the company should be able to act on its own behalf through one of its organs, such as the general meeting. Even if the legal representative functions as the company's "implementation organ," where the original implementation organ is ineffective or unavailable, a decision-making organ should be able to implement its own decision through another servant or a lawyer.

From a doctrinal perspective, is it more desirable to insist on having the action brought by the company's new legal representative, once appointed, rather than allowing the general meeting to represent the company? Probably not. There is often a temporal gap between the company's decision to change its legal representative and the amending of the BICA legal representative registration. Denying the general meeting's power to represent the company in such a situation may deprive the company of its ability to control its own litigation during the temporal gap. A suspension of the company's ability to defend its interests and vindicate its rights through legal proceedings may cause injury to the interests of the company and its investors. It may also have the effect of holding up commercial activities and hampering economic development. The circumstances involving such a temporal gap are discussed in the next two cases.

B. Case Study: When the Attempted Registration of the Replacement Legal Representative Is Invalid

An attempted registration of the replacement legal representative may be invalid if the company does not follow prescribed procedures. When this occurs, the company does not have a legal representative because the previous legal representative has been removed and a replacement has not

¹²⁴ *Id.* art. 38.

¹²⁵ See *supra* text accompanying note 121.

been appointed. In these cases, the people's courts have tended to recognize the general meeting's power to exercise control over corporate decisions on conducting legal proceedings.

This is illustrated in *Yan Yu Cheng v. Nanjing Shihua Construction Supervision Co.*¹²⁶ Nanjing Shihua Construction Supervision Co. ("Shihua") was incorporated as a limited liability construction company on January 28, 2000.¹²⁷ The four initial shareholders of the company were Yan, the appellant in the case, Fang Xuechu, Yang Lisheng and Xi Yang Yang Enterprise Co.¹²⁸ Yan, being the majority shareholder, was elected as the executive director and the legal representative of the company at Shihua's first general meeting.¹²⁹

At the second general meeting held on August 14, 2000, the company passed a resolution to reorganize the company's shareholding and organizational structures.¹³⁰ The meeting resolved to establish a board of directors and appointed Wang Liangxi, not Yan, to be the chairperson of the board of directors and the company's legal representative.¹³¹ All shareholders, except Yan, signed the minutes of this meeting.

On September 16, 2000, Yan chaired a shareholders' office meeting (*gudong bangong huiyi*) attended by Fang and Yang.¹³² The meeting resolved that, *inter alia*, Yan needed more time to consider the resolution of the second general meeting. This same meeting further resolved that if the three attendees of the office meeting failed to reach a consensus on the rearrangement of the company's capital structure by September 22, 2000, the resolution of the second general meeting should be implemented.¹³³ On September 18, Yan informed the general meeting in writing that he wished to withdraw his contribution towards the company's registered capital and to resign from all posts he held within the company.¹³⁴

On September 22, the third general meeting resolved to accept Yan's resignation and reconfirm the resolution of the second general meeting to

¹²⁶ Nanjing Shihua jian she gong cheng jian li you xian gong si su Yan Yucheng dong shi sun hai gong si li yi an [Nanjing Shihua Const. Project Supervision Co. v. Dir. Yan Yucheng RE harming company interests], ZHONGGUO SHEN PAN AN LI YAO LAN (2003 NIAN SHANG SHI SHEN PAN AN LI JUAN) [A COLLECTION OF CHINESE TRIAL CASES (2003 COMMERCIAL CASES COLLECTION)] 226 (2004) (Nanjing Interm. People's Ct, 2002) [hereinafter *Shihua*].

¹²⁷ *Id.*

¹²⁸ *Id.* at 227.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

appoint Wang as the chairperson of the board and as the company's legal representative.¹³⁵ Accordingly, Shihua submitted an application to BICA to update the registration of the company's legal representative.¹³⁶ BICA approved the application on December 13, 2000.¹³⁷ The general meeting held its fourth meeting on December 29, 2001 and again resolved to reaffirm the validity of the resolution passed in the second general meeting on the change of legal representative.¹³⁸

Shihua then requested several times in vain that Yan return, in particular, the company's registration certificates and the company seal.¹³⁹ In June 2001, Wang, in his capacity as the company's legal representative, commenced a legal proceeding against Yan to recover the company's property.¹⁴⁰ The trial court ordered Yan to return to Shihua company property that was in his possession, reasoning that the legal rights of a duly incorporated company were protected by law.¹⁴¹

Yan appealed the case to the Nanjing Intermediate People's Court on the grounds that, *inter alia*: 1) Shihua used a false seal to execute the statement of claim (as the original seal was still in the possession of the defendant, Yan), and 2) the trial court erred by validating Wang's appointment as chairperson of the board of directors (and hence the legal representative) of the company.¹⁴² Yan further alleged that the resolution of the second general meeting regarding Wang's appointment as chairperson of the board contravened Order No. 16 of the Ministry of Construction.¹⁴³

Order No. 16 provided that to change the legal representative of a construction supervision company, the company must complete the replacement procedures through an original qualifying department before applying to BICA.¹⁴⁴ Shihua, however, did not complete the preliminary reappointment procedures before filing to change the legal representative registration with BICA,¹⁴⁵ making the appointment of Wang as Shihua's legal representative arguably invalid.¹⁴⁶

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 229.

¹³⁹ *Id.* at 226.

¹⁴⁰ *Id.* at 226, 228-29.

¹⁴¹ *Id.* at 226, 228.

¹⁴² *Id.* at 228.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 228-29.

¹⁴⁵ *Id.* at 229.

¹⁴⁶ *Id.*

It followed, argued the appellant, that whether Wang was capable of initiating a proceeding on behalf of the company was uncertain.¹⁴⁷ The respondent replied that Shihua's general meeting had replaced the appellant with Wang as the company's legal representative through lawful procedures.¹⁴⁸ The respondent also argued that it was the company's will and intention to change its legal representative and to commence the proceeding against the appellant.¹⁴⁹

The appellate court dismissed Yan's appeal on the ground that commencing the proceeding against the appellant was the company's will and intention, which was formed and expressed by the company's general meeting.¹⁵⁰ The court observed that Shihua, as a limited liability company, was entitled to determine who had the right to custody of its certificates and company seal.¹⁵¹ The court pointed out that the crux of the case was not whether Wang was able to act as the company's legal representative in relation to the proceeding against Yan, but whether it was the company's true will and intention to commence the legal action.¹⁵²

The court reasoned that a company's will and intention are expressed by its organs.¹⁵³ In general, a company's will and intention can be evidenced by the signature of the company's legal representative and the company seal.¹⁵⁴ In special circumstances, such as where there is friction among shareholders, or, as in *Shihua*, a change of legal representative, or where the effect of the two different seals is in question, the general meeting has the power to represent the company to express the company's will and intention.¹⁵⁵ This is because the general meeting is the company's supreme power organ and its resolutions are binding on all shareholders.¹⁵⁶

The appellate court also pointed out that both the second and fourth general meetings resolved by a two-thirds majority to relieve the appellant from his position as the company's legal representative and to require him to return company property that was in his possession.¹⁵⁷ This meant that taking an action against the appellant was the will and intention of Shihua, rather than the personal will of Wang, who purported to act as the legal

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 228.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 229-30.

¹⁵¹ *Id.* at 229.

¹⁵² *Id.*

¹⁵³ *Id.* at 226, 229.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

representative of the company.¹⁵⁸ Shihua's power to commence legal proceedings, therefore, was not affected by whether Wang could be appointed as the legal representative of the company or whether the registration of the new legal representative was valid.¹⁵⁹

Theoretically, the court did not need to determine the general meeting's representative power to decide the case. The same result could have been reached by curing the procedural defects relating to Wang's appointment. This could have been done, for example, by undoing the BICA registration of Wang as the company's legal representative and asking the company to complete the pre-registration approval procedures as required under Order No. 16 before re-lodging the change of legal representative registration with BICA. The court had general power to stay proceedings under the PRC Civil Procedure Law.¹⁶⁰ The court could, therefore, have chosen to stay the proceeding to allow time to remedy the defects in Wang's appointment. Once Wang had been properly appointed by curing the procedural defects, the proceeding could have been resumed as originally planned.

A broad ruling on the general meeting's representative power, however, makes better sense. It takes time to cure the procedural defects relating to the reappointment of a legal representative. An order to stay proceedings would leave a temporal gap between the dismissal of the legal representative and the finalization of the process to approve and register the replacement. For this reason, the court's determination of the general meeting's representative power will help protect the interests of the company and its investors as well as promote commercial activities.

Doctrinally, the court's judgment in *Shihua* was sound. The judgment was based squarely on its decision that the general meeting has the power to represent a company in litigation proceedings. As previously discussed in Part IV, there was no doctrinal barrier to recognizing the representative power of the general meeting for litigation purposes.

The case did not, however, mention whether the board of directors, established pursuant to the resolution of the second general meeting, had reached any resolution on the commencement of the action against Yan. Assuming that the board held a meeting and reached a resolution on this matter, perhaps the reason the court did not rely on the resolution was because the replacement legal representative—who must be the chairperson

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ Civil Procedure Law, *supra* note 117, art. 136(6).

of the board¹⁶¹—was not first approved by the qualification control department as required under Order No. 16.¹⁶² Thus, there was no properly appointed chairperson of the board, and no board meeting can be held without a chairperson.¹⁶³

C. *Case Study: When the Registration of the Replacement Legal Representative Has Not Been Completed*

The previous two cases involved circumstances where the company did not have a legal representative to represent itself. A similar situation occurs when the replacement of the representative has been made, but the registration of the replacement has not been completed. This was the situation that the court in *Shanghai Tongxin Pharmaceutical Co. v. Shanghai Public Housing Assets Management Co.* (“*Shanghai*”) encountered.¹⁶⁴ The plaintiff entered into a land use right transfer contract with the defendant.¹⁶⁵ Zhou Guozhu, the legal representative and the chairperson of the board of directors, executed the agreement on behalf of the plaintiff company.¹⁶⁶ Subsequently, a major change in shareholding took place.¹⁶⁷ As a result, a new board chairperson and legal representative, Zhang Xinguo, was appointed.¹⁶⁸ Before the change of the BICA registration regarding the replacement of the board chairperson and legal representative was completed, Zhou sought to rescind the land use right transfer contract.¹⁶⁹

The general meeting of the plaintiff company, held with the new shareholders in attendance, decided that the action commenced by Zhou was inconsistent with the best interest of the company and that the proceeding should be dropped.¹⁷⁰ The application for the discontinuation of proceedings was executed with the signature of Zhang, the new legal representative, whose name had not appeared in the relevant registry.¹⁷¹ At the time the

¹⁶¹ 1993 Company Law, *supra* note 24, art. 45.

¹⁶² *Shihua*, *supra* note 126, at 228.

¹⁶³ 1993 Company Law, *supra* note 24, arts. 48, 114.

¹⁶⁴ Shen Li, You gu dong hui jue ding de fa ding dai biao ren ying ju you gong si de su song dai biao quan [The Legal Representative Appointed by the General Meeting Should Have Power of Representation], <http://www.companylawyer.com.cn/gdqy/zxgdqydbh/20051215113225.htm> (last visited Dec. 17, 2007) (Shanghai Mun. First Interim. People’s Ct.) [hereinafter *Shanghai*].

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

application for discontinuation of proceedings was made, the above-mentioned change of registration had still not been completed.¹⁷²

The commentator on this case viewed the application for discontinuation as valid on the basis that the failure to complete the registration of the new legal representative only affected the quality of the publicity generated from the relevant company information, not the actual effect of the legal representative's replacement in the company.¹⁷³

It is arguable whether a failure to complete registration will affect the legal representative's replacement in the company. The person appointed as legal representative is only qualified to represent the company when the BICA registration has been completed.¹⁷⁴ When the application for discontinuation was made in *Shanghai*, the company did not have a validly registered legal representative, given that Zhou, the previous legal representative, had already been removed. This means that the court's decision to approve the company's discontinuation application relied entirely on the strength of the general meeting's resolution. The court's decision was based on the recognition of the general meeting's representative power. Zhang's power of representation, if any, was granted by the general meeting. If Zhang had played a role in the discontinuation application, he would have acted as the delegate of the general meeting, rather than the company's legal representative, because he had not been registered with BICA as such.

D. Case Study: When the Legal Representative Is Physically Unavailable or the Ability to Act as the Legal Representative Is in Doubt

The question of a general meeting's power of representation may also crop up where the company's legal representative is unavailable or where the ability to act as the company's legal representative is in doubt. This can occur, for example, when the legal representative is under police custody. The recent case of *Wanhong Co. v. Beimai Import and Export Co.* ("*Wanhong*")¹⁷⁵ illustrates that the court may be willing to recognize the general meeting's power to litigate under these circumstances, even though

¹⁷² *Id.*

¹⁷³ *Id.* The case commentator is Shen Li, an Assistant Judge of the Second Civil Law Division of Shanghai Higher People's Court, where the case was decided. There is therefore reason to believe that Shen's view is that of the court.

¹⁷⁴ Qi ye fa ren fa ding dai biao ren deng ji guan li gui ding [Administrative Rules for Registering an Enterprise's Legal Representative] (promulgated by St. Admin. for Indus. and Commerce, June 23, 1999), art. 3 CHINALAWINFO (last visited Jan. 20, 2008) (P.R.C.).

¹⁷⁵ *Wanhong Co. v. Beimai Imp./Exp. Co., Beidahuang Wheat Industry Co., and Longxing Agricultural Development Co.*, (on file with Journal) (Haerbin Interm. People's Ct., Sept. 14, 2005) [hereinafter *Beidahuang*].

the court in *Wanhong* appears to have erred by agreeing with the defendant's ungrounded argument regarding shareholders' litigation rights.

The plaintiff company, the first defendant company, Heilongjiang Province Beimai Import and Export Trading Co. ("Beimai"), and Danwei Holdings Co. ("Danwei") entered into an arrangement to jointly run an export business.¹⁷⁶ Under the agreement, the plaintiff was responsible for obtaining a loan for the first defendant who was in charge of procuring the goods to be exported.¹⁷⁷ Danwei was to act as the guarantor for the loan.¹⁷⁸ The second defendant, Heilongjiang Province Beidahuang Wheat Industry Co. ("Beidahuang"), and the third defendant, Longxing Agricultural Development Co. ("Longxing"), were the only shareholders in the first defendant company, holding fifty-one percent and forty-nine percent of the shares issued by the company, respectively.¹⁷⁹ The general manager of Beidahuang, which was the majority shareholder in Beimai, was appointed as the legal representative of Beimai.¹⁸⁰

It was alleged that the plaintiff company advanced a loan for RMB 17 million to Beimai in late 2002.¹⁸¹ The cooperative relationship between the plaintiff and Beimai ended in early 2003 due to market fluctuation.¹⁸² It was alleged that the latter, Beimai, still owed the plaintiff company RMB 7 million. The plaintiff brought an action against Beimai for the remaining debt and against Beidahuang and Longxing for failing to contribute or unlawfully withdrawing capital money in their capacity as shareholders.¹⁸³ Evidence existed, however, that cast doubt on whether Beimai received the allegedly loaned money from the plaintiff company and whether Beidahuang and Longxing failed to contribute capital or had otherwise illegally withdrawn the capital funds they had contributed.¹⁸⁴

When the action commenced, Beimai was virtually non-existent. Both the financial books and the company seal were missing.¹⁸⁵ Its legal representative was under police custody on a separate matter,¹⁸⁶ and the

¹⁷⁶ *Id.* at 2.

¹⁷⁷ *Id.* at 3.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 5.

¹⁸⁰ *Id.* at 1.

¹⁸¹ *Id.* at 3.

¹⁸² *Id.*

¹⁸³ Under the 2005 Company Law, the shareholders of a limited liability company must contribute the total amount of capital, which must be registered with the company registration authority. 2005 Company Law, *supra* note 11, arts. 26-32. See also Hu Zaichi, *Limited Liability Companies*, in 1 CHINA COMPANY LAW GUIDE, *supra* note 13, ¶ 45-130.

¹⁸⁴ *Beidahuang*, *supra* note 175, at 6-7.

¹⁸⁵ *Id.* at 7.

¹⁸⁶ *Id.*

company's actual location was unknown.¹⁸⁷ Thus, the legal representative, or even the board, of Beimai was not in a position to defend the proceedings on behalf of the company. Longxing was a fly-by-night company and could also not be located.¹⁸⁸ The only defendant that was worth suing was, therefore, Beidahuang.

One of the questions presented by the case was whether Beidahuang, the majority shareholder, could defend the proceedings on behalf of Beimai on the issues brought before the court.¹⁸⁹ The court answered this question in the affirmative.¹⁹⁰ The court reasoned that the majority shareholder had standing to defend proceedings in the name of the company because a shareholder could take a derivative action against a defaulting company officer to vindicate the company's rights.¹⁹¹

While the result of the court's judgment on this issue is justifiable, the basis of the judgment is questionable. In a derivative action, the shareholder who initiates a proceeding does so in her own name, rather than in the name of the company, against the person who has allegedly harmed the company. The court normally allows the company to join as a party in the litigation so that the company may be bound by the benefit of the judgment.¹⁹² The company itself is not, however, a claimant in such an action, as it has not consented to the action.¹⁹³

Proceedings against the company, on the other hand, can only be defended by the company itself. This means that only a person who has the power to represent the company has standing to defend proceedings in the name of the company. This person is, in ordinary circumstances, the legal representative of the company.¹⁹⁴ A shareholder does not have this representative power and does not have the standing to defend an action against the company.

¹⁸⁷ *Id.* at 1.

¹⁸⁸ *Id.*; Chen Hong, *Gu dong su song dai biao quan li lun de shi jian ying yong* [Practical Application of the Theory of a Shareholder's Litigational Representative Power], Red Flag Law Firm, Nov. 21, 2005, <http://www.hongqilawyer.com/newasp/newsdetail.asp?newsid=216>.

¹⁸⁹ *Beidahuang*, *supra* note 175, at 15.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² Under the Civil Procedure Law, where a person's interest will be affected by litigation to which he or she is not a party, the person may apply to join the litigation. Civil Procedure Law, *supra* note 117, art. 56. The court has the power to invite the person to be joined as a third party, even if neither of the parties in the litigation have a cause of action against the third party. *Id.* This is different from the practice in common law jurisdictions, where a company is normally joined as a defendant to achieve the same purpose. See DAVIES, *supra* note 1, at 454.

¹⁹³ See DAVIES, *supra* note 1, at 454.

¹⁹⁴ See *supra* note 56 and text accompanying.

Despite the court's mistake in determining the extent of the shareholder's right, the court would have reached the same result had it taken into account the general meeting's power to control corporate actions. As previously discussed, there are no doctrinal or practical barriers to allowing the general meeting to have control over corporate proceedings where the board of directors and the legal representative are both unavailable. In *Wanhong*, the Beidahuang was a majority shareholder, holding fifty-one percent of the issued shares.¹⁹⁵ It would have been able to pass an ordinary resolution, which simply requires a majority of votes, at the general meeting with respect to the litigation.

The plaintiff company would naturally have rejected this view by arguing that no general meeting resolution could have existed if no general meeting had been held. This argument can, however, be countered. Where it is physically or practically impossible for the shareholders to hold such a general meeting, the failure to hold the meeting cannot deprive the majority shareholders of their ability to form the will and intention of the company. The *Jinling* court upheld the effect of a resolution from a general meeting despite procedural defects.¹⁹⁶ This is because the defects were caused by the defaulting board chairperson who actually refused to call and chair the meeting.¹⁹⁷

By parity of reasoning, where the chairperson of the board and the only other shareholder are unavailable because they are under police custody or have simply disappeared, the impossibility of convening a general meeting should not affect the majority shareholder's power to make decisions about litigation proceedings on behalf of the company.¹⁹⁸ The result of such a meeting, if held, would be a foregone conclusion.¹⁹⁹

¹⁹⁵ *Beidahuang*, *supra* note 175, at 5.

¹⁹⁶ *See supra* note 112 and text accompanying.

¹⁹⁷ *See supra* note 112 and text accompanying.

¹⁹⁸ Neither the 1993 Company Law, which was in force when the case was decided, nor the 2005 Company Law, provide for a quorum. The above view is based on the presumption that a meeting will not constitute a quorum unless at least two individuals entitled to attend it are present. This is the common law position. As stated by Lord President Cooper, "a 'meeting' is an assemblage where two or more persons meet, and that, unless the word 'meeting' can have assigned to it some special meaning, a meeting cannot be composed of one individual." *In re Prain & Sons* [1947] S.C. 325, 328. The quorum required in England and other jurisdictions of British origin is normally two. *See, e.g.*, Companies (Table A to F) Regulations, 1985, S.I. 1985/805, amended by S.I. 2007/2541 and S.I. 2007/2826, tbl. A, art. 40 (U.K.); Companies Ordinance, (2004) Cap. 32, § 114A(1)(c) (H.K.), available at <http://www.legislation.gov.hk/eng/how.htm>; Corporations Act, 2001, § 249T(1) (Austl.) (a replaceable rule).

¹⁹⁹ *See supra* note 122 and text accompanying.

VI. CONCLUSION

The company representation mechanism is only functional when a person capable of representing the company is available. Such a person is unavailable when the person granted the power of representation is unable to faithfully perform duties or is physically unavailable. Ironically, the legal representative mechanism under China's company law regime often creates situations where the legal representative is unavailable. Because the power of representation is statutorily vested in a senior executive officer, the legal representative's performance is often self-biased. Furthermore, because the power of representation is vested in a single person, the company's competence in controlling its legal proceedings is often questioned when the legal representative is physically unavailable or when the representative has not delegated his or her power of representation to another.²⁰⁰ The requirement that the appointment of the legal representative must be approved by and registered with the company registration authority often creates a temporal gap between the appointment and the subsequent processes with the registration authority.²⁰¹

The unavailability of a company's legal representative often places the courts in a dilemma between requiring compliance with the formal rules of legal representation and the substantive need for giving effect to the intentions of the company and enabling it to resolve disputes or defend its interests through court proceedings. The courts in the cases discussed in this Article demonstrate a consistent willingness to prefer the latter to the former. However, the courts have not always been able to identify and articulate the correct doctrinal basis for their decisions.

The cases discussed in Part V demonstrate that the issues in each case can all be resolved on the basis of the general meeting's power to control corporate proceedings. Following the justifications discussed in Parts IV and V, when a company's representative mechanism is dysfunctional, the general meeting should be regarded as having decision-making and representation powers over legal proceedings. The general meeting's power to control company litigation can, therefore, serve as a doctrinal basis to retain the litigational power of the company when the company's board of directors or the legal representative is unavailable or incompetent. The general meeting's representative power should only be exercisable when a legal representative is unavailable, or otherwise incapable of discharging his or her role in an unbiased manner.

²⁰⁰ See *Beidahuang*, *supra* note 175.

²⁰¹ As was the case in *Wang*, *supra* note 97, *Shihua*, *supra* note 126, and *Shanghai*, *supra* note 164.

With the general meeting's power to control corporate actions, the inherent deficiency of the legal representative system will be cured. Additionally, Chinese companies will be able to enhance their ability to settle disputes and protect their interests through legal proceedings. More importantly, this will help strengthen corporate governance under the current company law regime by providing an additional avenue through which the company may seek to enforce its senior officers' duties. Since case precedent does not have binding force in China,²⁰² the recognition of the general meeting's power to control company proceedings may be formalized by inserting a provision in the 2005 Company Law, or more realistically, by Supreme People's Court judicial interpretation on this issue.²⁰³

²⁰² He Jiahong, *Lun Faguan fa guan Zao zao Fafa* [On Judge Made Law] (Apr. 15, 2006), <http://www.chinalawedu.com/news/20800/209/2006/4/zh558017584151460023534-0.htm> (P.R.C.).

²⁰³ The Supreme People's Court has power to provide judicial interpretation on questions concerning specific application of laws and decrees in judicial proceedings. See Organic Law of the People's Courts (promulgated by the Standing Comm. Nat'l People's Cong., July 5, 1979, effective Jan. 1, 1980, rev. Sept. 2, 1983), art. 33, translated in <http://www.china.org.cn/english/government/207254.htm> (last visited Dec. 19, 2007) (P.R.C.). The judicial interpretations provided by the Supreme People's Court have legal force and function to fill the gaps left in legislation and to resolve inconsistencies in legislative provisions. See Zhou Daoluan, *Lun si fa jie shi ji qi gui fan hua* [On Judicial Interpretations and Their Standardization], 1 ZHONGGUO FAXUE [CHINA LEGAL SCIENCE] 87, 87-91 (1994).