

COUNTRY REPORT FOR THE ROLE OF BOARD DIRECTORS AND SUPERVISORS IN CHINESE TAIPEI

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General Legal Framework

Chinese Taipei is a Civil Law jurisdiction and her Company Law follows the models of continental Europe and Japan. However, in recent years both the Company Law and the Securities and Exchange Law ("SEL") have received influence from the Common Law world, especially the United States. This background explains much of the features of the role of the board of directors in Chinese Taipei.

Chinese Taipei's Company Law provides for four types of companies: companies with unlimited liability shareholders (functionally like general partnerships), companies with mixed liability shareholders (like limited partnerships or Kommanditgesellschaft in German law); limited companies (which do not issue shares) and companies limited by shares. The following discussion will focus on companies limited by shares, which are analogous to a business corporation in Common Law jurisdictions.

In Chinese Taipei, companies limited by shares have a "two-tier" board. The term "two-tier" is used loosely for lack of a better description. In fact, it is not two-tier and the second tier does not function as a board. In other words, there is a board of directors who are elected directly from among the shareholders (instead of election by supervisors indirectly) and manage the business of a company in Chinese Taipei. In addition, the Company Law also requires supervisors (similar to statutory auditors or *kansaiyaku* in Japan), who are elected from among shareholders. Supervisors perform their functions and duties individually and not collectively and, as such, they are different from the German Aufischerat.

A useful article on corporate governance in Chinese Taipei is Lawrence S. Liu's "Simulating Securities Class Actions: The Case in Taiwan", Corporate Governance International, Volume 3, Issue 4, pp.4-12 (December 2000).

Minimum Number of Directors and Supervisors

The minimum number of directors in Chinese Taipei is three, and the minimum for supervisors is one. Note that Chinese Taipei is drafting a Financial Institutions Holding Company Act ("FIHCA"). The proposed FIHCA will allow one-shareholder financial institutions if the shareholder is a financial

holding company. However, such one-shareholder financial institutions will still have three directors and one supervisor as a minimum.

Minimum Requirements to Serve as Directors and Supervisors

Directors and supervisors may not have certain negative qualifications, which are stated in the Company Law, that otherwise will disqualify individuals from serving as such. These negative qualifications are mainly (1) prior records for economic or financial crimes like embezzlement, breach of trust and fraud unless a certain period has lapsed from the completion of prison term, and (2) incidents material adverse credit standing which has not been resolved two years before, (3) bankruptcy declaration with has not been reinstated, (4) incapacitation because of age or mental illness, and (5) convictions of sedition-related criminal offenses and pending prosecutions. There is a proposal to amend the Company Law so that individuals with records of having engaging in organized crimes will be barred from serving as directors and supervisors.

Some statutes impose additional requirements on the positive qualifications of directors and supervisors. For example, the Banking Law and regulations promulgated under it require a portion of the directors and supervisors have banking experience.

In addition to general requirements mentioned above, the TSE contains a “moral turpitude” test for directors or supervisors of companies seeking a listing on the TSE. Pursuant to Rule 15 of the TSE’s Supplemental Rules to the Listing Rules, the following conditions constitute such moral turpitude:

- (1) having had checks or negotiable instruments dishonored;
- (2) having defaulted on loans to banking institutions;
- (3) having been convicted of criminal violations of labor laws, except when there has been an improvement for more than two years;
- (4) having been convicted for criminal evasion of taxes;
- (5) having violated undertakings rendered to support listing applications;
- (6) having made misrepresentations or violated laws and regulations or causing companies to default or damage its credit, or having damaged the interest of the company, shareholders or the public; and
- (7) having engaged in other conduct involving a material violation of laws and regulations or breach of good faith. having had checks or negotiable instruments dishonored;
- (8) having defaulted on loans to banking institutions;
- (9) having been convicted of criminal violations of labor laws, except when there has been an improvement for more than two years;
- (10) having been convicted for criminal evasion of taxes;
- (11) having violated undertakings rendered to support listing applications;
- (12) having made misrepresentations or violated laws and regulations or causing companies to default or damage its credit, or having damaged the interest of the company, shareholders or the public; and

- (13) having engaged in other conduct involving a material violation of laws and regulations or breach of good faith.

Election of Board Directors and Supervisors

Directors and supervisors are elected from among the shareholders in separation elections. The same person may not stand in election as both a director and a supervisor. Cumulative voting is mandatory for both elections.

Directors and supervisors are authorized by the Company Law to serve up to three-year terms. As a result, most companies in Chinese Taipei provide in their articles of incorporation three-year terms for directors and supervisors. No staggering is permitted.

Under a 2000 amendment to the Law Governing State-Owned Enterprises, one-fifth of the board of directors of state-owned companies will have to be representatives of unions of company workers. In Chinese Taipei, a state-owned enterprise is defined as companies (or unincorporated businesses) in which the government owns half or more of the interest. The one-fifth labor director requirement under the Law Governing State-owned Enterprises is the closest analogy to co-determination in Chinese Taipei. Its progeny is the Statute Governing Chung-Hua Telecom Corporation. This statute provides that CHT, which was corporatized from the business arm of the old Directorate General of Telecommunications, has to have one-fifth directors who are "experts".

Legal Entities as Directors and Supervisors

Legal entities can become directors and supervisors. They can appoint individuals as candidates or run for election themselves and then appoint representatives to exercise the right and perform the duty of directors and supervisors on their behalf. Indeed, corporate shareholders and government shareholders in Chinese Taipei frequently make such appointment. As a result, a split loyalty problem arises. In addition, representatives can be re-appointed during the three-year term. While this rule allows flexibility for closely held companies, it creates governance problems for public or widely held companies.

Directors and Supervisors as Shareholders

To serve as directors and supervisors, an individual has to be a shareholder himself or the representative of a corporate shareholder. This is a specific requirement of the Company Law. In addition, if shareholders who are themselves directors/supervisors or who have appointed directors and supervisors as their representatives sell more than half of their holdings during the term, they will cause such directors and supervisors to be automatically discharged. Moreover, the Securities and Futures Commission ("SFC") is authorized under the Securities and Exchange Law ("SEL") to provide for the minimum level of ownership of all directors and supervisors of public reporting companies. In other words, the SFC has the power to require that directors and supervisors own a minimum level of shares in such companies.

Non-executive Directors

In Chinese Taipei, there has been much discussion over concepts like non-executive directors, independent directors, outside directors, public-interest directors, and the like. According to Rule 9(12) of the Listing Rules of the Taiwan Stock Exchange ("TSE"), a company applying to list its shares shall commit to elect at least one independent director as a condition to listing. The Listing Rules do not define independence, and there is no clear guidance or interpretation on what constitutes independence. The TSE nevertheless has adopted interpretations in article 17 of Supplementing Rules to the Listing Rules to indicate what constitutes lack of independence.

Pursuant to this interpretation, where a board of directors has less than five directors, and more than two-thirds of them have an affiliation among them, then there is lack of independence. Affiliation exists between (1) spouses, (2) lineal relatives within two degrees of relations (like father and son), (3) lateral relatives within three degrees of relations, (4) representatives serving the same corporate shareholder, or (5) affiliates. The same rule applies to outside supervisors, except that the minimum number of supervisors for which such affiliation will be examined is three. In the case of corporations, affiliates follow the general accounting bulletins governing affiliates. In the case of individuals, affiliates include spouses and dependent children.

The anecdotal observations of scholars, practitioners and the business and government community in Chinese Taipei is that companies seeking listing would seek an independent director to sit for a term but elect different (and perhaps executive or affiliated) directors when his or her term is up. See Lawrence S. Liu, "A Perspective on Corporate Governance in Taiwan," Asian Business Law Review, No. 31, pp. 29, 31-32 (January 2001); Weng-Ho Chen, "Study of Effective Exercise by Exterior Directors and Supervisors of Listed Companies," (in Chinese) TSEC Monthly Review, No. 456, pp. 1, 9 (April 2000).

When independent directors (whatever that term means in Chinese Taipei) are elected, they serve the same three-year term. Reappointment is not automatic and has to follow election procedures pursuant to the Company Law.

Composition of the Board and Supervisors

No formal statistical study has been made of the composition of the board and supervisors, such as the ratio of executive and non-executive directors, their skills, expertise and background, or percentage of foreign (particularly Western) directors. However, please see the TSE study mentioned above and summarized below.

According to a TSE study of board directors and supervisors (Chen, supra), 403 TSE-listed companies were surveyed in 1998, and 12 directors or supervisors of TSE-listed companies were interviewed. A total of 170 questionnaires were returned, representing a 42.18% return ratio. Subject to a number of constraints caveated by the TSE such as authenticity, objectivity, confidentiality and so on, the results are as follows:

First, about 60.3% of the respondents believed Rule 9(12)'s independent director requirement was reasonable (while 12.6% viewed it unreasonable, 26.5% had no views, and 0.7% had other views).

Second, among the respondents, 67.7% indicated that by the end of 1997 their companies had independent directors, and that independent directors represented 34.96% of all directors of the respondents. In addition, 63.5% of the respondents have elected outside supervisors, and that outside supervisors represented 53% of all supervisors of such respondents.

Third, outside directors' attendance performance is as follows:

20% attendance rate or below: 2.7% of outside directors;
21% to 40% attendance rate: 0.9%;
41% to 69% attendance rate: 6.2%;
61% to 80% attendance rate: 23%; and
over 81% attendance rate: 67.3%.

Fourth, 71.4% of the outside directors said they understood matters that came before the board meetings very well, 26.8% said they had some understanding, and 1.8% said they did not understand these matters at all.

Fifth, 20.4% of the outside directors said they were very vocal in board meetings, while 76.1% said they were moderately vocal, and 3.5% said they rarely spoke.

Sixth, 18.8% of the outside directors said they would vote along with the executive directors, while 79.5% said they would deliberate in earnest on the pending matters on the basis of their merits.

Seventh, 16.1% of respondents believed outside directors had excellent decision-making capability, 62.5% believed they had good capabilities, 20.5% of them could manage to make decisions, and 0.9% believed they were not good decision makers.

Eighth, of the respondents 23.6% believed there should be a minimum college degree for outside directors, 21.3% believed outside directors should have junior college degrees at least, and 55.1% said there should not be any requirements on educational levels.

Ninth, the respondents had the foregoing opinions on whether outside directors should have specified credentials:

Table I Director’s Mandatory Qualifications

Mandatory professional background or expertise	yes		no	
	No. of companies	%	no. of companies	%
Mandatory industry background	77	60.6	50	39.4
Mandatory academic knowledge	45	35.4	82	64.6
Mandatory professional qualifications	14	11.0	113	89.0
No mandatory requirements	44	34.6	83	65.4

Note: Multiple choices were allowed.

Tenth, the following table shows the relative decision-making power of the outside and inside directors:

Table II Allocation of Decision-Making Power

Matters for Decision-Making	Average Intensity of Decision-Making Power		T Test for Significance Levels
	Outside Directors	Inside Directors	
Company Strategies	4.5225	2.9370	0.000
Major Capital Expenditures	4.3153	3.0090	0.000
Addition or Elimination of Departments and/or Branches	4.2973	2.6396	0.000
Capital Increase or Investment in Others	4.2432	3.2162	0.000
Major Borrowings	4.000	3.1273	0.000
Adoption or R/D for New Technologies and Products	4.2432	2.4234	0.000
Hiring, Firing, Performance Review and Compensation of Mangers	4.2883	2.5586	0.000
Selection of Counter Parties for Major Transactions	4.0545	2.7182	0.000
Dividend Policy	4.1712	3.3063	0.000
Earnings Manipulation	3.4685	2.5586	0.000

Note: Five points were assigned to Maximum decision-making power and one point was assigned to minimum decision-making power.

Eleventh, the following table shows the perceived relative contribution by inside and outside directors to company performance:

Table III Relative Contribution to Company Performance

Types of Contribution	Relative Contributions to Company Performance		T Test for Significance Levels
	Inside Directors	Outside Directors	
Rationalizing Purposes, Pricing and Terms for Related-Party Transactions	4.0090	2.9099	0.000
Hiring Management	4.2973	2.6486	0.000
Expense Reduction	4.1982	2.4775	0.000
Cost Reduction	4.2162	3.5586	0.000
Fund Raising	4.3153	2.7297	0.000
Strengthening Financial Structure	4.3514	2.8108	0.000
Strengthening Internal Control and Internal Audit Systems for Prevention of Wrongdoing	4.2613	2.9189	0.000
Business Promotion to Increase Performance	4.2793	2.6757	0.000
Enhancing Corporate Image	4.2072	2.9459	0.000
Prevention of Earnings Manipulation	4.1171	2.9459	0.000

Note: Five points were assigned to maximum contribution, and one point was assigned to minimum contribution.

Twelfth, among the respondents, 27.1% of the supervisors would often look into the company’s business and financial conditions, 63.90% would occasionally perform such functions, and 9.0% never performed such functions.

Thirteenth, when supervisors actually looked into the business and financial conditions of the company, only 5.4% engaged lawyers or certified public accountants.

Fourteenth, 93.3% of the respondents indicated that supervisors were extremely outstanding or competent in investigating the business and financial conditions of the company.

Fifteenth, among the respondents, 17.7% viewed outside supervisors as more knowledgeable and competent in performing their functions and duties, 19.4% viewed inside directors as more knowledgeable and competent, and 62.9% saw no difference between them.

Sixteenth, the following table shows the views on the need for mandatory academic background of outside directors.

Table IV Perceived Need for Outside Supervisor's Academic Background

Nature of Academic Background	yes		no	
	No. of companies	%	No. of companies	%
Law or Business Majors and University Degrees	56	40.3	83	59.7
Any College Degrees without Need for Law or Business Majors	24	17.3	115	82.7
High School Graduates	3	2.2	136	97.8
No Need for Required Degrees	62	44.6	77	55.4

Note: Multiple choices were allowed.

Seventeenth, the following table shows the perceived need for outside directors' mandatory qualifications.

Table V Need for Outside Directors Mandatory Qualifications

Nature of Mandatory Qualifications	yes		no	
	No. of companies	%	No. of companies	%
Having Worked in Internal Auditing Area	35	25.4	103	74.6
Having Worked in Financial or Accounting Area	61	44.2	77	55.8
Having Practiced as Lawyers or Certified Public Accountant	25	18.1	113	81.9
Having Been A Company's Board Director or Supervisor	25	18.1	113	81.9
No Need for Required Qualifications	64	46.4	74	53.6

Note: Multiple choices were allowed.

Eighteenth, the following table shows the perceived contribution of inside and outside supervisors.

Table VI Relative Contribution to Company Performance

Types of Contribution	Relative Contributions to Company Performance		T Test for Significance Levels
	Inside Directors	Outside Directors	
Prevention of Business-Related Wrongdoing	3.5195	3.1948	0.004
Prevention of Finance-Related Wrongdoing	3.6494	3.3247	0.005
Prevention of Violations of Law by the Company	3.6234	3.3377	0.009
Rationalizing Purpose, Pricing and Terms of Related-Party Transactions	3.5584	3.2468	0.005
Prevention of Earnings Manipulation	3.5000	3.2027	0.008

Note: Five points were assigned to maximum contribution, and one point was assigned to maximum contribution.

Nineteenth, all in all, 18.3% of the respondents believed that because of their existence and exercise of duties by outside directors, they had greatly improved the business and financial strengths and development of the company. On the other hand, 53.2% thought they were effective, 26.2% thought they had made no impact, and 2.4% thought they have rendered a disservice to the company.

Twentieth, all in all, 15.5% of the respondents believed that, because of their existence and exercise of duties by outside supervisors, they had greatly improved the business and financial strengths and development of the company. In contrast, 53.5% thought they were effective, 30.2% thought they had made no impact, and 0.8% thought they had rendered a disservice to the company.

In sum, the foregoing TSE study has only referential probative value, event though it was a pioneering study. In addition to the TSE's statistical caveats on possible defects in the response, some results seem inconsistent.

The TSE noted that their selected interviews were subjective, and that some directors and supervisors selected by them were not co-operative. TSE also noted that as a self-regulatory organization which often acted at the instruction of the SFC, some respondents may have viewed this academic study as a study mandated by the SFC. This is not a far-fetched speculation, because the SFC had commissioned a study to draft an Investors Protection Law bill around the same time of the TSE study. Finally, the TSE noted that in Chinese Taipei, outside directors and supervisors often were nominees or affiliates of inside directors and supervisors. This phenomenon would make it impossible for outside directors and supervisors to function well. In other words, the integrity of some of the responses may be grave in doubt.

Other Empirical Studies

In addition to the TSE study, there are a few empirical studies in recent years on the composition and performance of board of directors. These studies are mainly dissertations and need to be examined in

closer details. They are summarized below. Chun-Ping Chang, *The Relationship between Corporate Governance and Corporate Performance* (June 1999); Ming-Hung Ong, *the Characteristics of Board of Directors Versus Operating Performance* (June 1998).

The Chang study examined a sample of 213 listed companies for the period of 1996-97. The major findings of this study were:

- (1) The relationship between CEO compensation and corporate performance was positive.
- (2) The relationship between whether the chairman and president were the same person and corporate performance was not significant.
- (3) The relationship between the size of the board and corporate performance was not significant.
- (4) The relationship between managerial shareholding and corporate performance was not significant.
- (5) The relationship between share ownership by the board of directors and corporate ownership was positive.
- (6) The relationship between the largest family shareholding and corporate performance was not significant.
- (7) The relationship between institutional shareholding and corporate performance was not significant.

The Ong study was made upon a sample of 742 listed companies on the TSE and TAISDAQ between 1994 and 1996, and was made by examining their prospectuses and other disclosure documents. It found that the average number of directors in the board was 8.33. In addition, the number of directors representing a corporate shareholder, inside directors and family directors was 3.07, 2.20 and 2.38 respectively. The average holdings of all directors were 21.82%. It also made the following findings:

- (1) The level of shareholdings by the board of directors positively correlated with corporate performance.
- (2) There was an insignificant positive relationship between the size of the board of directors and corporate performance.
- (3) The average education of board of directors positively correlated with the operating performance.
- (4) The number of directors representing a corporate shareholder had an insignificant negative correlation with operating performance.
- (5) No significant correlation could be found between the proportion of inside directors and operating performance.
- (6) The proportion of family directors negatively correlated with corporate performance.
- (7) Among all classes of directors, only family directors significantly correlate with operating performance, and other classes of directors have an insignificant correlation with operating performance.

Responsibilities and Functions of Directors and Supervisors

According to the Company Law, the Shareholders Meeting, the Board of Directors and supervisors are the mandatory organizational units of a company limited by shares. The Shareholders Meeting is the highest authority of making policy decision and as such, certain major decisions must be made at the Shareholders Meeting. The Board of Directors is the organ that manages the company either by statutory prescription or by delegation of powers from the Shareholders Meeting. The supervisor does not manage the company but only oversee, for the interest of the Shareholders, the performance of the Board of Directors.

To strike a balance between the supreme power of the Shareholders and the need of a functional Board, the Company Law provides protection to the inherent powers of Shareholders on the one hand while strengthens the functional authorities of the Board of Directors on the other.

Article 202 of the Company Law provides that the business of the company shall be conducted by the Board of Directors, and unless the Company Law or the Articles of Incorporation request decisions by the Shareholders Meeting, all matters may be decided by resolutions of the Board of Directors.

The following summary shows the respective functions and authority of the Board Meeting and Shareholders Meeting and those of the Directors and Supervisor.

1. The transaction of business of a company shall be determined by the Board of Directors. Unless the Company Law or the Articles of Incorporation provide that certain matters must be resolved at the Shareholders Meeting, all may be determined by resolution of the Board Meeting (Article 202).
2. Except as otherwise provided in the Company Law, the following matters must be resolved and adopted by a majority of the directors at a meeting attended by directors representing more than one-half of the directors of the company:
 - (1) appointment and dismissal of outside auditors and their remuneration (requiring majority directors' consent, Article 20);
 - (2) appointment and dismissal of managers and their remuneration (requiring majority directors' consent, Article 29);
 - (3) the calling of Shareholders Meetings (Article 171);
 - (4) reporting of loss of the company to the Shareholders Meeting when the loss reaches half of the paid-in capital; declaration of bankruptcy when the company's assets are not sufficient to satisfy its indebtedness (Article 211);
 - (5) approval of the annual financial report for submission to the Shareholders Meeting for approval (Article 228);
 - (6) approval of a merger agreement for submission to the Shareholders Meeting for approval (Article 317);
 - (7) amendment of the Articles of Incorporation for submission to the Shareholders Meeting for approval; change of address (Article 428); and
 - (8) any matters which must be approved at the Shareholders Meeting.
3. The following matters may be resolved and adopted by a simple majority vote of the Directors

present at a Board Meeting attended by two-thirds or more of the Directors:

- (1) making proposals to the Shareholders Meeting to do any of the following transactions (Article 185);
 - (a) enter into, amend, or terminate any contract for lease of the company's business in whole, or for entrusted business, or for regular joint operation with others;
 - (b) transfer the whole or any essential part of the company's business or assets; and
 - (c) accept the transfer of another's whole business or assets, which has great impact on the business operation of the company.
 - (2) election of the Chairman of the Board and/or the Managing Directors from among the directors (Article 208);
 - (3) Offering corporate bonds, provided that the reasons for offering corporate bonds shall also be reported to the Shareholders Meeting (Article 246);
 - (4) issuance of new shares (Article 266); and
 - (5) application for reconstruction of the company (Article 282).
4. If greater criteria for quorum and vote are specified in the Articles of Incorporation of the company, such greater criteria shall govern.

In contrast, the following powers are exercised by the shareholders meeting in Chinese Taipei. Except for those otherwise provided in the Company Law, the following matters shall be resolved and adopted by a majority of the Shareholders at meeting attended by Shareholders representing more than one-half of the total number of voting shares:

- (1) compensation to be made to the Directors and Supervisors unless otherwise stipulated in the Articles of Incorporation (Articles 196 and 227);
 - (2) election of Directors and Supervisor (by cumulative voting method); dismissal of Directors and Supervisors (Articles 192, 199 and 216);
 - (3) claims against Directors (Article 212);
 - (4) approval of the annual financial reports (Article 230);
 - (5) setting aside of special reserves unless otherwise stipulated in the Articles of Incorporation (Article 237);
 - (6) election of liquidator unless otherwise appointed by the court or stipulated in the Articles of Incorporation (Articles 79 and 322);
 - (7) compensation to the liquidator unless the liquidator is appointed by the court (Article 325); and
 - (8) approval of the financial report made during the liquidation period (Article 331).
1. The following matters must be resolved and adopted by a majority of the Shareholders at

meetings attended by Shareholders representing two-thirds or more of the total number of voting shares (for a public offering company, i.e., a company which is required to publicize its financial statements periodically pursuant to the SEL but whose shares are yet to be traded on the stock exchange, the resolution may be adopted by two-thirds or more of the Shareholders at a meeting attended by Shareholders representing a majority of the total number of voting shares):

- (1) any of the following resolutions submitted by the Board of Directors (Article 185):
 - (a) enter into, amend, or terminate any contract for lease of the company's business in whole, or for entrusted business, or for regular joint operation with others;
 - (b) transfer the whole or any essential part of its business or assets; and
 - (c) accept the transfer of another's whole business or assets, which has great impact on the business operation of the company;
 - (2) approval for a Director to act for himself or on behalf of another person that is within the scope of the company's business (Article 209);
 - (3) issuance of new shares by capitalization of retained earnings or legal reserve (Articles 240 and 241); and
 - (4) amendments to the Articles of Incorporation (Article 277).
2. Other matters that must be resolved and adopted by a Shareholders Meeting, include:
- (1) the promoters shall, by unanimous agreement, execute, sign and seal the Articles of Incorporation (Article 129);
 - (2) in case a company has issued special shares, any amendment of the Articles of Incorporation prejudicial to the privileges of the holders of special shares shall be adopted by a meeting of holders of special shares (Article 159); and
 - (3) a resolution for dissolution or consolidation or merger of the company shall be adopted by a majority vote at a Shareholders Meeting attended by Shareholders representing three-fourths or more of the total number of issued shares (for a public issuing company, the resolution may be adopted by three-fourths or more of the votes of the shareholders present at a Shareholders Meeting who represent a majority of the total number of voting shares) (Article 316).
3. If greater criteria for quorum and vote are specified in the Articles of Incorporation of the company, such greater criteria shall govern.

Board directors have the following functions (that is, rights) and duties specified in the Company Law.

1. Functions:

- (1) Investigating the promoters' report and reporting the same to the inaugural meeting (Article 146);
- (2) Filing application by a majority of Directors and at least one Supervisor for registration of incorporation on behalf of promoters (Article 418);

- (3) Attending the Board Meeting in person or by proxy (a director residing in a foreign country may appoint in writing a Shareholder residing in the ROC as his proxy to attend meetings regularly) (Article 205);
- (4) Each Director shall have one voting right, except a Director who has personal interest in the matter under discussion shall not vote nor exercise the voting right on behalf of another Director (Article 206);
- (5) Determining (by a majority of directors) the appointment, discharge, or remuneration of managerial officer(s) (Article 29);
- (6) Filing applications (by a majority of directors and at least one supervisor), on behalf of the company, for registration of dissolution or amendment of registration or reflect capital increases or decreases, issuance of new shares, issuance of corporate bonds, or a consolidation or merger (Article 418);
- (7) Signing and sealing (by at least three directors) of certificates of shares and/or that of corporate bonds (Article 162); and
- (8) Acting on behalf of the company in case of a lawsuit is proceeded between the company and a supervisor (Article 225).

2. Duties:

- (1) Jointly liable with the company to compensate any person who suffers damages or losses resulting from his illegal act which is within the scope of the company's business (Article 23);
- (2) Executing corporate business with due care (Article 192 II);
- (3) Compensating the company for losses or damages resulting from adoption by the Directors' of any resolution in contravention of laws and ordinances, the Articles of Incorporation, and the resolutions adopted at Shareholders Meeting; provided, however, that those Directors whose disagreement appears on record or is expressed in writing shall be exempt from liability (Article 193 II);
- (4) Compensating the company for any losses or damages resulting from his/their failure to act in compliance with laws and ordinances, the Articles of Incorporation or the resolution adopted by Board Meeting or Shareholders Meeting (Article 200);
- (5) Prohibited from doing anything, for self-benefit or for the benefit of another person, that is within the scope of the company's business, unless prior approval has been given by a Shareholders Meeting (Article 209 I);
- (6) Compensating the Shareholder(s) for any losses or damages resulting from a lawsuit which was instituted against the Director and is upheld by a final judgment to be based on true facts (Article 215); and
- (7) Reporting to the Supervisor immediately upon discovery the possibility that the company will suffer substantial damages (Article 218-1).

Supervisors have the following functions (that is, rights) and duties specified in the Company Law.

1. Functions:

- (1) Supervising the company's business:
 - (a) examining the promoters' report and reporting the same to the inaugural meeting (Article 146 I);
 - (b) examining the business and financial condition of the company, examining books, records, and documents, and requesting the Board of Directors to make reports thereon. (A supervisor may, in performing these functions, appoint an attorney or CPA to conduct such examination on behalf of the company.) (Article 218 I);
 - (c) examining all statements and records of various kinds prepared and submitted by the Board of Directors to the meeting of shareholders with books and vouchers, and auditing the actual conditions in order to make a report of the findings to the meeting of shareholders. (A supervisor may, in performing these functions, appoint a CPA to conduct the auditing.) (Articles 219 and 228);
 - (d) instructing the Board of Directors to stop transacting business in violation of the laws or the Articles of Incorporation or business operation beyond the registered business scope of the company (Article 218-2);
 - (e) convening a meeting of shareholders when the Board of Directors is unable or fails to do so (Article 220);
 - (f) inspecting and commenting on, and reporting to the authorities for approval of, accepting property as payment for subscribing shares (Article 274);
 - (g) examining the balance sheet and inventory prepared by the liquidator of the company when the liquidator assumes his office for dissolving and liquidating the company (Articles 326 I);
 - (h) examining the list of receipts and payments, statement of profit and loss together with all statements and records of accounts during the period of liquidation, submitted by the liquidator (Article 331 I); and
 - (i) filing application (along with a majority of directors) on behalf of the company for registration of incorporation, dissolution or amendment of registration to reflect the capital increase or decrease, issuance of new shares, issuance of corporate bonds, or a consolidation or merger (Article 418).
- (2) Representing the company:
 - (a) acting on behalf of the company in a lawsuit between the company and a director in violation of its fiduciary duty, laws or regulations (Article 213);
 - (b) instituting an action against a director on behalf of the company at the request of shareholders who have continuously held 5% or more of the total number of issued shares for a period of one year or longer (Article 214);
 - (c) retaining, on behalf of the company, an attorney and/or CPA to conduct the examination in (1)(a) and (b) mentioned above (Articles 218 II & 219 II); and
 - (d) acting as the representative of the company when a director is negotiating with the company on his own account or on behalf of others (Article 223).

2. Duties:

- (1) jointly liable with the company to compensate any person who suffers damages or losses resulting from his illegal act in performing official duty which is within the scope of the company's business (Article 23);
- (2) prohibited from concurrently being a director, a managerial officer and/or other staff employee of the company (Article 222);
- (3) compensating the company for any losses or damages resulting from negligence in performing his duty of supervision (Article 224);
- (4) compensating the shareholder(s) for any losses or damages resulting from a lawsuit instituted against the supervisor(s) and found by a final judgment to be based on true facts (Articles 215 & 227).

Board of Managing Directors and Committees

Note that in Chinese Taipei, board of directors may elect from among themselves a Board of Managing Directors. They have certain specified statutory powers, and functions like an all purpose committee. The full board, on the other hand, is rarely divided in committees.

Fiduciary Duties

Board directors and supervisors both serve under a contract of mandate for the company. A contract of mandate is a contract specified in the Civil Code for being engaged to render service and attend to the affairs of others. A mandate has to exercise the duty of a good administrator. This duty focuses on the duty of due care.

On the other hand, neither the Civil Code nor the Company Law stresses the concept of fiduciary duty. However, such a duty exists by inference. For example, directors, supervisors and managers as fiduciaries of the company for which they serve can be prosecuted criminally for embezzlement and breach of trust. On such enforcement in Chinese Taipei since the Asian financial crisis, see Lawrence S. Liu's "Simulating Securities Class Actions: The Case in Taiwan", Corporate Governance International, Volume 3, Issue 4, pp.4-12 (December 2000). Generally enforcement of fiduciary duty in Chinese Taipei relies heavily on administrative and criminal mechanisms, because of typical free rider, information cost, court-fee advance payment, judicial expertise and other costs relating to meaningful private enforcement.

Changing Role of Board Directors

This author's personal view is that in Chinese Taipei the board directors are playing a more meaningful role in the recent decade, as a result of a more pluralistic society, more competitive market and more sophisticated regulation. Previously, the Chairman of the board would often dictate corporate strategies and major operations decisions.

Best Interest of the Company

Directors and supervisors owe a duty of due care under the Civil Code contract of mandate to conduct the business of the companies in its best interest. This is usually understood as the best interest of the shareholders as the primary stakeholder. Article 1 of the Company Law defines a company as a profit-seeking legal person, and this provision may be authority for the position mentioned above. The Company Law does have some provisions requiring the board and management to protect the interest

of employees relative to share subscription and bonus. In sum, the board may but does not need to take into account the interest of other stakeholders, unless a specific statute so requires.

There are no hard and fast rules, or major ingredients, to ensure that directors will watch out for the best interest of the company. However, directors may be sued for civil liability arising from failure to exercise their duty of due care. They can also be criminally liable for breach of trust, as mentioned above. The SEL also imposes criminal and civil liability on directors and managers for engaging in transactions with the company at other than at arms' length. The SFC and TSE have adopted elaborate rules and interpretations on transactions at other than at arms' length.

The real issue in ensuring that directors will act in the best interest of the company is enforcement. In Chinese Taipei, the SFC has intensified its enforcement especially after the Asian financial crisis. See Lawrence S. Liu, "Simulating Securities Class Actions: The Case in Taiwan", Corporate Governance International, Volume 3, Issue 4, pp.4-12 (December 2000). One of the problems with enforcement has been form over substance. For example, for many years listed companies in Chinese Taipei have set up wholly-owned investment companies which would turn around to buy shares of the company, while some insiders also churn company stock. Previously, the SFC did not deal with this de-facto buyback, self tender practice effectively. Another problem is that most enforcement actions still are taken primarily by the regulators, including securities institutes sponsored by the SFC which would bring piggyback civil actions on the coattail of criminal prosecution of directors and other insiders for wrongdoing.

Board Decisions

See the section on the responsibilities and functions of directors and supervisors supra for matters which fall within the board of directors' decision-making authority, rather than left to the management.

The board of directors controls the business of the company and the executive management by exercising the power of appointment and dismissal. Depending on the companies, in Chinese Taipei the board of directors of a company will hold monthly or quarterly meetings. Management is expected to make periodic reports to the board on the state of business of the company. The chairman of the board, who often maintains an office in the company, often doubles as the chief executive officer and leads the management and runs the company. The president and general manager is often more like a chief operating officer.

Employees as such are not involved in the business of the company. If they constitute the minimum block of shareholders (that is, 3%), they can obtain company information such minority shareholder pursuant to the information gathering and inspection provisions of the Company Law. One exception is the recent amendment to the Law Governing State-Owned Enterprises mentioned above. This provision is still to be implemented among state-owned companies, and the impact of labor co-determination a la Chinese Taipei remains to be seen.

When held liable, directors' liability is collective, and indeed joint and several. This is because the Company authorizes and mandates the board of directors collective, rather than individually, to conduct the business of the company. On the other hand, if a board director made written oppositions to board proceedings and have them entered into the board minutes, he or she would be absolved from liability. Civil and criminal liability may arise under both the Company Law and SEL, and may attach for insider trading, willful failure to disclose (or willful disclosure of false) material information, and consummation of related party transactions at other than arms' length. As mentioned above, the more important issue in Chinese Taipei is not to write up rules or the law book, but rather to enhance enforcement of such rules.

The board of director has access to company information as it is the decision-making body authorized

by the Company Law. Non-executive directors theoretically have the same right of information. See the results of the TSE study mentioned above. Further research needs to be done to see how effective non-executive directors have exercised such right of information. In early February 2001 the TSE held an informal forum for independent directors of listed companies for the first time to explore how they can better their duty.

Relationships among Board Members and between the Board and the Other Bodies

The chairman of the board of directors is authorized by the Company Law to convene and chair board meetings (without any tie-breaking vote), and to act as the legal representative of the company. The Company Law also specifies the position of the president (that is, the general manager or managing director). Directors and managers are both defined by the Company Law as “responsible persons”.

Because of his or her position as the legal representative of the company and the cultural influence dating back to imperial China of always having individual instead of collective leadership, the chairman of the board is essentially the chief executive officer of the company as well. Where the president/general manager is another person, that person functions often like a chief operating officer. In other words, the chairman wields substantial power within and outside the board room.

Unless there is a significant ownership (and, therefore, power) de-centralization, culturally other directors will substantially defer to the chairman or endorse his (or, sometimes, her) decision when the board meeting is held after-the-fact. Where the Company Law specifically requires certain matters to be adopted by the board, board members may be more assertive. However, it is common that some executive directors who form the chairman’s inner circle will have had some coordination before the meeting, so that such board meetings may be more pro forma.

In Chinese Taipei, it is not common for the board of directors to have ongoing or standing committees like audit, compensation and nomination committees. The Company Law does authorize a board of managing directors (which, if it is constituted at all, has to be one-third the size of the full board) as a legally recognized executive committee. The board can adopt ad hoc resolutions to authorize some members to form a working party or task force to look into certain matters and before back to the full board.

As statutory auditors, supervisors individually performs functions like an audit committee. However, unless there is ownership de-centralization, supervisors are often elected by the same individual or corporate shareholders who elect directors. Therefore, it is impossible for the “left hand” to supervise the “right hand”.

See discussions above concerning the decision-making authority of the board of directors for the relationship between the board and management.

The Company Law prohibits a director and manager from serving for himself or another company as a director or manager which competes with the company. Managers are full-time positions unless a waiver is made by the board. Where a director has a conflict of interest with the company, he or she should disclose such conflict to the shareholders meeting which may adopt a resolution by a supermajority vote to waive such conflicts. Failing such clearance, a director is liable to the company and the illegal personal gains may be forfeited to the company pursuant to a profit disgorgement rule. Directors and shareholders who have an interest adverse to the company in a matter pending before the board or shareholders meeting, as the case may be, may not vote on such decisions.

The SEL also provides for civil and criminal liabilities for insider trading, including trading on insider information by directors of listed companies. In addition, directors and other insiders are subject to a strict liability rule to disgorge deemed trading profits, calculated by matching short-swing trading activities, that is, trading of company stock within any six-month period.

Board Remuneration and Training

The Company Law provides that when directors receives any compensation (which is interpreted to mean other than a token amount of honorarium and travel allowance) as directors, such compensation has to be approved by the shareholders' meeting or made pursuant to specific authorization in the articles of incorporation. This compensation is generally perceived as important to motivate directors to perform their duty well. Non-executive directors also receive the same compensation as executive directors.

Compensation to the directors can take the form of stock. Indeed, the Company Law also provides a mandatory distribution of annual bonus to employees of the company, which in the case of listed companies often takes the form (at least in part) of stock. When such shares are awarded to the employees and directors, they are often awarded at par value (which is usually NT\$10 per share) while the shares may be traded at a substantially higher level. Historically, the difference between the trading price at time of the award and par value has not been taxed. Recently, there has been a controversy when the Ministry of Finance attempts to change this tax policy, arguing that this form of incentive payment is particularly distortive when high-tech companies, which typically have higher trading prices, engage in such a practice.

Directors do not receive training, although for new, first-time directors there may be some orientation. Executive directors are "trained" in their capacity as executives of the company or group of companies. Outside directors and outsider supervisors, where they are invited to serve, usually will have some expertise in their area of specialization. They may not have a good working knowledge of the rights and responsibilities of a director and supervisor, or of the current state of the company's business and operations. See discussion above about the TSE's effort to meet with outside directors and improved their effectiveness.