

中国公司治理的结构性问题

A Structural Problem of Corporate Governance (CG) in China

- 一、世界公司治理的四种模式 Four models on CG in the world
- 二、两大法系下的董事会制度 The Board in two law systems
- 三、中国公司的董事会结构 The Board structure in Chinese companies
- 四、国际趋势和对中国公司治理结构改进的思考 International Convergence and a thinking on the improvement of CG of China

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一、世界公司治理的四种模式

Four models on CG in the world

1、以英美国家为代表的公司治理模式是以外部监督为主的模式

The CG model represented by Anglo-American countries mainly of outside supervisory.

2、以德、日国家为代表的公司治理是一种典型的内部监控模式

The CG model represented by German and Japan mainly of internal supervisory.

3、以东南亚国家和地区为代表的家族治理模式

The CG model represented by countries and districts of southeast Asia mainly of family control.

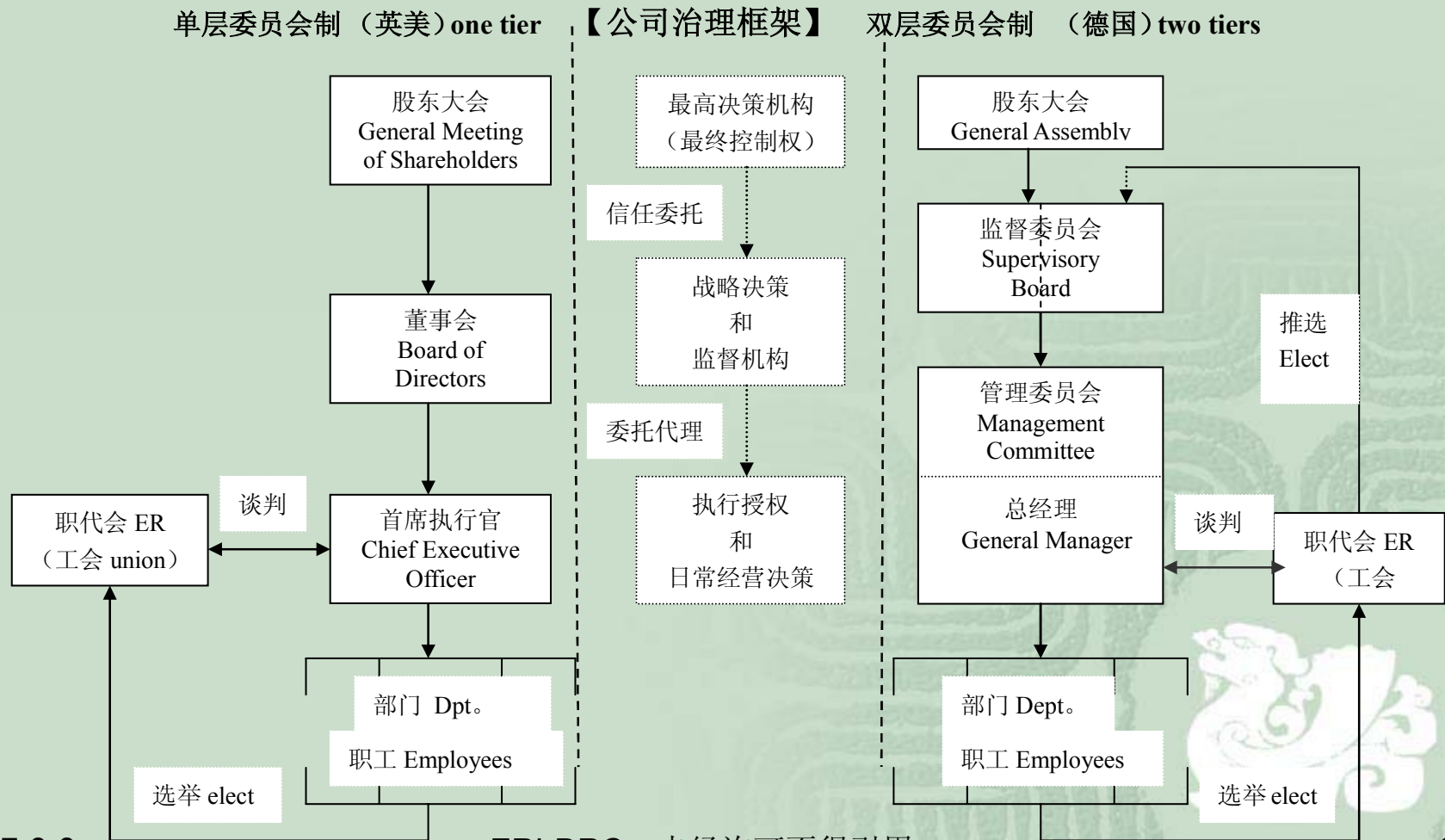
4、前苏联和东欧等转轨经济国家的内部人控制模式

The CG model represented by former Soviet Union and east Europe countries in the transition economy mainly of internal control.

二、两大法系下的董事会制度

The Board in two law systems

1、英美的单层委员会、德国的双层委员会 one tier system of Anglo-Saxon, two tiers system of Germany



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日本的双元委员会 **dual boards in Japan**

“日本的股份公司，其董事会集业务执行与监督机能于一身，是一元制；但同时又设有专门从事监视、监督工作的监事（会），从这点上说，又是二元制（不是二层制），可以说是复杂的重复构造”（酒卷俊雄，1997）

A Japanese professor (酒卷俊雄, 1997) has given a lucid illustration of the corporate governance in Japan by saying that "the Japanese shareholding companies have a complex structure that tries to combine the one-tier system with the two-tier system, as the board of directors responsible for business execution and supervision exists side by side with the board of supervisors responsible solely for supervision".



2、OECD对公司治理的分类和对董事会的定义 the category of CG and the definition of “board ” by OECD

OECD: 国际上两大类two category (三种模式 three models)

- (1) 外部人 (Outsiders) 模式—英、美股东模式(Anglo-US)
—单层委员会制 (one tier system) ;
- (2) 内部人 (Insiders) 模式—德、日、北欧等国家(Germany, Japan, North Europe),
↓
德国劳资共治模式(employer-employee common governance)—双层委员会制(two tiers system);
派生 develop to
- (3) 家族 (Family) /国家 (State) 模式
—东南亚韩国、台湾地区、印尼、土耳其等
(southeast countries and districts)。

- 法国和北欧一些国家的经验是企业可以自己选择单层或双层模式。
(experience in France and some north European countries:
company can select by itself on whether of one tier or two tiers)

《经合组织公司治理原则》 对使用的“董事会（board）”一词的解释 The concept of “Board” in 《OECD CG principles》

- “董事会（board）”一词意味着包含了在经合组织国家和非经合组织国家董事会结构的不同国家的模式。” the principles do not advocate any particular board structure and the term “board” as used in this document is meant to embrace the different national models of board structures found in OECD and non-OECD countries” .
- 在一些国家典型的双层委员会制度（two tier system, 或称双层董事会制度）中，当“主要执行机构（key executive, 或称执行委员会）”指的是“管理委员会（management board, 或称管理董事会）”时，“董事会（board）”是指监督委员会（supervisory board, 或称监督董事会）。In the typical two tier system, found in some countries, “board” as used in the Principles refers to the “supervisory board” while “key executives” refer to the “management board” .

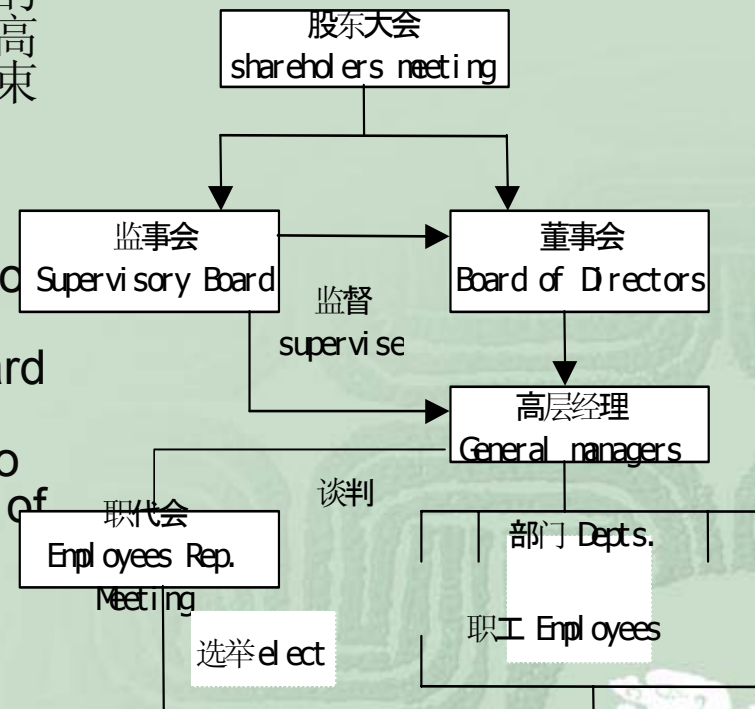
三、中国公司的治理结构

The CG structure in Chinese companies: parallel

1、中国公司的双层委员会结构

双元委员会的结构使委托代理关系和责任不对称：由股东大会既任命董事会的董事、又任命由股东代表出任的监事会的监事；由董事会制定战略决策和任命高层经理；监事会对董事和经理是软约束监督，委托代理关系不明确。

Under the existing model, it is not symmetry on the relation of agency theory and responsibility. The board of directors elected by the general meeting of shareholders and the board of supervisors represented by the shareholders and employees (with no requirement on the ratio). The board of directors formulates strategic decisions and appoints the management headed by the general manager, while the board of supervisors exercises supervision over the board members and the general manager. These caused "soft" supervision in practice.



2、历史的原因和问题

Historical reasons and question

过去把德国的双层委员会的“管理委员会”翻译成了“董事会”，误解了德国股东会与监事会以及管理委员会之间逐层具有的委托代理关系。而且，由于把“管理委员会”翻译成“董事会”，而误解为英美法系的董事会。从而对中国设计董事会结构造成一定影响。 Some Chinese textbooks and newspapers translate the supervisory board (in German: **Aufsichtsrat**) under the two-tier board system as "the board of supervisors", and the management board (in German: **Vorstand**) as "the board of directors". This is misleading, as it ignores the relations between the general meeting of shareholders and the supervisory board, and between the supervisory board and the management board, and tends to confuse with the concept of the "board of directors" in the Anglo-American model. Which influenced to China on the design of CG.

中国现行公司治理的结构，并不像德国的双层委员会制，更像是日本的双元委员会制。The existing corporate governance arrangement in China is quite similar in form to Japanese dual board system compare with German two-tier board system.

- 中国的监事会不像德国的监督委员会那样体现劳资共治和代表股东承担明确的控制重要资本投资回报的责任。虽然有既监督董事、又监督高管人员的使命，监事都是内部监事或很少的职工代表（大国企还有外部监事），只是监督别人而自己不承担重要决策的责任，监事会对董事会没有直接任命和授权的关系，很难实行有效监督，由于权责不对称而造成“软性监督”。The board of supervisors in China, unlike the supervisory board in Germany, does not reflect the principle of co-determination between labor and capital, nor does it take responsibility to control important capital investments on behalf of shareholders. Though it has the mission to supervise board directors and senior executives, it chiefly comprises of internal supervisors with few employee representatives (there are also outside supervisors from government to big SOEs) whose sole responsibility is to supervise others without participating in important decision making. As the board of supervisors cannot directly appoint or authorize the board of directors, effective supervision is almost impossible, and very often, "soft supervision" arises because of the asymmetry in rights and responsibilities.

- 中国的董事会由股东大会任命，应对股东大会负责，而不是像德国的管理委员会向监督委员会负责，虽然承担重要战略决策和任命高管人员，却又与监督高管人员相脱节。这种二元委员会的结构设计使监事会和董事会的授权和资本回报责任都不对称。中国股份公司监事会的软约束监督，甚至缺乏监督效率的问题，在上市公司和其他公司的实践中已经反应出来了。 Secondly, the board of directors in China is appointed by and reports to the general meeting of shareholders, while in Germany the management board reports directly to the supervisory board. It is true that the board of directors is involved in strategic decisions and appointment of senior executives, but it does not have the responsibility to exercise supervision over senior executives. This double-board structure indicates the asymmetry between the board of supervisors and the board of directors in empowerment and responsibility for capital returns. The problem of soft supervision or inefficiency in supervision at China's limited liability companies has already been felt in the practices of listed and other companies.
- 中国2002年《上市公司治理准则》在董事会中引入审计、薪酬、提名委员会，使审计委员会与监事会的职能，既有重复、又影响监督的效率，结构相当复杂。《CG principle for listed Companies in China》in 2002, made it more complex that the functions between supervisory board and the audit committee repeated and influenced to efficiency.

四、国际趋势和对中国公司治理结构改进的思考

International convergence and a thinking on the improvement of CG of China

1、国际趋势和比较 International Convergence and comparison in Corporate Governance Practices

公司治理国际发展趋势的特点 The main features:

- 机构投资者发挥着日益积极的作用； Institutional investors are playing an ever-important role.
- 股东利益日益受到管理层重视； The interests of shareholders interests are increasingly stressed by the management.
- 外部董事使董事会的独立性增强； External directors add to the independence of the board.
- 有效的信息披露系统发挥重要的外部监督作用； An effective disclosure system plays an important role in external supervision.
- 通过健全公司治理解决对“内部人控制”失控等深层问题。 To solve the problem of “internal control” through completing CG.

在美国 in USA: 近年来, 任命大量的独立董事进入董事会, 消减董事会整体的规模; 发展强大的由外部人员主导的董事会下属委员会 (诸如审计、薪酬和提名委员会); 2002 年 6 月颁布萨班斯-奥克斯利法案 (上市公司会计改革和投资者保护法案) 解决对“内部人控制”的失控。Appointed amount of independent Directors into BD, and outsiders led audit, compensation and nomination committees. June 2002 announced Sarbanes-Oxley Act to solve “internal control”.

在欧洲: in Europe: 双层委员会的模式正在改变, 朝着增加资本市场对公司治理的约束力的方向变化。法国的多数公司采用了单层委员会制。德国的戴姆勒-克莱斯勒汽车公司首先开始了英美模式与德国共治模式的“杂交”, 引入了独立的非执行董事。It is changing on the two tiers system towards CG constrained by the capital market. More companies in France towards one tier system. Daimler-Chrysler combined Anglo-Saxon model with German model, and introduce independent non-execution Directors.



在日本 in Japan :

日本企业治理结构论坛1997年3月30日公布了中期报告《企业治理结构的原則—关于新日本型企业治理结构的思考》，指出：“应在董事会内部设置由全体外部董事组成的监察（审计）委员会，这样就可以废除监事制度，建立起由董事会包含监事会机能的一元化结构，朝着深化企业治理结构的方向发展”，明确了日本公司治理长期改革的目标。

Japanese Corporate Governance Forum publicized a mid-term report on March 30, 1997-"Principles for Corporate Governance: Thoughts on New Japanese Corporate Governance"- pointing out that **"an auditing committee should be created under the board of directors with external directors as its members such that the system of supervisors can be eliminated and a unitary system can be established that incorporates the functions of the supervisory board in the board of directors, thereby moving towards the deepening of corporate governance structure."** Obviously, the mid-term report has provided clear objectives for the long-term reform in Japan.

国际共同趋势 **International tendency and Convergence**

董事会结构向单层委员会快速转变，外部董事发挥重要的补充作用。基本趋势是由资本市场主导控制的公司治理模式。The board structure is rapidly converging towards one-tier board system under which external directors are taken as an important complement. This convergence is in essence a corporate governance model that exercises control through the capital market.

2、对中国公司治理结构改进的思考

A thinking on the improvement of CG in China

公司治理的基本原理是法人财产制度和委托代理制 The basic principle of CG is assets of legal person and agency theory

确定公司目标，实现股东价值 objective-value of shareholders

治理 governance

(经济学、法学)

- 1、公司控制权的合理安排 rational arrangement of control
- 2、有效的激励与监督 effective incentive and supervise

战略管理和风险控制 strategic decision and risk control

管理 management

(管理学、实践经验)

- 1、执行董事会决策 execution of BD decision
- 2、日常管理决策 ordinary management and decision

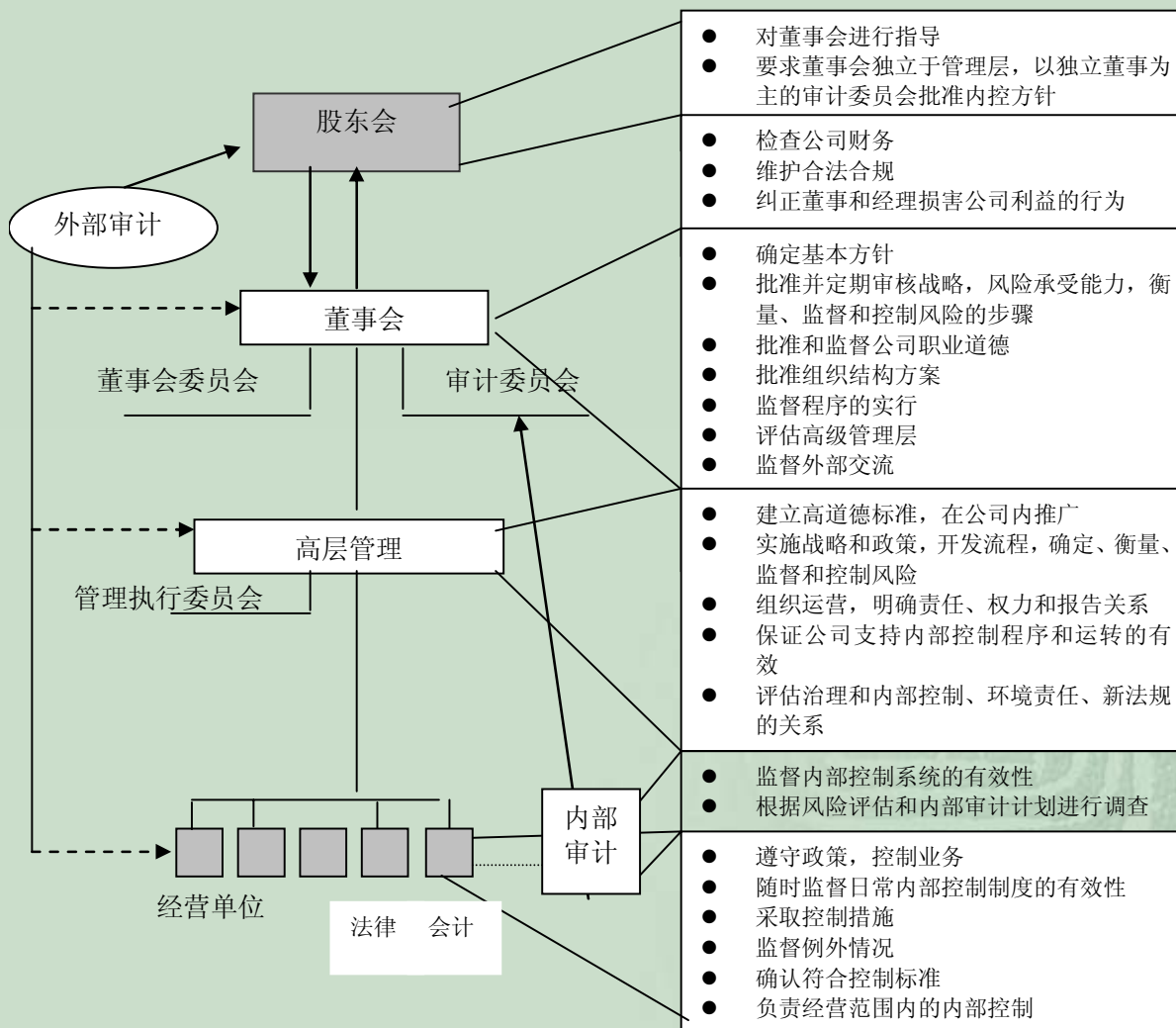


(1) 存在和需要继续解决的问题 Existing problems should be solved

- 主要问题是一股独大和对“内部人控制”的失控。The seriously distorted corporate governance can be seen in the "overwhelming majority of one shareholder" as a result of government intervention, and the loss of control over the management.
- 不仅双元委员会的董事会制度扭曲了公司治理的委托代理关系，而且导致了监督的低效率。 This is not only because the distortion of the existing corporate governance is closely related to the dual-board system in China compare with agency theory, but also because any slack in solving the problem will lead to fossilization of the inefficient means of supervision.
- 从长期考虑，改进公司治理应该采取公司治理与资本市场监督结合的模式。 From the long-term perspectives of improving corporate governance and the capital market, we should adopt the model that combines corporate governance and capital market supervision.
- 换句话讲，将监事会并入董事会内设的审计委员会，是下一次《公司法》修改时应该考虑的问题。 In other words, we should consider the inclusion of the functions of the supervisory board into the auditing committee under the board of directors when next revise on the "Company Law" in the future.

健全公司治理模式和改进要素： 加强内部控制体系与风险管理

内部控制体系：职责和任务



(2) 政府对国有企业的监督 government supervise to SOEs including listed

两条国际经验 two international experience:

- (1) 政府对国有企业监督有一个从行政监督到法制监督的过程; from administrative supervision to legal and market supervision.
- (2) 逐步从事后监督走向以过程监督为主。From afterwards supervision to process supervision.

政府的监督对企业来讲是外部监督（事后监督） government supervision is outside and afterwards supervision towards SOEs.

- 对国有企业外部监督的完整框架：立法机构+财政部+行业部+审计署；
Framework: legislative body + financial ministry + industrial ministry + audit court
- 法国经验：由于行使国家所有权的国家参股局委派国有股东代表进入国企董事会，而撤销了稽查员、特派员。而由经济财政部下设的国家监察署（与国家参股局平行），监察使用公共资金的机构（直接或间接接受国家支持的各类机构）和商品领域的国有企业（国家占股至少50%的企业及这些企业占大股的子公司）。所有权机构和监察机构是分开的。French experience: ownership by state participation agency and supervision by state supervisory bureau under Economic and Financial Ministry.

企业的内部监督（过程监督）— 通过健全公司治理和改进董事会结构 Internal supervision (process supervision) by company itself – through completing CG and improving board structure to increase efficiency.

- 通过明确受托责任和问责机制来完善企业内部监督，实现过程监督； to clarify accountability, check and balance system by process supervision.
- 在健全的公司治理结构中实行有效的激励与约束，实现法制和市场监督。 To make effective incentive mechanism and restrain by legal and market supervision.

谢谢大家!

Thank you very much!

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