

Juan Chen

# Regulating the Takeover of Chinese Listed Companies

Divergence from the West

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*A Book Dedicated to My Amazing Husband  
Ming An*



# List of Important Chinese Laws

上市公司收购管理办法 [Measures for the Administration of the Takeover of Listed Companies] (People's Republic of China) CSRC, Jul 31, 2006, lastly revised on Feb 21, 2012

中华人民共和国公司法 [Company Law of People's Republic of China] (People's Republic of China), the Standing Committee of National People's Congress, Dec 29, 1993, lastly revised on Oct 27, 2005

中华人民共和国证券法 [Securities Law of the People's Republic of China] (People's Republic of China) the Standing Committee of National People's Congress, Dec 29, 1998, lastly revised on Oct 27, 2005

最高人民法院关于审理证券市场因虚假陈述引发的民事赔偿案件的若干规定 [Certain Provisions of the Supreme People's Court on Hearing Civil Compensation Cases Arising From False Statement on the Securities Market] (People's Republic of China) SPC, Jan 9, 2003

上市公司重大资产重组管理办法 [The Measures for Administration of Material Assets Reorganization of Listed Companies] (People's Republic of China) CSRC, May 18, 2008

股票发行与交易管理暂行条例 [Provisional Regulations for the Administration of Stock Issuance and Transactions] (People's Republic of China) State Council, Apr 22, 1993

中华人民共和国企业国有资产法 [Law of the People's Republic of China on the State-Owned Assets of Enterprises] (People's Republic of China), Standing Committee of National People's Congress, Oct 28, 200.

国务院关于推进企业并购重组的若干意见 [Opinions of the State Council on Promoting Corporate Merger and Restructuring] (People's Republic of China), the State Council, Sep 06, 201.





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If I crave for a drop of water,

You will give me the whole ocean;

If I want to pluck one leaf from a maple tree,

You will give me the whole woods, together with the rosy cloud.

Translated and Abstracted from '*Flowers Blossom in a Warm Spring*', Mang Liang

Shenzhen Stock Exchange, China

Juan Chen

# List of Important Abbreviations

ASIC	Australian Securities and Investments Commission
Company Law 2005	Company Law of People’s Republic of China
CSRC	China Securities Regulatory Commission
M&A	Mergers and acquisitions
NDRC	National Development and Reform Commission
SASAC	State-owned Assets Supervision and Administration Commission of the State Council
Securities Law 2005	Securities Law of the People’s Republic of China
SOEs	State-owned enterprises
Takeover Regulation 2006	Measures for the Administration of the Takeover of Listed Companies
The City Code	The City Code on Takeovers and Mergers 2011
The Hong Kong Takeover Code	The Codes on Takeovers and Mergers and Share Repurchases 2002



# Contents

<b>1</b>	<b>Introduction</b> . . . . .	1
1.1	Subject of the Book . . . . .	1
1.2	The Particular Perspective: Divergence . . . . .	3
1.3	Practical and Theoretical Contributions of the Work . . . . .	3
1.4	Framework of the Work . . . . .	4
<b>2</b>	<b>Understanding the Context</b> . . . . .	7
2.1	The Emerging Chinese Securities Market . . . . .	8
2.2	The Transitional Chinese Securities Market . . . . .	8
2.2.1	The Concentrated Ownership Structure . . . . .	9
2.2.2	The Significance of Listed SOEs . . . . .	10
2.3	Shareholder Protection Rules Provided in General Corporate Law . . . . .	14
2.3.1	Basic Rights of Shareholders . . . . .	14
2.3.2	Underdeveloped Regulatory Framework . . . . .	15
2.3.3	Insufficient Judicial Adjudication . . . . .	17
2.4	Conclusion . . . . .	18
<b>3</b>	<b>Legal Transplantation Theory: A Theoretical Framework for Examining Chinese Takeover Law</b> . . . . .	19
3.1	Introduction . . . . .	19
3.2	Transplantation Resulting Divergence . . . . .	19
3.3	The Mixed Motivations for Legal Transplantation . . . . .	21
3.3.1	Cost-Saving Legal Transplantation . . . . .	21
3.3.2	Externally Dictated Legal Transplantation . . . . .	22
3.3.3	Entrepreneur-Driven Transplantation . . . . .	23
3.3.4	Legitimacy-Generating Transplantation . . . . .	23
3.3.5	Summary . . . . .	24
3.4	Conduct of the Main Actors . . . . .	25
3.4.1	Selective Adoption/Adaptation by Legislature . . . . .	25
3.4.2	Discretionary Implementation/Non-implementation by Administrative Regulators . . . . .	26

3.4.3	Creative Compliance by Market Participants . . . . .	27
3.4.4	Summary . . . . .	28
3.5	Key Political, Economic, Social, and Cultural Factors of Significant Influences on Legal Transplantation . . . . .	29
3.5.1	General Political Factors and Institutional Capacity . . . . .	29
3.5.2	General Economic Factors and Status of Economic Development . . . . .	31
3.5.3	Social Factor: Legal Demands of Authorities and Society Members . . . . .	32
3.5.4	Culture and Legal Culture . . . . .	33
3.5.5	The Interconnected Relationships Among Influential Factors . . . . .	34
3.5.6	The Key Factors and Their Relationships: What Are the Implications for Transplanting Takeover Law into China? . . . . .	36
3.6	The Approaches for Evaluating the Success or Failure of Legal Transplantation . . . . .	39
3.6.1	A Difficult Question to Tackle . . . . .	39
3.6.2	Developing the Criteria for Evaluating Specific Legal Transplantation . . . . .	40
3.7	Conclusion . . . . .	40
<b>4</b>	<b>Principles of Chinese Takeover Regulation: Economic Efficiency, Administrative Intervention, and Shareholder Equality . . . . .</b>	<b>43</b>
4.1	Introduction . . . . .	43
4.2	Efficiency as a General Principle for Takeover Regulation . . . . .	45
4.2.1	Efficiency as a Main Attribute for Takeovers . . . . .	45
4.2.2	The Meaning of Efficiency . . . . .	45
4.2.3	How Takeovers Enhance Efficiency . . . . .	46
4.2.4	Varied Foreign Regulatory Stances . . . . .	48
4.3	The Pursuit of Efficiency in Chinese Government Policy . . . . .	49
4.4	The Right Regulatory Approach Adopted by CSRC: Reducing Administrative Intervention . . . . .	50
4.5	Shareholder Protection as a General Principle for Takeover Regulation . . . . .	52
4.5.1	Theoretical Justification for Protecting Shareholders in Takeovers . . . . .	52
4.5.2	The Equal Treatment of Shareholders Under the UK Law . . . . .	54
4.5.3	Protecting Shareholders Against Damage/Unfair Treatment Under the US Law . . . . .	55
4.6	Local Chinese Regulatory Principle: Protecting Lawful Interests of Shareholders . . . . .	56

4.7	Evaluating the ‘Attenuated’ Principle of Shareholder Protection in Chinese Takeover Law . . . . .	57
4.7.1	Justifications for Protecting the Lawful Interests of Securities Investors in Chinese Takeover Law . . . . .	57
4.7.2	The Meanings of ‘Protecting the Lawful Interests of Securities Investors’ . . . . .	62
4.8	Conclusion . . . . .	64
<b>5</b>	<b>Mandatory Bid Rule and Shareholder Equality: Legal Transplantation and Local Divergence . . . . .</b>	<b>67</b>
5.1	Introduction . . . . .	67
5.2	Mandatory Takeover Bid Rule and the Equal Treatment of Shareholders . . . . .	68
5.3	The Mandatory Takeover Bid Rule Provided in Takeover Regulation 2006 . . . . .	69
5.4	General Permission of Partial Bids . . . . .	70
5.4.1	Potential Inequality Among Shareholders Due to the Use of Partial Bids . . . . .	71
5.5	Exempting Important Local Transactions from the Rule . . . . .	72
5.5.1	Exempting Rescue Operations from the Mandatory Takeover Bid Rule . . . . .	73
5.5.2	Exempting Complete Listing from the Mandatory Takeover Bid Rule . . . . .	75
5.5.3	Exempting SOE-involved Takeovers from the Mandatory Takeover Bid Rule . . . . .	79
5.6	Inequality Among Shareholders: Discretionary Exemption of the Rule Exercised by the CSRC . . . . .	82
5.6.1	Lack of Substantive and Procedural Constraints . . . . .	82
5.7	Creative Compliance and Violation of the Rule . . . . .	85
5.8	Explaining the Divergence and Proposals for Improvements . . . . .	89
5.8.1	The Costs for Complying with the Mandatory Bid Rule in China . . . . .	89
5.8.2	Proposed Changes to the Mandatory Bid Rule . . . . .	91
5.9	How to Evaluate the Divergence and Reform Proposals . . . . .	91
5.9.1	Principle for Evaluation: The Fair Treatment of Shareholders . . . . .	91
5.9.2	The Necessity to Have the Mandatory Bid Rule . . . . .	92
5.9.3	The General Permission of Partial Bids . . . . .	93
5.9.4	Amending the Mandatory Bid Exemption Rules . . . . .	93
5.9.5	Expanding the Exemption of the Mandatory Takeover Bid Rule . . . . .	94
5.9.6	Permitting Flexibility to the Price Offered in a Takeover Bid . . . . .	96
5.10	Conclusion . . . . .	97



<b>6</b>	<b>Miscellaneous Shareholder Protection Rules: The Influence of Legal Culture, Local Demand and Institutional Capacity in Transplantation</b> . . . . .	99
6.1	Introduction . . . . .	99
6.2	Preserving Openness Through Defining Acting in Concert, Control, and Disclosure Requirements . . . . .	100
6.2.1	The Chinese Regulation of Acting in Concert . . . . .	100
6.2.2	The Definition of Control Provided in Takeover Regulation 2006 . . . . .	107
6.2.3	Summary: The Cultural Element Behind the Divergence . . . . .	109
6.3	Intensified Disclosure for Share Acquisitions Below 30 % . . . . .	110
6.3.1	The Differentiated Disclosure Requirements . . . . .	110
6.3.2	The Divergence and Features of the Chinese Regulation . . . . .	111
6.3.3	Justifications for the Enhanced Disclosure Regulation . . . . .	112
6.4	Preserving Impartiality Through Addressing Conflicts of Interest in Management Buyouts . . . . .	113
6.5	Imposing Obligations on the Controlling Shareholder and Acquirer . . . . .	117
6.5.1	Three Common Forms of Minority Shareholder Oppression in Negotiated Takeovers . . . . .	118
6.5.2	The General and Specific Obligations in Chinese Law . . . . .	118
6.5.3	The US Law: The Three Regulatory Areas, Uncertainty, and Theories . . . . .	119
6.5.4	The Convergence and Divergence Between the Chinese Law and the US Law . . . . .	123
6.5.5	Evaluation of the Current Chinese Regulatory Rules . . . . .	124
6.6	The Missing Link in Chinese Shareholder Protection Rules . . . . .	125
6.6.1	The Constrained Criminal Liability and Evaluation . . . . .	126
6.6.2	The Most Developed Administrative Liability and Evaluation . . . . .	127
6.6.3	The Largely Missing Civil Liability . . . . .	129
6.7	Conclusion . . . . .	136
<b>7</b>	<b>Regulating Takeover Defences: The UK Model in Books and the US Model in Action</b> . . . . .	137
7.1	Introduction . . . . .	137
7.2	Two Approaches for Regulating Takeover Defences: Shareholder Decision-Making Vs Management Decision-Making . . . . .	138
7.2.1	The US Business Judgment Rule . . . . .	139
7.2.2	The Allocation of Decision-Making Powers in the US . . . . .	142

7.2.3	The UK Board Neutrality Rule . . . . .	143
7.2.4	The Fiduciary Duty of Management in the UK . . . . .	144
7.2.5	Summary and Discussion . . . . .	146
7.3	Chinese Regulation of Takeover Defences: The UK Model in Books and the US Model in Regulatory Effects . . . . .	147
7.3.1	The Fiduciary Duty of Management in Chinese Company Law and Takeover Law . . . . .	147
7.3.2	The Chinese Version of the Board Neutrality Rule . . . . .	150
7.3.3	Relevant Provisions in the Chinese Corporate Law . . . . .	151
7.4	Takeover Defences Used in Chinese Practice: Management Discretion in Adopting Takeover Defences . . . . .	153
7.4.1	The Use of Pre-bid Defences in Chinese Practice . . . . .	154
7.4.2	The Use of Post-bid Defences in Chinese Practice . . . . .	160
7.5	What Is the Future for Chinese Takeover Defence Regulation? . . . . .	165
7.5.1	Allocating the Primary Decision-Making Powers to Shareholders . . . . .	166
7.5.2	Protecting the Fundamental Rights of Shareholders . . . . .	168
7.5.3	A Shifted Burden of Proof . . . . .	170
7.5.4	Broadening the Application Areas of the Board Neutrality Rule . . . . .	171
7.5.5	Shareholder Veto as a Precondition for Giving a Board of Directors Discretion to Adopt Defensive Measures . . . . .	172
<b>8</b>	<b>Conclusion . . . . .</b>	<b>175</b>
8.1	Introduction . . . . .	175
8.2	The Justification for Selective Transplantation . . . . .	176
8.3	The Right Approach to Achieve Efficiency . . . . .	177
8.4	Problems with Shareholder Protection and How to Improve Them . . . . .	178
8.5	Conclusion . . . . .	180
	<b>Bibliography . . . . .</b>	<b>183</b>

# Chapter 1

## Introduction

When growing on the south side of Huai River, Ju is Ju; when growing on the north side of Huai River, it becomes Zhi. Although the leaves of the two fruits do look similar, the tastes are quite different. Why has the fruit become different? The environment is different.

Yan Zi (?–500BC)<sup>1</sup>

### 1.1 Subject of the Book

The Chinese mergers and acquisitions (M&A) market has been expanding at unprecedented rates in recent years (see Fig. 1.1). The year 2010 alone has witnessed 1,743 inbound M&A transactions, with an aggregate value of more than US\$52 billion.

The growth of the Chinese M&A market has been accompanied by the development of regulatory rules. In the area of corporate law and securities law, a most important legislation is *the Measures for the Administration of the Takeover of Listed Companies 2006* (Takeover Regulation 2006), which has been gradually developed since the promulgation of *Provisional Regulations for the Administration of Stock Issuance and Transaction* (Provisional Regulation for Stock Issuance and Transactions) in 1993.<sup>2</sup>

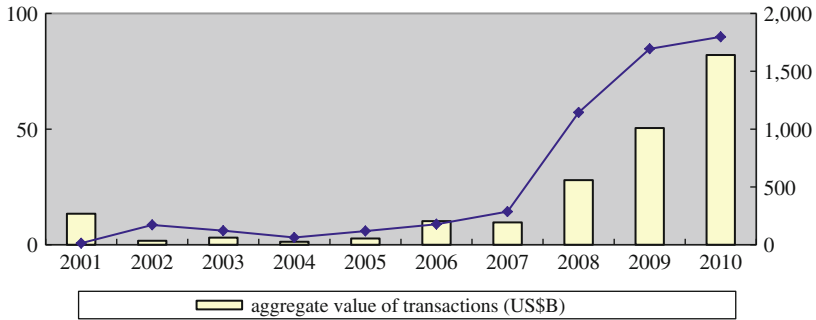
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<sup>1</sup> Ju is a citrus fruit that usually has a sweet taste. Zhi is shaped like a small orange but is not edible due to its bitter taste.

The quote was made by diplomat Yan Zi when he went to Chu as an ambassador of his own country Qi. The king of Chu wanted to insult Yan Zi and his country. The king interrogated a thief who came from Qi and was caught stealing in Chu. The king asked Yanzi, quite provocatively, whether people from Qi were all thieves. As seen in the quote, Yan Zi's comment indicated that the environment of Chu made people from Qi thieves.

See 晏嬰 [Ying Yan], '內篇雜下 [Part One Miscellaneous]' in 晏子春秋 [Yan Zi Chunqiu] (李万寿 [Wanshou Li] Interpreter, 台湾古籍出版社 1996).

<sup>2</sup> 股票发行与交易管理暂行条例 [Provisional Regulations for the Administration of Stock Issuance and Transactions] (People's Republic of China) State Council, Apr 22, 1993.



**Fig. 1.1** M&A Transactions in China 2001–2010 [万格 [Ge Wan], ‘2010年中国并购市场统计分析报告’ (Jul 20, 2011) <http://report.chinaventure.com.cn/r/f/309.aspx>]. Source: [www.chinaventure.com.cn](http://www.chinaventure.com.cn), CVSource database

Takeover Regulation 2006 is currently under consideration for revision. The work embraces recent amendments and latest proposed revisions, such as the current and proposed amendment of the mandatory bid rule discussed in Chap. 5.

Takeover Regulation 2006 addresses a particular type of M&A transactions—takeovers. Takeovers are transactions whereby a person obtains control of a listed company through directly or indirectly acquiring voting shares of the target company.<sup>3</sup> Takeover transactions, as defined above, have three features. First, the transaction targets at companies listed on the two Chinese stock exchanges, Shanghai Stock Exchange and Shenzhen Stock Exchange. Second, takeover transactions must involve the acquisition of shares, either through direct ownership or through indirect control of voting rights.<sup>4</sup> Third, takeovers involve the change of corporate

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A major difference between Takeover Regulation 2006 and previous regulatory rules such as Provisional Regulation for Stock Issuance and Transactions is that the former is a specific takeover law while the latter is a comprehensive securities law containing some takeover regulatory rules.

<sup>3</sup>M. A. Weinberg et al., *Weinberg and Blank on Takeovers and Mergers* (Sweet and Maxwell, 4th ed, 1979), 3. ‘Indirect acquisition of shares’ refers to circumstances under which a person controls voting rights of shares without becoming the registered owner of those shares. Such indirect acquisition of control is discussed in more details in Chap. 6.

<sup>4</sup>In Chinese practice, acquisitions of shares are often conducted along with acquisitions of assets and other transactions/arrangements in an M&A transaction. This is different from countries such as the UK, in which takeovers as a form of M&A transaction are regulated separately from another form of M&A transaction called scheme of arrangement. The implication of this local Chinese feature provides one justification for Chinese takeover law not adhering to the principle of ‘equal treatment of shareholders’ adopted in the UK takeover law. More details will be discussed in Chap. 4.

According to recent news report, the CSRC is considering changing the current unseparated regulatory mechanism, namely regulating takeover bids separately from other M&A transactions. Report Team for National People’s Congress, ‘中国证监会副主席庄心一表示并购重组分道制审核或于2013年启动[Vice President of CSRC said Separate Review of Takeovers and Restructuring may Experiment in 2013]’, *China Securities Journal* (Beijing), Mar 4, 2013.

control to the acquirer after their completion. The features of takeover transactions, such as targeting at listed companies, acquiring publicly traded shares, and resulting in a change of corporate control, pose challenging tasks for inexperienced Chinese securities regulators.

## 1.2 The Particular Perspective: Divergence

There have been many insightful discussions on Chinese takeover regulation.<sup>5</sup> Nonetheless, this work offers a fresh perspective to discuss Chinese takeover law, that is, to discuss the divergence between the transplanted Chinese takeover law and the law of its origin.

The Chinese takeover law is developed through legal transplantation, namely borrowing legal rules from other jurisdictions. Chinese lawmakers mainly transplant rules from the UK, Hong Kong, and the US, which are referred to as the 'origins' of Chinese takeover law in this work. In addition to the above three countries, the work also discusses the Australian takeover law. The Australian takeover law originated from the UK City Code, which is the primary law of origin for the Chinese takeover law.

However, legal transplantation often generates divergence, and the divergence can be justifiable when fitting into the regulatory environment of the recipient country. The work discusses the divergence in Chinese takeover law, as well as how to evaluate the divergence and how to improve the Chinese takeover law.

## 1.3 Practical and Theoretical Contributions of the Work

The work makes both practical and theoretical contributions to existing literature on the transplantation of takeover law into China. From a practical perspective, the Chinese M&A market has been booming at an unprecedented rate in recent years. Not only domestic investors but also foreign funds and multinational companies do actively participate in the market. For both market participants and researchers, it is crucially important to understand the emerging and transitional feature of the Chinese economy and its M&A market and the impacts of such feature on the

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<sup>5</sup> An incomplete list of the existing studies include Guanghua Yu, 'Takeovers in China: the Case against Uniformity in Corporate Governance' (2005) 34(2) *Common Law World Review*; Hui Huang, 'China's Takeover Law: A Comparative Analysis and Proposals for Reform' (2005) 30 *Delaware Journal of Corporate Law* 145; Wei Cai, 'The Mandatory Bid Rule in China' (2011) 12 *European Business Organization Law Review*.